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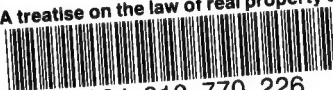


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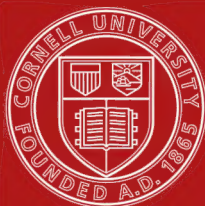
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A treatise on the law of real property a



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A TREATISE  
ON THE LAW OF  
REAL PROPERTY

AS APPLIED BETWEEN

VENDOR AND PURCHASER

IN

MODERN CONVEYANCING

OR

ESTATES IN FEE AND THEIR TRANSFER BY DEED

BY

LEONARD A. JONES, A. B., LL. B. [HARV.]

AUTHOR OF LEGAL TREATISES

IN TWO VOLUMES

VOL. II

BOSTON AND NEW YORK  
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##### *I. Signing in General.*

1000. A deed must be signed. — Under the Saxon rule in England, deeds were executed by subscribing with the sign of the cross. Seals were not then used.<sup>1</sup> Sealing was introduced after the Norman Conquest, in place of signing with a cross, the people in general not being able to write, and no signing was necessary. Hence, even by the early common law, the seal alone was the test of the existence of a deed.<sup>2</sup>

The English statute of frauds and similar statutes in this country made a signing necessary.<sup>3</sup>

<sup>1</sup> Wright *v.* Wakeford, 17 Ves. 454 *a*, 459; Mut. Benefit L. Ins. Co. *v.* Brown, 30 N. J. Eq. 193; Devereux *v.* McMahon, 108 N. C. 134, 12 S. E. Rep. 902.

<sup>2</sup> Jerome *v.* Ortman, 66 Mich. 668, 33 N. W. Rep. 759.

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<sup>3</sup> Wright *v.* Wakeford, 17 Ves. 454 *a*; Mut. Benefit L. Ins. Co. *v.* Brown, 30 N. J. Eq. 193; Devereux *v.* McMahon, 108 N. C. 134, 12 S. E. Rep. 902; Hutchins *v.* Byrnes, 9 Gray, 367; Jerome *v.* Ortman, 66 Mich. 668, 33 N. W. Rep. 759.

1001. As to the manner of signing, all that is requisite is that the deed should be signed so as to show that the grantor intended it as his act and deed.<sup>1</sup> The most essential and efficacious act to give a deed validity is the delivery of it, because that more clearly than anything else shows that the grantor intends to make it his deed.

1002. The signing of a deed need not always be at the end of it. Under statutes which simply provide that a deed shall be signed, it is not essential that the signature shall be placed at the end of the deed: it is sufficient if it is in the body of the instrument.<sup>2</sup> Under statutes requiring deeds to be subscribed, the rule is different.

Even under a statutory provision that a deed shall be signed at its foot, a deed written on a sheet of common legal-cap paper of four pages, the body of the deed being on the first page, the acknowledgment of the wife on the second page, the certificate of filing and recording on the third page, the signatures of the grantor and his wife on the fourth page, is not open to the objection that it was not signed.<sup>3</sup>

1003. The grantor should be named as such in the body of the deed. But "the name of the grantor is not put in the deed to any other intent but to make certainty of the grantor;"<sup>4</sup> and this certainty may be attained by a person's signing, sealing, acknowledging, and delivering an instrument as his deed, though no mention is made of him as grantor in the body of it. This is especially the case where the instrument is a deed poll, in which only the grantor speaks or signs.<sup>5</sup>

There is more danger of mistake or uncertainty in case the

<sup>1</sup> *Armstrong v. Stovall*, 26 Miss. 275.

<sup>2</sup> *Devereux v. McMahon*, 108 N. C. 134, 12 S. E. Rep. 902; *Coddington v. Goddard*, 16 Gray, 436, 444; *Hawkins v. Chace*, 19 Pick. 502; *Penniman v. Harts-horn*, 13 Mass. 87; *Newton v. Emerson*, 66 Tex. 142, 18 S. W. Rep. 348; *Fulshear v. Randon*, 18 Tex. 275; *McConnell v. Brillhart*, 17 Ill. 354; *Ingoldsby v. Juan*, 12 Cal. 564; *People v. Murray*, 5 Hill, 468; *Smith v. Howell*, 11 N. J. Eq. 349; *Adams v. Field*, 21 Vt. 256; *Knight v. Crockford*, 1 Esp. 190; *Johnson v. Dodg-son*, 2 Mees. & W. 653.

In Kentucky it is provided by statute that an instrument is not deemed to be signed unless the signature be subscribed at the end or close of it. G. S. 1894, § 468.

<sup>3</sup> *Winston v. Hodges* (Ala.), 15 So. Rep. 528; Code Ala. 1886, § 1789.

<sup>4</sup> § 213; *Perkins*, § 36.

<sup>5</sup> *Elliot v. Sleeper*, 2 N. H. 525; *Hrous-ka v. Janke*, 66 Wis. 252, 28 N. W. Rep. 166; *Ingoldsby v. Juan*, 12 Cal. 564; *Stone v. Montgomery*, 35 Miss. 83; *Armstrong v. Stovall*, 26 Miss. 275.

deed is in the form of an indenture, and accordingly it has been held that such a deed, signed and acknowledged by a person not mentioned in it, is not the deed of the signer. The signing and acknowledging in such case do not show that the signer intended to be a grantor rather than a grantee. Even if it were shown by extrinsic evidence that he intended to be a grantor, the deed could not be held to be his.<sup>1</sup> The same rule has also been applied to a deed poll in which there are several grantors named, and it is also signed by another not named.<sup>2</sup>

**1004. Merely signing, sealing, and acknowledging a deed, in which another person is named as the grantor, does not make it the deed of the person so signing who is not named as a grantor.<sup>3</sup>** This rule is of frequent application in cases of deeds in which a husband or wife joins without being named in any way as a grantor, or as conveying any interest.<sup>4</sup> Though a wife joins her husband in signing a deed in which she is not named, and acknowledges the instrument to be her deed, it is inoperative to convey any interest she may have in the land described, or to relinquish her right of dower in it.<sup>5</sup>

If a deed purports to be the deed of several grantors, and is executed by a part of them and not by others, it ordinarily conveys the interests of those who executed it, unless the deed was intended to be joint only, but is invalid to convey any interest of those who did not execute it.<sup>6</sup>

**1005. The naming of a person in a deed as grantor does not ordinarily make it his deed unless it is signed and sealed by him.<sup>7</sup>** Though such person formally acknowledges the instru-

<sup>1</sup> *Agricultural Bank v. Rice*, 4 How. 225, 241; *Adams v. Medsker*, 25 W. Va. 127. In the first cited case, Taney, C. J., said: "In order to convey by grant, the party possessing the right must be the grantor, and use apt and proper words to convey to the grantee, and merely signing and sealing and acknowledging an instrument in which another person is grantor is not sufficient."

<sup>2</sup> *Harrison v. Simons*, 55 Ala. 510.

<sup>3</sup> *Payne v. Parker*, 10 Me. 178, 25 Am. Dec. 221; *Agricultural Bank v. Rice*, 4 How. 225; *Harrison v. Simons*, 55 Ala. 510.

<sup>4</sup> *Agricultural Bank v. Rice*, 4 How. 225; *Catlin v. Ware*, 9 Mass. 218; *Luf-*

*kin v. Curtis*, 13 Mass. 223; *Gaston v. Weir*, 84 Ala. 193, 4 So. Rep. 258; *Blythe v. Dargin*, 68 Ala. 370; *Madden v. Floyd*, 69 Ala. 221.

<sup>5</sup> *Peabody v. Hewett*, 52 Me. 33, 83 Am. Dec. 486; *Laughlin v. Fream*, 14 W. Va. 322.

<sup>6</sup> *Tustin v. Faught*, 23 Cal. 237; *Colton v. Seavey*, 22 Cal. 496; *Jackson v. Stanford*, 19 Ga. 14; *Adams v. Medsker*, 25 W. Va. 127; *Harrelson v. Sarvis*, 39 S. C. 14, 17 S. E. Rep. 368.

<sup>7</sup> *Thomas v. Caldwell*, 50 Ill. 138; *Cromwell v. Tate*, 7 Leigh, 301, 30 Am. Dec. 506; *Pratt v. Clemens*, 4 W. Va. 443; *Adams v. Medsker*, 25 W. Va. 127.

ment to be his deed, it does not become such, either in fact or in law, without his signature. The acknowledgment cannot be made a substitute for signing.<sup>1</sup>

1006. But a deed written by a person who inserts his name as a grantor is valid, though not subscribed by him, where there is proof of his delivery of the instrument to the grantee, or other evidence to show that his signature was intended to be final.<sup>2</sup> The question of intent in such case is one of fact for the jury.<sup>3</sup> An official acknowledgment of the instrument, or an admission of it as his deed before witnesses, would doubtless establish such intent.<sup>4</sup>

1007. If the name signed by the grantor differs materially from that recited in the granting clause of the deed, evidence that the names were used to designate the same person should be given before the deed is admitted in evidence.<sup>5</sup>

The grantor may be bound by his signature though he uses a wrong given name, as, for instance, Edmund instead of Edward, his true name, which is recited in the body of the deed.<sup>6</sup> He cannot avoid his signature because he has misspelled it. Proof that he used the name for his signature is sufficient to bind him.<sup>7</sup>

Where the name of a grantor appears in full in the granting clause of a deed, the signing of his given name only is a sufficient execution of it.<sup>8</sup>

1008. A defective execution of a deed by one grantor is not aided by a correct execution of it by another grantor.<sup>9</sup> It is the deed of those grantors who have executed it, but not the deed of one who has not executed it.<sup>10</sup> There may be circumstances under which a deed will not be operative unless it is executed by all the parties to it, as where the purpose of the deed is a partition of land between tenants in common.<sup>11</sup> It is a question of

<sup>1</sup> *Jones v. Gurlie*, 61 Miss. 423; *Goodman v. Randall*, 44 Conn. 321, 325, per Carpenter, J.

<sup>2</sup> § 1002; *Saunders v. Hackney*, 10 Lea, 194; *Newton v. Emerson*, 66 Tex. 142, 18 S. W. Rep. 348.

<sup>3</sup> *Johnson v. Dodgon*, 2 Mees. & W. 653.

<sup>4</sup> *Saunders v. Hackney*, 10 Lea, 194, per Cooper, J.

<sup>5</sup> § 215; *Games v. Stiles*, 14 Pet. 322; *Dunn v. Games*, 1 McLean, 321; *Tustin*

*v. Faught*, 23 Cal. 237; *Erskine v. Davis*, 25 Ill. 251.

<sup>6</sup> § 217; *Middleton v. Findla*, 25 Cal. 76.

<sup>7</sup> *O'Meara v. North Am. Mining Co.* 2 Nev. 112.

<sup>8</sup> *Zann v. Haller*, 71 Ind. 136, 36 Am. Rep. 193.

<sup>9</sup> *Hall v. Redson*, 10 Mich. 21.

<sup>10</sup> *Colton v. Seavey*, 22 Cal. 496; *Hall v. Redson*, 10 Mich. 21.

<sup>11</sup> *Jackson v. Stanford*, 19 Ga. 14.

intention whether a deed prepared to be signed by several, but not signed by all, is to be regarded as the deed of those who did sign it, or as an escrow only until signed by the others.<sup>1</sup> If it appears that it was intended that the deed should be operative only when executed by all the parties named as grantors, an execution by some of the parties only does not bind them.<sup>2</sup>

1009. A grantor is bound by signing a deed though he misunderstood its purport. It is negligence for one to sign a deed without reading it, or without having it explained if he does not understand it. In Sheppard's Touchstone<sup>3</sup> it is said: "If the party that is to seal the deed can read himself and doth not, or, being an illiterate or blind man, doth not inquire to hear the deed read, or the contents thereof declared, in these cases, albeit the deed is contrary to his mind, yet it is good and unavoidable." The grantor is presumed to know the contents and purport of the deed he executes. He cannot contest its validity on the ground that he executed it without knowing its contents, unless fraud is shown.<sup>4</sup>

Even a person deaf and dumb and unable to read, who directed a deed to be drawn, and, this having been done, requested the draughtsman to inform him what lands it described, and then executed it without further inquiry or explanation, is bound by it, although he was not informed whether it contained any covenants.<sup>5</sup>

Of course, if an illiterate man is induced to sign a deed through any misrepresentation of its nature and contents, it is void.<sup>6</sup> But a misrepresentation of the legal effect of the provisions of a deed does not invalidate it.<sup>7</sup>

<sup>1</sup> *Haskins v. Lombard*, 16 Me. 140, 33 Am. Dec. 645; *Cutter v. Whittemore*, 10 Mass. 442; *Scott v. Whipple*, 5 Me. 336.

<sup>2</sup> *Arthur v. Anderson*, 9 S. C. 234.

<sup>3</sup> P. 56; *King v. Longnor*, 1 Nev. & M. 576.

<sup>4</sup> *Leslie v. Merrick*, 99 Ind. 180; *Rogers v. Place*, 29 Ind. 577; *Clem v. Newcastle, &c. R. Co.* 9 Ind. 488; *Greenfield's Estate*, 14 Pa. St. 489; *Hallenbeck v. Dewitt*, 2 Johns. 404; *Jackson v. Croy*, 12 Johns. 427; *Kimball v. Eaton*, 8 N. H. 391; *Link v. Page*, 72 Tex. 592, 596, 10 S. W. Rep. 699; *De Prez v. Everett*, 73

Tex. 431, 434, 11 S. W. Rep. 388; *School Committee v. Kesler*, 67 N. C. 443, 448.

<sup>5</sup> *Brown v. Brown*, 3 Conn. 299, 8 Am. Dec. 187.

<sup>6</sup> *Jackson v. Hayner*, 12 Johns. 469; *Clem v. Newcastle, &c. R. Co.* 9 Ind. 488, 68 Am. Dec. 653; *Taylor v. King*, 6 Munf. 358, 8 Am. Dec. 746; *Hyer v. Little*, 20 N. J. Eq. 443.

<sup>7</sup> *New Albany, &c. R. Co. v. Fields*, 10 Ind. 187; *Clem v. Newcastle, &c. R. Co.* 9 Ind. 488, 68 Am. Dec. 653; *Russell v. Branham*, 8 Blackf. 277.

## II. *Signing by Mark.*

1010. A deed may be executed by the grantor's making his mark in place of his signature.<sup>1</sup> It is not essential, though usual, that the words "his mark" should accompany the cross of the grantor upon the deed, when it appears that the cross was made by him, or was made by some other person in his presence, and adopted by him.<sup>2</sup> Neither is it essential that the grantor's name should be written in immediate connection with the cross; it is sufficient if the attestation clause contains his name, and the cross is made opposite the seal.<sup>3</sup>

A grantor's mark may be affixed by the hand of another in his presence, just as his signature may be so affixed.<sup>4</sup>

In several States it is declared by statute that a signature includes a mark written to authenticate an instrument.<sup>5</sup> In some States it is more particularly provided that a signature includes a mark, when the person cannot write, his name being near it and witnessed by a person who writes his own name as a witness.<sup>6</sup>

<sup>1</sup> *Strong v. Brewer*, 17 Ala. 706; *Shank v. Butsch*, 28 Ind. 19; *Mut. Benefit L. Ins. Co. v. Brown*, 30 N. J. Eq. 193; *Devereux v. McMahon*, 108 N. C. 134, 12 L. R. A. 205; *Sellers v. Sellers*, 98 N. C. 13; *Carrier v. Hampton*, 11 Ired. 307; *Truiman v. Lore*, 14 Ohio St. 144; *Lyons v. Holmes*, 11 S. C. 429, 32 Am. Rep. 483.

<sup>2</sup> *Sellers v. Sellers*, 98 N. C. 13, 3 S. E. Rep. 917; *State v. Byrd*, 93 N. C. 624.

<sup>3</sup> *Devereux v. McMahon*, 108 N. C. 134, 12 S. E. Rep. 902. "In construing the act of making the mark in this case as an adoption of the signature just above it in the body of the deed, we can foresee no greater danger of opening a door for the evasion of the statute of frauds than in any other case where the mark is used and placed in juxtaposition to the written name." Per *Avery, J.*

<sup>4</sup> *Devereux v. McMahon*, 108 N. C. 134, 12 S. E. Rep. 902.

<sup>5</sup> Some of the statutes cited have special reference to criminal procedure. *Alabama*: Code 1886, § 1789. *Connecticut*: With grantor's name annexed. G. S. 1888, § 2954. *Indiana*: R. S. 1894, § 240. *Maine*: R. S. 1883, p. 59, § 6.

*Michigan*: If grantor is unable to write. Annot. Stats. 1882, § 2, pl. 17. *Minnesota*: G. S. 1892, § 6842. *New York*: Laws 1892, ch. 677, § 12. *Oregon*: 1 Annot. Laws 1892, § 2041. *Utah*: Comp. Laws 1888, § 4371. *Texas*: Of person unable to write. R. Civ. Stat. 1889, art. 3140.

<sup>6</sup> *Arkansas*: Dig. of Stats. 1894, § 7204. *California*: Civ. Code, § 14. *Idaho*: R. S. 1887, § 16. *Nebraska*: Comp. Stats. 1895, § 6977. *Nevada*: G. S. 1885, § 3614. *Tennessee*: Code 1884, § 48. *Oklahoma T.*: Comp. Stats. 1893, § 4868.

Under the statute of Arkansas, providing that the writing of a name by mark shall be witnessed by a person who writes his own name as a witness, it was at first held that the statute must be complied with, and the mark witnessed, to make a signature. *Watson v. Billings*, 38 Ark. 278. But by later decisions it is held to mean that a mark is not to be taken as *prima facie* a signature unless it is witnessed; but other proof is not excluded. *Ex parte Miller*, 49 Ark. 18, 3 S. W. Rep. 883; *Davies v. Semmes*, 51 Ark. 48, 9 S. W. Rep. 434.

1011. The grantor's mark is his signature. It does not matter who wrote his name, if he himself sets his mark near the name. "His signature is his mark, and the requirements of law are fully satisfied if, finding his name subscribed to an instrument, he set his mark near it. The sole purpose of the name being there at all is by way of identifying and individualizing the mark; and this purpose can be as fully conserved when the name is written — as is by no means unusual in practice — by the other party to the contract as by a stranger, the act of either in so doing being as purely clerical as writing the body of the paper."<sup>1</sup> Accordingly, if a mortgagee writes the name of his mortgagor upon the mortgage, and the latter affixes his mark, and a disinterested witness attests the signature, the mortgage is properly executed.<sup>2</sup> It would not be proper, however, for the mortgagee not only to write the mortgagor's name, but also to affix his mark to the instrument.<sup>3</sup>

But the mark is the grantor's signature though the pen is held by the grantee or by a third person, the grantor holding merely the top of the penholder, but intending to execute the instrument. The making of the mark is the act of the maker, and not of the other party who holds the pen with him.<sup>4</sup>

1012. It has sometimes been held that a deed executed by an illiterate person by his mark must first be correctly read to him to make it valid;<sup>5</sup> though, if he does not require the deed to be read to him, it is sufficient that he is fully apprised of the nature and effect of the deed.<sup>6</sup> If in such case the deed be falsely read, or the effect of it be falsely stated, it is not binding upon the grantor, though the person who thus falsely reads the deed, or states its effect, be a friend of his; "for it is at the peril of the party to whom the writing is made that the true effect and purport of the writing be declared, if it be required; but if the party who should deliver the deed doth not require it, he shall be bound by the deed although it be penned against his meaning."<sup>7</sup>

<sup>1</sup> *Johnson v. Davis*, 95 Ala. 293, 10 So. Rep. 911, per McClellan, J. And see *Jackson v. Jackson*, 39 N. Y. 153; *Pool v. Buffum*, 3 Oreg. 438; *Re Will of Cornelius*, 14 Ark. 675, relating to wills.

<sup>2</sup> *Johnson v. Davis*, 95 Ala. 293, 10 So. Rep. 911.

<sup>3</sup> *Carlisle v. Campbell*, 76 Ala. 247.

<sup>4</sup> *Mash v. Daniel* (Ala.), 18 So. Rep. 8; *Johnson v. Davis*, 95 Ala. 293, 10 So. Rep. 911.

<sup>5</sup> *Suffern v. Butler*, 18 N. J. Eq. 220; *Hyer v. Little*, 20 N. J. Eq. 443; *May v. Seymour*, 17 Fla. 725.

<sup>6</sup> *Hallenbeck v. Dewitt*, 2 Johns. 404.

<sup>7</sup> *Thoroughgood's Case*, 2 Co. 9 a, b.

The better view, however, is that a deed so executed is valid though not read to the maker, in the absence of fraud or misrepresentation on the part of the grantee. If a person competent to execute a deed chooses to sign it without requiring it to be read or explained to him, he cannot blame another for his own negligence.<sup>1</sup>

1013. One may make a valid signature by his mark though he is able to write his name.<sup>2</sup>

It is not essential, though usual and desirable, that a signing by a mark should be attested by a subscribing witness, unless a subscribing witness to all deeds is required by statute.<sup>3</sup> A mark, like a signature, is intended to be in itself evidence of the fact of execution, and it is ordinarily just as binding without a subscribing witness as with one. The signing by a mark may be proved by a witness who saw it made, or who heard the grantor acknowledge it to be his. It may be proved by evidence that it was a substitute habitually used by him for his signature. A mark may be so peculiar and uniform that it may be proved just as a signature may be proved.<sup>4</sup> The occasion for a subscribing witness arises from the fact that ordinarily a mere cross cannot be identified as the mark of the person making it as a signature may be.

### III. *Signing by the Hand of Another.*

1014. It is not essential that the grantor himself shall sign his deed. It may be subscribed by another person in his behalf,

In this case a person present at the execution of the deed took it from another who had commenced the reading of it, and said, "Goodman Thoroughgood, you are a man unlearned, and I will declare it unto you, and make you understand it better than you can by hearing of it read;" and he further said, "Goodman Thoroughgood, the effect of it is this," stating briefly the purport of it, to which the latter said: "If it be no otherwise, I am content." It was adjudged not to be his deed.

<sup>1</sup> King v. Longnor, 1 Nev. & M. 576; Brown v. Brown, 3 Conn. 299, 8 Am. Dec. 187; School Committee v. Kesler, 67 N. C. 443, 448; Kimball v. Eaton, 8 N. H. 391; Jackson v. Croy, 12 Johns. 427.

In Indiana it is declared by statute that, in case the grantor has signed by mark, it is the duty of the officer taking the acknowledgment to explain to him the contents of the deed. But his failure to do so does not affect the validity of the deed. G. S. 1894, § 3368; Fitzgerald v. Goff, 99 Ind. 28; Leslie v. Merrick, 99 Ind. 180.

<sup>2</sup> Mackay v. Easton, 19 Wall. 619, 631, per Field, J.; Devereux v. McMahon, 108 N. C. 134, 12 S. E. Rep. 902.

<sup>3</sup> Devereux v. McMahon, 108 N. C. 134, 12 S. E. Rep. 902; Meazles v. Martin (Ky.), 18 S. W. Rep. 1028.

<sup>4</sup> State v. Byrd, 93 N. C. 624; Devereux v. McMahon, 108 N. C. 134, 12 S. E. Rep. 902; Tatom v. White, 95 N. C. 453.



under his direction, in his presence.<sup>1</sup> He may also adopt the act of another in signing his name, although he had given no previous authority for it. A wife may release her right of dower in a deed to a third person by having her name signed by her husband by her direction. It is as competent for her to affix her name by her husband's hand as by the hand of any other person.<sup>2</sup>

A sheriff may sign his name in this way to a deed made in his official capacity, and it is as efficacious as though signed by himself.<sup>3</sup>

In such case it is not necessary to show the incapacity of the grantor to execute the deed himself.<sup>4</sup>

The fact of the execution of the deed by the hand of another, under the immediate direction of the grantor and in his presence, must be affirmatively shown by the party relying upon the deed. The proper execution of the deed cannot be left to inference.<sup>5</sup>

Upon the issue, whether the grantor authorized another to subscribe his name, evidence is admissible that, within a short time before, the grantor directed the deed to be prepared in the form it was executed with the intent to execute it. Such evidence adds probability to the testimony of witnesses who testified that he directed his name to be signed to the deed.<sup>6</sup>

<sup>1</sup> *Ball v. Dunsterville*, 4 Term, 313; *King v. Longnor*, 4 Barn. & A. 647; *Lewis v. Watson*, 98 Ala. 479, 22 L. R. A. 297. **California**: *Jansen v. McCahill*, 22 Cal. 563, 83 Am. Dec. 84; *Videau v. Griffin*, 21 Cal. 389; *Harris v. Harris*, 59 Cal. 620. **Georgia**: *Reinhart v. Miller*, 22 Ga. 402, 68 Am. Dec. 506. **Illinois**: *Rockford, R. I. & St. L. R. Co. v. Shunick*, 65 Ill. 223. **Indiana**: *Nye v. Lowry*, 82 Ind. 316; *Rhode v. Lonthain*, 8 Blackf. 413. **Kentucky**: *Irvine v. Thompson*, 4 Bibb, 295. **Maine**: *Lovejoy v. Richardson*, 68 Me. 386; *Bird v. Decker*, 64 Me. 550; *Frost v. Deering*, 21 Me. 156. **Massachusetts**: *Gardner v. Gardner*, 5 Cush. 483, 52 Am. Dec. 740; *Wood v. Goodridge*, 6 Cush. 117, 52 Am. Dec. 771. **Minnesota**: *Conlan v. Grace*, 36 Minn. 276, 30 N. W. Rep. 880; *Schmitt v. Schmitt*, 31 Minn. 106, 16 N. W. Rep. 543. **New Hampshire**: *Cushman v. Wooster*, 45 N. H. 410, 413. **New Jersey**: *Mutual Benefit L. Ins. Co. v. Brown*, 30 N. J. Eq. 193. **North Carolina**: *Kime v. Brooks*, 9 Ired. 218; *Devereux v. McMahon*, 108 N. C. 134, 12 S. E. Rep. 902. **Pennsylvania**: *Pierce v. Hakes*, 23 Pa. St. 231. **Rhode Island**: *Goodell v. Bates*, 14 R. I. 65. **South Carolina**: *Wallace v. McCollough*, 1 Rich. Eq. 426, court divided.

<sup>2</sup> *Frost v. Deering*, 21 Me. 156; *Bartlett v. Drake*, 100 Mass. 174.

<sup>3</sup> *Lewis v. Watson*, 98 Ala. 479, 22 L. R. A. 297.

<sup>4</sup> *Baker v. Denning*, 8 Ad. & El. 94; *Mut. Benefit L. Ins. Co. v. Brown*, 30 N. J. Eq. 193.

<sup>5</sup> *Videau v. Griffin*, 21 Cal. 389; *Waggener v. Waggener*, 3 T. B. Mon. 542; *Logan v. Steele*, 4 T. B. Mon. 430.

<sup>6</sup> *Woodcock v. Johnson*, 36 Minn. 217, 30 N. W. Rep. 894; *Roles v. Mintzer*, 27 Minn. 31, 6 N. W. Rep. 378; *Miller v. Lamb*, 22 Minn. 43; *Kumler v. Ferguson*, 7 Minn. 442; *Schwerin v. De Graff*, 21 Minn. 354.

1015. In the case of an ancient deed coming from the possession of the heirs of the grantee, if it appears that the name of a grantor is in the handwriting of a person then present, and not a party to the deed or in interest, in the absence of evidence of fraud the presumption is that the signature was made in the presence of the grantor by virtue of an oral direction from him, in which event the signature is that of the grantor as principal.<sup>1</sup>

1016. The disposing capacity and will, which are the essential elements in the execution of a deed, are in the grantor, when he merely uses the hand of another, instead of his own, to do the physical act of signing his name. The distinction between a deed by the hand of a third person in the grantor's presence and acting at his request, and a deed executed by an attorney, is obvious and well recognized. In the execution of a deed by an attorney, the disposing power, though delegated, is with the attorney, and the deed takes effect from his act; and therefore the power is to be strictly construed, and the authority of the attorney must be proved by evidence of as high a nature as the deed itself; it must be derived from an instrument under the hand and seal of the grantor.<sup>2</sup>

1017. The signing by the third person must ordinarily be in the immediate presence of the grantor in order to make it his act.<sup>3</sup> "The only exception to the rule that an authority to execute a deed must be conferred by writing is where the execution by the attorney is in the presence of the principal. The exception arises from the doctrine that what one does in the presence of and by the direction of another is the act of the latter, — as much so as if it were done by himself in person. The attorney in such case, so far as the signature to the instrument is concerned, is a mere amanuensis of the grantor. It is not sufficient that the attorney was directed to sign the name of the principal and affix his seal; the execution must be in the immediate presence of the principal, and this fact must be affirm-

<sup>1</sup> *Hogans v. Carruth*, 19 Fla. 84.

<sup>2</sup> *Gardner v. Gardner*, 5 Cush. 483, 52 Am. Dec. 740, per Shaw, C. J. See, also, *Gordon v. Bulkeley*, 14 S. & R. 331; *McMurtry v. Brown*, 6 Neb. 368.

<sup>3</sup> *Touchstone*, 57. "Where one person delivers an instrument as the act of another person who is present, no deed con-

ferring an authority is requisite. But a person cannot, unless authorized by deed, execute an instrument as the act of a person who is absent; and every letter of attorney must be by deed." *Kime v. Brooks*, 9 Ired. 218; *McMurtry v. Brown*, 6 Neb. 368.

actively established by the party who relies upon it as an excuse for the absence of a power in writing. It is not a fact to be inferred from any coincidence between the date of the deed and the acknowledgment of the principal that it was executed by his attorney, as contended by the learned counsel of the appellants.”<sup>1</sup>

1018. If, however, the signing be shown to have been at the grantor's request, it need not appear that it was done in his presence if he afterwards recognizes and adopts the signature as his own.<sup>2</sup> He recognizes and adopts the signature by acknowledging the deed before a magistrate.<sup>3</sup> He is, moreover, estopped by his own acts from denying his signature. “By acknowledging the deed as his, he authorized its recordation. On receiving the consideration he delivered it; for it is not to be assumed, in the absence of proof, that he delivered it without receiving such consideration. By delivering it, he gave authority to the grantee to place it on record, and by thus placing it on record to give notice to all the world that he had parted with his title, which could never have been done without such acknowledgment and delivery. If a party is ever to be estopped, a stronger case of estoppel is not conceivable.”<sup>4</sup>

Under a former statute of Texas, which did not require that a deed should be subscribed at the end by the grantor as does the present statute, a deed wholly written by another at the grantor's request, and not subscribed by the grantor, his name only appearing in the granting clause, but which was acknowledged by him before the proper officer as his deed, and was then filed for record, was held to be valid and operative. Stayton, J., delivering judgment, said: “It is well settled that by his acknowledgment before the officer he adopted, and made his own, every word, including his own name, then upon the instrument. By that act and the delivery of the instrument he declared and made his name or sign,

<sup>1</sup> *Videau v. Griffin*, 21 Cal. 389, 392, per Field, C. J.

<sup>2</sup> *Tupper v. Foulkes*, 9 C. B. N. S. 797; *Birmingham Canal Co. v. Bold*, 11 Q. B. 127; *Holbrook v. Chamberlin*, 116 Mass. 155, 17 Am. Rep. 146; *Nye v. Lowry*, 82 Ind. 316.

<sup>3</sup> *Bartlett v. Drake*, 100 Mass. 174, 97 Am. Dec. 92; *Lovejoy v. Richardson*, 68

Me. 386; *Clough v. Clough*, 73 Me. 487, 40 Am. Rep. 386; *Pierce v. Hakes*, 23 Pa. St. 231; *Harris v. Harris*, 59 Cal. 620. And see *Goodell v. Bates*, 14 R. I. 65; *Newton v. Emerson*, 66 Tex. 142, 18 S. W. Rep. 348. *Contra*, *Linsley v. Brown*, 13 Conn. 192.

<sup>4</sup> *Lovejoy v. Richardson*, 68 Me. 386, 389, per Appleton, C. J.

then on the paper, the evidence of his intention in reference to giving it validity and effect, as fully as though the name had been written by himself.<sup>1</sup> It is to be regarded, then, as though entirely written by himself, for he declared that, as an entirety, it was his act; that he had signed and executed it. This declaration must be received as true, unless it appears that he was mistaken; that is, unless it be true that what appeared upon the paper at that time, if wholly written by the person named as maker, cannot in law constitute a signing.”<sup>2</sup>

1019. One may adopt a deed which has been executed in his name by another. He does this by acknowledging and delivering such deed as his own, and he will not afterwards be allowed to deny that the signature is his.<sup>3</sup> “The unauthorized execution of a deed in the name either of a partnership or of an individual may be ratified by parol.”<sup>4</sup> One whose name was subscribed to a deed by his wife in his absence adopts the signature as his own by acknowledging it before a magistrate.<sup>5</sup>

1020. A deed with a forged signature of course confers no title.<sup>6</sup> A *bona fide* purchaser for a valuable consideration necessarily takes the risk of the genuineness of the deeds in the line of title.<sup>7</sup> The burden of proof is upon the party asserting the genuineness of a deed, and this is not changed by the fact that it is recorded.<sup>8</sup>

<sup>1</sup> Citing *Bartlett v. Drake*, 100 Mass. 174; *Clough v. Clough*, 73 Me. 487; *Nye v. Lowry*, 82 Ind. 316; *Willis v. Lewis*, 28 Tex. 185; *Adams v. Field*, 21 Vt. 256; *Armstrong v. Stovall*, 26 Miss. 275; *Pike v. Bacon*, 21 Me. 280; *Bird v. Decker*, 64 Me. 550.

<sup>2</sup> *Newton v. Emerson*, 66 Tex. 142, 18 S. W. Rep. 348.

<sup>3</sup> *Clough v. Clough*, 73 Me. 487, 489, 40 Am. Rep. 386. In this case the grantor's name had been signed to the deed by the grantee. Walton, J., delivering the opinion, said: “It is not often important to notice this distinction; but it is important in this case in order to avoid the apparent absurdity of holding that an agent can contract with himself,—can be both grantor and grantee. An agent cannot contract with himself. He cannot, as agent for the grantor, execute a deed to

himself. But he can prepare a deed running to himself, even to the signing and sealing, and, if the grantor then adopts the deed by personally acknowledging and delivering it, it will be a legal and valid instrument. But its validity rests upon the ground of adoption, not agency or ratification.” And see *Lovejoy v. Richardson*, 68 Me. 386; *Kerr v. Russell*, 69 Ill. 666, 18 Am. Rep. 634; *Holbrook v. Chamberlin*, 116 Mass. 155; *Bartlett v. Drake*, 100 Mass. 174; *Greenfield Bank v. Crafts*, 4 Allen, 447; *Watson v. Billings*, 38 Ark. 278, 282.

<sup>4</sup> *Holbrook v. Chamberlin*, 116 Mass. 155, 161.

<sup>5</sup> *Bartlett v. Drake*, 100 Mass. 174

<sup>6</sup> *Cole v. Long*, 44 Ga. 579.

<sup>7</sup> *Reck v. Clapp*, 98 Pa. St. 581.

<sup>8</sup> *Hanks v. Phillips*, 39 Ga. 550.

IV. *Execution under Power of Attorney.*

**1021.** Authority to execute a deed must be given by deed. A deed cannot be executed by a third person for the grantor in his absence unless authorized by a power under seal.<sup>1</sup> A recital of the attorney's authority in the deed is proper and desirable, but it has of itself no effect as showing authority,<sup>2</sup> though such recital, coupled with a long delay of the principal to assist an adverse claim, affords presumption of the existence of the power.<sup>3</sup> The attorney may execute the deed by signing the name of the principal alone, without signing his own.<sup>4</sup> The deed should purport throughout to be the deed of the principal, and the principal's name should be signed, together with his own name as attorney. This is the common-law form of executing a deed under a power of attorney, and this form is proper though a statute provides that a person executing a deed as attorney for another shall describe himself in and sign the deed as attorney.<sup>5</sup>

**1022.** A power of attorney for the execution of a deed should be as certain and as formal as the deed itself.<sup>6</sup> The

<sup>1</sup> Co. Litt. 52 a; Touchstone, 57; see: *Smith v. Dickinson*, 6 Humph. 261, 44 Am. Dec. 306.  
Comyn's Dig. Att'y C. 5; *Combe's Case*, 9 Coke, 76 b; *Clark v. Graham*, 6 Wheat. 577. **California**: *Videau v. Griffin*, 21 Cal. 389. **Georgia**: *Rowe v. Ware*, 30 Ga. 278. **Indiana**: *Rhode v. Louthain*, 8 Blackf. 413. **Kentucky**: *Waggener v. Waggener*, 3 T. B. Mon. 542; *Logan v. Steele*, 4 T. B. Mon. 430. **Maine**: *Wheeler v. Nevins*, 34 Me. 54; *Heath v. Nutter*, 50 Me. 378. **Michigan**: *Davenport v. Parsons*, 10 Mich. 42, 81 Am. Dec. 772. **Missouri**: *Shuetze v. Bailey*, 40 Mo. 69. **Nebraska**: *McMurtry v. Brown*, 6 Neb. 368. **New Jersey**: *Tappan v. Redfield*, 5 N. J. Eq. 339; *Smith v. Perry*, 29 N. J. L. 74. **New York**: *Blood v. Goodrich*, 9 Wend. 68, 24 Am. Dec. 121; *Van Ostrand v. Reed*, 1 Wend. 424; *Lawrence v. Taylor*, 5 Hill, 107, per Cowen, J.; *Worrall v. Munn*, 5 N. Y. 229, 55 Am. Dec. 330. **North Carolina**: *Cadell v. Allen*, 99 N. C. 542; *Davenport v. Sleight*, 2 Dev. & B. 381, 31 Am. Dec. 420; *Humphreys v. Finch*, 97 N. C. 303. **Pennsylvania**: *Gordon v. Bulkeley*, 14 S. & R. 331. **Tennes-**

<sup>2</sup> *Waggener v. Waggener*, 3 T. B. Mon. 542.

<sup>3</sup> *Folts v. Ferguson* (Tex.), 24 S. W. Rep. 657.

<sup>4</sup> *Devinney v. Reynolds*, 1 Watts & S. 328.

<sup>5</sup> *Posner v. Bayless*, 59 Md. 56. A deed executed in the form indicated by such statute is good. *Citizens, &c. Land Co. v. Doll*, 35 Md. 89. In **Texas**, also, the technical requirements of the common law in regard to the execution of a power of attorney are dispensed with, and, if the attorney has the power to convey, the conveyance is binding upon the principal, and conveys his title, though the conveyance be made without reference to him. *Hough v. Hill*, 47 Tex. 148; *Rogers v. Bracken*, 15 Tex. 564; *Link v. Page*, 72 Tex. 592, 10 S. W. Rep. 699; *Trinity Co. Lumber Co. v. Pinckard* (Tex.), 23 S. W. Rep. 720.

<sup>6</sup> *Clark v. Graham*, 6 Wheat. 517; *Gale v. Gale*, 30 N. H. 420; *Lumbard v. Aldrich*, 8 N. H. 31, 28 Am. Dec. 381.

same formalities, moreover, of signing, sealing, and acknowledging, should be observed in its execution.<sup>1</sup> If two subscribing witnesses are required for the execution of the deed, two witnesses should be required for the execution of the power.<sup>2</sup> Where the deed of a married woman is invalid unless her husband joins with her in the execution of it, the husband should join in the execution of a power of attorney given by his wife for the conveyance of her land.<sup>3</sup> If it is required that a married woman in acknowledging a deed shall be examined apart from her husband, the same formality is requisite in her acknowledgment of a power of attorney for the conveyance of her land.<sup>4</sup>

The lands to be conveyed under the power must be sufficiently identified.<sup>5</sup>

It is provided by statute in nearly all the States, though in somewhat varying terms, that a power of attorney to convey real estate must be executed, acknowledged, and recorded in the same manner that conveyances are.<sup>6</sup>

In several States a power of attorney to convey is not deemed to be revoked until the instrument of revocation is deposited for record in the same office in which the power is recorded.<sup>7</sup>

<sup>1</sup> *Cadell v. Allen*, 99 N. C. 542.

<sup>2</sup> *Gage v. Gage*, 30 N. H. 420; *Stone v. Ashley*, 13 N. H. 38.

<sup>3</sup> *Heinlen v. Martin*, 53 Cal. 321; *Dow v. Gould*, 31 Cal. 629; *Dentzel v. Waldie*, 30 Cal. 138.

<sup>4</sup> *Butterfield v. Beall*, 3 Ind. 203.

<sup>5</sup> *Bradley v. Whitesides*, 55 Minn. 455, 57 N. W. Rep. 148.

<sup>6</sup> *Alabama*: Code 1886, § 1856. *Arkansas*: Dig. of Stats. 1894, § 719. *California*: Civ. Code, §§ 1214-1216. *Colorado*: Annot. Stats. 1891, § 445. *Connecticut*: G. S. 1888, § 2954. *Delaware*: R. Code 1893, ch. 83, §§ 11-14. *Georgia*: Code 1882, § 2182. *Indiana*: R. S. 1894, §§ 3336, 3337. *Kansas*: 1 G. S. 1889, § 1131. *Kentucky*: G. S. 1894, § 499. *Maryland*: Pub. G. L. art. 21, §§ 25, 26. *Massachusetts*: P. S. 1882, ch. 120, § 14. *Michigan*: 2 Annot. Stats. 1882, §§ 5690, 5692. *Mississippi*: Annot. Code 1892, §§ 193, 196. *Missouri*: R. S. 1889, §§ 2425, 2426. *Montana*: Comp. Stats. 1887, p. 662, §§ 261, 262. *Nebraska*: Comp.

Stats. 1895, § 4140. *Nevada*: G. S. 1885, §§ 2596, 2597. *New Hampshire*: P. S. 1891, ch. 137, § 6. *New Jersey*: R. S. 1877, p. 156. *New Mexico*: Comp. Laws 1884, §§ 2765, 2766. *New York*: 4 R. S. 1889, p. 2475, §§ 39, 40. *Ohio*: R. S. 1890, §§ 4108, 4131. *Oregon*: Annot. Laws 1892, §§ 3035, 3036. *Pennsylvania*: Brightly's *Purdon's Dig.* 1894, p. 152. *Tennessee*: Code 1884, § 2937. *Utah*: Comp. Laws 1888, §§ 2614, 2615. *Vermont*: R. L. 1880, § 1935. *Wisconsin*: Annot. Stats. 1889, § 2237. *Wyoming*: R. S. 1887, §§ 24, 26.

<sup>7</sup> *Arkansas*: Dig. of Stats. 1894, § 720. *California*: Civ. Code, § 1216. *Idaho*: R. S. 1887, § 3003. *Iowa*: R. S. 1888, § 3144. *Kansas*: G. S. 1889, § 1133. *Kentucky*: G. S. 1894, § 499. *Maryland*: Pub. G. L. art. 21, § 26. *Michigan*: 2 Annot. Stats. 1882, § 5692. *Mississippi*: Annot. Code 1892, § 196. *Missouri*: R. S. 1889, § 2426. *Montana*: Civ. Code 1895, § 1643. *Nevada*: G. S. 1885, § 2597. *New Mexico*: Comp. Laws 1884,

1023. One who is capable of making a deed may execute it by an attorney constituted such by writing under his hand and seal.<sup>1</sup> Of course the same disabilities that prevent the owner's making a conveyance prevent his appointing an attorney to make it. While, as already noticed, the deed of an infant is, as a general rule, not absolutely void but voidable only,<sup>2</sup> yet, if his deed is not to take effect by delivery, it is void. The power of attorney of an infant, not conveying a present interest, is not voidable merely, but absolutely void.<sup>3</sup> "In fact," says Mr. Justice Strong, "we know no case of authority in which the letter of attorney of either an infant or a lunatic has been held merely voidable."

1024. An insane person can neither make a deed<sup>4</sup> nor by a power of attorney authorize another to make a deed for him. His power of attorney is wholly void.<sup>5</sup>

1025. One partner or member of an association has no implied authority to execute a deed binding upon the other members.<sup>6</sup> But an instrument of this character, executed in this manner, may be rendered obligatory by a previous parol

§ 2766. New York: 4 R. S. 1889, p. 2475, § 40. North Dakota: Comp. Laws 1887, § 3295. Ohio: R. S. 1890, § 4132. Oregon: Annot. Laws 1892, § 3036. Oklahoma: Comp. Stats. 1893, § 6129. Pennsylvania: Brightly's Purdon's Dig. 1894, p. 152. South Dakota: Comp. Laws 1887, § 3295. Tennessee: Code 1884, § 2937. Utah: Comp. Laws 1888, § 2615. Wyoming: R. S. 1887, § 26.

<sup>1</sup> § 4.

<sup>2</sup> § 2.

<sup>3</sup> *Dexter v. Hall*, 15 Wall. 9, 25, per Strong, J.; *Lawrence v. McArter*, 10 Ohio, 37; *Fonda v. Van Horne*, 15 Wend. 631; *Pyle v. Cravens*, 4 Litt. 17. "Perhaps it cannot be contended against the current of authorities that an act done by another for an infant, which act must necessarily be done by letter of attorney under seal, is not absolutely void, though no satisfactory reason can be assigned for such a position." Per Parker, C. J., in *Whitney v. Dutch*, 14 Mass. 457, 7 Am. Dec. 229.

<sup>4</sup> §§ 52-54.

<sup>5</sup> *Dexter v. Hall*, 15 Wall. 9. Mr. Jus-

tice Strong, delivering the decision, said: "The doctrine, that a lunatic's power of attorney is void, finds confirmation in the analogy there is between the situation and acts of infants and lunatics. Both such classes of persons are regarded as under the protection of the law. But, as already remarked, a lunatic needs more protection than a minor. The latter is presumed to lack sufficient discretion. Reason is wanting in degree. With a lunatic it is wanting altogether. Yet it is universally held, as laid down by Lord Mansfield in *Zouch v. Parsons*, 3 Burrow, 1805, that deeds of an infant which do not take effect by delivery of his hand (in which class he places a letter of attorney) are void. We are not aware that any different rule exists in England or in this country. It has repeatedly been determined that a power of attorney made by an infant is void. . . . In fact we know no case of authority in which the letter of attorney of either an infant or lunatic has been held merely voidable."

<sup>6</sup> *Skinner v. Dayton*, 19 Johns. 513, 10 Am. Dec. 286.

authority, or by subsequent parol ratification, and thus become the deed of the partnership. Much slighter authority will produce this effect where the subject-matter of the instrument is within the partnership dealings than where it has no connection with the business of the firm.<sup>1</sup>

### V. *Execution by Married Woman by Power of Attorney.*

1026. A married woman, under statutes which have removed her common-law disabilities, may appoint an attorney to convey land which she is herself competent to convey. Her power of attorney may be made in the same manner and with the same legal effect as the power of a *feme sole*.<sup>2</sup> Under statutes which enable a married woman to transfer her separate real estate as if she were sole, doubtless her power of attorney to her husband is valid.<sup>3</sup> This is true even under a statute which does not enable the wife to convey directly to her husband.<sup>4</sup> Special provisions in regard to powers of attorney by married women exist in many States.<sup>5</sup>

<sup>1</sup> McDonald v. Eggleston, 26 Vt. 154, 161, 60 Am. Dec. 303, per Isham, J.; Cady v. Shepherd, 11 Pick. 405, 22 Am. Dec. 379; Swan v. Stedman, 4 Met. 548. In Bell v. Dunsterville, 4 Term, 313, it was held that a deed signed by a partner in behalf of himself and his copartner, by the authority and in the presence of the copartner, is a good execution of the deed by both. The presence of the non-subscribing partner may be the most satisfactory proof of his assent, but such presence is not necessary. The assent of such partner may be proved by other evidence. Cady v. Shepherd, 11 Pick. 400, 405, 22 Am. Dec. 379; McDonald v. Eggleston, 26 Vt. 154, 161, 60 Am. Dec. 303.

<sup>2</sup> Knapp v. Smith, 27 N. Y. 277. See §§ 36-39.

<sup>3</sup> Weisbrod v. Chicago & N. W. Ry. Co. 18 Wis. 35, 86 Am. Dec. 743; Racouillat v. Sansevain, 32 Cal. 376. See Hunt v. Johnson, 19 N. Y. 279.

<sup>4</sup> Weisbrod v. Chicago & N. W. Ry. Co. 18 Wis. 35, 86 Am. Dec. 743.

<sup>5</sup> Alabama: Wife of eighteen years of

age may join with husband in a power of attorney to relinquish dower, her signature being attested by two witnesses, or acknowledged, as her conveyance is required to be. Code 1886, § 1894. California: The power of attorney of a married woman authorizing the conveyance of an estate in her separate property is not valid unless acknowledged by her in the manner required for the acknowledgment of a deed. Civ. Code, § 1094. Delaware: A married woman may make a letter of attorney as though she were a *feme sole*. Laws 1877, ch. 467; R. Code 1893, ch. 83, §§ 11-14. Florida: A married woman may convey her separate real property by power of attorney signed and acknowledged as a deed of her separate property is signed and acknowledged, provided her husband joins in the power and it be duly recorded. R. S. 1892, § 1967. Indiana: A married woman may join in a power of attorney with her husband to convey her land, or any interest therein; and this must be acknowledged and recorded. R. S. 1894, § 3369. Kentucky: Any married woman resident out of this common-



It is true that at common law a married woman could not make a deed by an attorney.<sup>1</sup>

A power of attorney, made by a woman when sole, is revoked by her marriage.<sup>2</sup>

1027. A joint power of attorney by a husband and wife is effectual to authorize the attorney to execute a deed of the wife's separate estate, where it is competent for her to convey by an attorney.<sup>3</sup> Under some statutes expressly authorizing a married woman to execute a power of attorney for the conveyance of her real estate, the husband must join in the execution of the power.<sup>4</sup>

Under a statute which provides that a married woman shall convey her real estate only by deed executed jointly with her husband, a deed made by the wife jointly with an agent acting

wealth may convey any interest she may have in real estate therein by a power of attorney, executed and acknowledged as deeds by married women are by law required. G. S. 1894, § 508. **Minnesota** : No power of attorney or other authority by husband or wife to the other to convey real estate, or any interest therein, is of any force. G. S. 1894, § 5534. **Missouri** : A married woman may convey her real estate, or relinquish her dower in the real estate of her husband, by a power of attorney executed and acknowledged by her jointly with her husband, as deeds conveying real estate by them are required to be. R. S. 1889, § 2397. **New York** : A married woman residing in this State, and of the age of twenty-one years or more, may execute, acknowledge, and deliver her power of attorney with like force and effect as if she were single. 4 R. S. 1889, 8th ed. p. 2605. **North Carolina** : Conveyances may be made under a power of attorney by husband and wife to convey her lands. Code 1883, § 1257. **Utah** : A married woman may join in a power of attorney with her husband for the incumbrance, release, or conveyance of lands, or of any interest therein; such power must be witnessed by at least one credible witness and acknowledged. Comp. Laws 1888, § 2532. **West Virginia** : It is provided that a married woman may, by power of attorney duly executed, ac-

knowledge, and certified, appoint an attorney in fact to execute any deed or other writing which she might execute and acknowledge in person; and every deed or other writing executed and acknowledged shall be valid and effectual to convey the title and interest of such married woman, and to bar her right of dower therein as if she had, in person and in the manner required, executed and acknowledged the same. Acts 1873, ch. 67, §§ 6, 12; R. S. 1878, ch. 65, § 12. **Wisconsin** : A married woman may, by letter of attorney, bar her dower, or convey any other interest in any real estate, in the same manner and in the same cases as she might personally do. Annot. Stats. 1889, § 2223.

<sup>1</sup> *Oulds v. Sansom*, 3 Taunt. 261; *Snyder v. Sponable*, 1 Hill (N. Y.), 567; *Hardenburgh v. Lakin*, 47 N. Y. 109, 113, per Allen, J.; *Boyd v. Turpin*, 94 N. C. 137, 55 Am. Rep. 597; *Bank of Louisville v. Gray*, 84 Ky. 565, 2 S. W. Rep. 168.

<sup>2</sup> *Judson v. Sierra*, 22 Tex. 365.

<sup>3</sup> *Douglas v. Fulda*, 50 Cal. 77. See § 37.

<sup>4</sup> As in California: *Dow v. Gould*, &c. Silver M. Co. 31 Cal. 629. The husband's name need not appear as in the body of the instrument as a constituent, but it is sufficient if he signs, seals, and acknowledges it. *Dentzel v. Waldie*, 30 Cal. 138.

under a power from the husband to convey his land is a nullity, so far as it relates to land belonging to her. Such a power does not authorize the agent to join the wife in a conveyance of her realty.<sup>1</sup>

A deed executed under a joint power of attorney from a husband and wife is the deed of the husband, though, the power being void as to the wife, the deed is void as to her.<sup>2</sup>

1028. Under statutes which provide that a married woman can convey her real estate only by a deed acknowledged upon a separate examination, she cannot, except by express statutory provision, execute, either alone or in connection with her husband, a valid power of attorney to convey her interest in real property.<sup>3</sup> "The private examination is required to protect her from the coercion or undue influence of her husband, and her acknowledgment is therefore considered as an essential preliminary to the validity of any transfer to her. The private examination is in its nature personal; it is a matter in which she cannot be represented by another. A privy acknowledgment by attorney, as observed by Bishop,<sup>4</sup> would seem to involve a contradiction, and certainly would in a great degree defeat the object which her personal examination was intended to secure."<sup>5</sup> The execution of the power of attorney by a married woman by acknowledgment upon a separate examination, in the manner required for the execution of a deed by her, is not sufficient to make valid a deed executed in pursuance of such a power, unless the power is expressly authorized by statute. Under a statute which provides that the power of attorney of a wife to convey her real estate or dower shall be executed by her jointly with her husband, and acknowledged as a deed by a married woman is required to be, a power of attorney acknowledged by the husband but not by the wife does not authorize the execution of a deed to convey any title or interest of hers.<sup>6</sup>

<sup>1</sup> Toulmin v. Heidelberg, 32 Miss. 268.

<sup>2</sup> Shanks v. Lancaster, 5 Gratt. 110, 50 Am. Dec. 108.

<sup>3</sup> Mott v. Smith, 16 Cal. 533, 556; Dow v. Gould, &c. Silver M. Co. 31 Cal. 629; Sumner v. Conant, 10 Vt. 9, 19; Lewis v. Coxe, 5 Harr. 401; Bank of Louisville v. Gray, 84 Ky. 565, 2 S. W. Rep. 168; Dawson v. Shirley, 6 Blackf. 531; Butterfield v. Beall, 3 Ind. 203; Smith v. Vree-

land, 16 N. J. Eq. 198; Earle v. Earle, 20 N. J. L. 347; Aiken v. Suttle, 4 Lea, 103; Elliott v. Teal, 5 Sawyer, 249; Holland v. Moon, 39 Ark. 120; McDaniel v. Grace, 15 Ark. 465; Clark v. Mumford, 62 Tex. 531.

<sup>4</sup> Law of Married Women, § 602.

<sup>5</sup> Holladay v. Daily, 19 Wall. 606, per Field, J.

<sup>6</sup> Bocock v. Pavey, 8 Ohio St. 270.

VI. *Construction of Power of Attorney.*

1029. In construing a power of attorney the intention of the parties is to be regarded. Though the power to sell be not expressly given, it may be implied from the terms of the instrument.<sup>1</sup> It cannot be implied, however, from general words, when the particular words do not in any way relate to a conveyance of the principal's authority.<sup>2</sup> The authority of the attorney must be ascertained from the language of the instrument which confers the authority,<sup>3</sup> though the practical interpretation put upon it by the parties themselves by their acts may serve to show the extent of the authority they intended it to confer.<sup>4</sup> One dealing with an agent acting under a written power deals with him with that power before him.<sup>5</sup>

1030. The attorney's authority, as expressed in the terms of the power, cannot be extended further than is necessary and proper for carrying the authority expressly conferred into full effect. Therefore, where the object of the power seems to have been to authorize the agent to manage and take care of the principal's property, and for this purpose to buy and sell real and personal property, and there was nothing to show that in the execution of the power it was necessary for the attorney to raise money for his principal by mortgage, it was held that the attorney could not bind the principal by a mortgage.<sup>6</sup> A power of attorney must be strictly construed according to its plain import.<sup>7</sup>

A power of attorney may fix a limit of time within which the agent is to do the act. Where it fixes a reasonable time for doing the act, it must be done by the agent within a reasonable time in

<sup>1</sup> *Marr v. Given*, 23 Me. 55, 39 Am. Dec. 600; *Sullivan v. Davis*, 4 Cal. 291.

<sup>2</sup> *Coquillard v. French*, 19 Ind. 274; *Lord v. Sherman*, 2 Cal. 498; *Billings v. Morrow*, 7 Cal. 171, 68 Am. Dec. 235. Here the power was "to superintend any real and personal estate, to make contracts, to settle outstanding debts, and generally to do all things that concern my interest in any way, real or personal, whatsoever, giving my said attorney full power to use my name to release others or bind myself, as he may deem proper or expedient."

<sup>3</sup> *Blum v. Robertson*, 24 Cal. 127.

<sup>4</sup> *Marr v. Given*, 23 Me. 55, 39 Am. Dec. 600, per Shepley, J.

<sup>5</sup> *Dyer v. Duffy*, 39 W. Va. 148, 19 S. E. Rep. 540.

<sup>6</sup> *Wood v. Goodridge*, 6 Cush. 117, 52 Am. Dec. 771. See, also, *Hoyt v. Jaques*, 129 Mass. 286.

<sup>7</sup> *Wynne v. Parke* (Tex. Civ. App.), 30 S. W. Rep. 52; *Skaggs v. Murchison*, 63 Tex. 348; *Reese v. Medlock*, 27 Tex. 120; *Frost v. Erath Cattle Co.* 81 Tex. 505, 17 S. W. Rep. 52.

order to bind the principal. A proposal of sale made under such power must be accepted within a reasonable time from the date of the power.<sup>1</sup>

A power of attorney merely to sell land implies that the agent shall sell for cash, and he cannot sell on credit in the absence of authority contained in such power of attorney.<sup>2</sup>

1031. In construing a power of attorney reference may be had to the purpose of the appointment, and the powers specifically declared may properly be enlarged or limited by a due consideration of the object intended to be accomplished.<sup>3</sup> Accordingly, under a power of attorney which was manifestly intended to enable his attorney to settle all the principal's business, to collect all moneys due, dispose of all his property real and personal and pay his debts, the attorney, though in terms only authorized to sell the real estate, may mortgage it to secure his principal's creditors.<sup>4</sup>

An attorney who is merely empowered to contract for the sale of land has no power to convey for his principal.<sup>5</sup>

An irrevocable power of attorney to sell and convey land, coupled with a release to the attorney of the grantor's claim to the proceeds of any sales made by the attorney, does not vest in the attorney the title to the land. He cannot convey as the owner, but only as attorney for the owner.<sup>6</sup>

1032. An unrestricted power to sell land gives the attorney the right to sell in bulk or in parcels. As incident to such a power, the attorney may plat the land and lay out ways. Having done this, his deeds of lots of land bounding upon streets so laid out pass the fee in the streets, whether the attorney had the power to dedicate the streets to the public or not. He had at any rate the right to sell the land in fee, and to convey a right of way to his grantees.<sup>7</sup>

<sup>1</sup> *Dyer v. Duffy*, 39 W. Va. 148, 19 S. W. Rep. 540.

<sup>2</sup> *Dyer v. Duffy*, 39 W. Va. 148, 19 S. E. Rep. 540; *Burks v. Hubbard*, 69 Ala. 379; *Delafield v. Illinois*, 26 Wend. 192; *School Dist. v. Ætna Ins. Co.* 62 Me. 330; *Lumpkin v. Wilson*, 5 Heisk. 555.

<sup>3</sup> *Martin v. Harris* (Tex. Civ. App.), 26 S. W. Rep. 91.

<sup>4</sup> *Lamy v. Burr*, 36 Mo. 85, 88 Am. Dec. 135. See, also, *Gimell v. Adams*, 11 Humph. 283.

<sup>5</sup> *Force v. Dutcher*, 18 N. J. Eq. 401; *Moore v. Lockett*, 2 Bibb, 67, 4 Am. Dec. 683.

<sup>6</sup> *Douglas v. De Laittre*, 55 Fed. Rep. 873.

<sup>7</sup> *Anthony v. Providence* (R. I.), 28 Atl. Rep. 766.

1033. Whether an attorney can bind his principal by covenants, without express or implied authority to convey with covenants, is a question upon which the cases can hardly be reconciled. The cases which hold that such express authority is necessary are perhaps the most numerous.<sup>1</sup> But there are well-considered decisions by courts of high authority which hold that a power which authorizes the attorney to convey, in as full and ample a manner as the principal himself could, authorizes him to make a deed with full covenants of warranty.<sup>2</sup> A power to execute deeds of conveyance necessary for the full and perfect transfer of the principal's title, as sufficiently in all respects as he could do personally in the premises, aided by the situation of the parties, the usages of the country, and other circumstances having a legal bearing upon the question, may be construed as giving the agent power to enter into a covenant of seisin.<sup>3</sup>

1034. Ordinarily a party who relies on a grant of land, under a power of attorney, must show the authority of the attorney.<sup>4</sup> But after the lapse of twenty years, or other time sufficient to bar a recovery, a presumption arises that a conveyance by an attorney in fact was made under a power of attorney, though there is no evidence of the actual existence of such a power.<sup>5</sup> But a deed, though forty years old, which purports to be executed by an attorney in fact, but is unaccompanied by his power of attorney, is inadmissible, where no claim appears to have been asserted under it by the grantee for twenty-five years, and it does not ap-

<sup>1</sup> *Howe v. Harrington*, 18 N. J. Eq. 495; *Nixon v. Hyserott*, 5 Johns. 58; *Gibson v. Colt*, 7 Johns. 390. Authority to an attorney "to grant all discharges," as fully as the principal might do, does not authorize him to convey by deed of warranty. *Heath v. Nutter*, 50 Me. 378.

<sup>2</sup> *Le Roy v. Beard*, 8 How. 451; *Taggart v. Stanbery*, 2 McLean, 543; *Peters v. Farnsworth*, 15 Vt. 155.

<sup>3</sup> *Bronson v. Coffin*, 118 Mass. 156, per Morton, J. "A naked power to sell land may not give the attorney power to bind the principal by any covenants. But the power of attorney in this case is broader than a mere power to sell. It gives the attorney power to sell and to make all necessary deeds of conveyance, to pay the taxes, to make leases, to appear in and

defend suits, to submit to arbitration any matter respecting the estate, and generally to do any acts in relation to the estate which the interest of the principals required. It seems to have been the intention of the principals to intrust the management and disposal of their estate to the attorney, and to authorize him to make such deeds and to do such acts as in his judgment would be most for their benefit. We think he was authorized to give the deed to the plaintiff, which is in the form usually adopted in conveying real estate, and contains the usual covenants."

<sup>4</sup> *Hager v. Spect*, 52 Cal. 579.

<sup>5</sup> *Goodwin v. M'Cluer*, 3 Gratt. 291; *Blackburn v. Norman* (Tex. Civ. App.), 30 S. W. Rep. 718.

pear that the one for whom it purported to have been executed ever knew of the assertion of any title by the grantee.<sup>1</sup>

In case of an ancient deed, that is, one executed more than thirty years ago, purporting to have been executed under a power of attorney, and coming from proper custody, there is a presumption of the existence of such a power at the time of the execution of the deed.<sup>2</sup>

## VII. Ratification and Revocation of Power of Attorney.

**1035. Ratification.** — While many authorities hold that a deed executed by an attorney having no previous authority may be ratified by parol,<sup>3</sup> others hold to the rule that such unauthorized act, of an attorney in fact, can be confirmed only by an instrument under seal.<sup>4</sup> But even this rule does not prevent a ratification by acts which operate as an estoppel *in pais*.<sup>5</sup> A son received from his parents a power of attorney to sell land. They allowed him to exercise complete control over the property, but later withdrew the power. The son subsequently conveyed the land under an ostensible power of attorney from his parents, who, though informed of the act, took no steps to disavow it for three years, during which time the purchaser made valuable improvements. It was held that the parents ratified the son's act, and were estopped to assert title on the ground that the power of attorney was a forgery.<sup>6</sup>

**1036. A power of attorney is revocable at any time, though it is expressly declared irrevocable, unless the attorney has an interest in the property on which the power is to be exercised.<sup>7</sup>**

<sup>1</sup> Baldwin v. Goldfrink (Tex.), 31 S. W. Rep. 1064.

<sup>2</sup> Davis v. Pearson (Tex. Civ. App.), 26 S. W. Rep. 241; Harrison v. McMurray, 71 Tex. 122, 8 S. W. Rep. 612; O'Donnell v. Johns, 76 Tex. 362, 13 S. W. Rep. 376.

<sup>3</sup> McIntyre v. Park, 11 Gray, 102, 71 Am. Dec. 690; Cady v. Shepherd, 11 Pick. 400, 22 Am. Dec. 379; Swan v. Stedman, 4 Met. 548; McDonald v. Eggleston, 26 Vt. 154.

<sup>4</sup> Spofford v. Hobbs, 29 Me. 148, 48 Am. Dec. 521; Heath v. Nutter, 50 Me. 378; Smith v. Dickinson, 6 Humph. 261, 44 Am. Dec. 306; Paine v. Tucker, 21

Me. 138, 38 Am. Dec. 255; Hanford v. McNair, 9 Wend. 54; Despatch Line Co. v. Bellamy Manuf. Co. 12 N. H. 205, 37 Am. Dec. 203.

<sup>5</sup> Borel v. Rollins, 30 Cal. 408; Alexander v. Jones, 64 Iowa, 207, 19 N. W. Rep. 913.

<sup>6</sup> Lynch v. Richter (Wash.), 39 Pac. Rep. 125.

<sup>7</sup> Hunt v. Rousmanier, 8 Wheat. 174. "The reason of the rule is a plain one," said Chief Justice Marshall. "It seems founded on the presumption that the substitute acts by virtue of the authority of his principal existing at the time the act is performed, and on the manner in which

It is not enough that he is interested in the proceeds of a sale which he is authorized to make,<sup>1</sup> unless the power is given him as security, and he is entitled to receive the proceeds, so far as necessary to cover the debt, to his own use.<sup>2</sup> Ordinarily, when the attorney's interest is limited to the proceeds of the sale of the property, the power is not coupled with an interest, for the proceeds do not arise until after the power has been exercised, and when it is exercised it is extinguished.<sup>3</sup> A power which makes the attorney the general agent for the transaction of all the principal's business is not irrevocable, unless the grant of an interest is so plain as not to need the aid of construction.<sup>4</sup>

**1037.** The death of the principal terminates a power to convey, and a deed made by the attorney after such death is void even if he was ignorant of the fact of the death;<sup>5</sup> though, if the power be coupled with an interest, it survives and may be executed after the death of the donor.

**1038.** The marriage of the donor of a power of attorney operates as a revocation of the same, so far as concerns the rights which the wife of the donor may acquire in the property by the marriage, such as the rights of dower and homestead.<sup>6</sup>

**1039.** The insanity of the principal after the execution of a power of attorney operates as a revocation, or suspension for the time being, of the authority of the agent to act under it; though it seems that if the disability of the principal is not known to those who deal with the agent within the scope of the authority he appears to possess under the power, the principal and those who claim under him may be precluded from setting up the insanity as a revocation.<sup>7</sup> This rule does not apply, however, where

he must execute his authority." *Brown v. Pforr*, 38 Cal. 550; *Williams v. Birbeck, Hoff.* (N. Y.) Ch. 359.

<sup>1</sup> *Hunt v. Rousmanier*, 8 Wheat. 174; *Walker v. Denison*, 86 Ill. 142.

<sup>2</sup> Such as a power of sale in a mortgage. *Bergen v. Bennett*, 1 Caines' Cas. 1, 2 Am. Dec. 281.

<sup>3</sup> *Hunt v. Rousmanier*, 8 Wheat. 174, 204; *Barr v. Schroeder*, 32 Cal. 609.

<sup>4</sup> *Barr v. Schroeder*, 32 Cal. 609.

<sup>5</sup> *Hunt v. Rousmanier*, 8 Wheat. 174; *Davis v. Windsor Sav. Bank*, 46 Vt. 728;

*Ferris v. Irving*, 28 Cal. 645; *Clayton v. Merrett*, 52 Miss. 353. The case of *Cassiday v. M'Kenzie*, 4 W. & S. 282, 39 Am. Dec. 76, contrary to the above authorities, holds that the acts of an agent after the death of his principal, of which he had no notice, are binding.

<sup>6</sup> *Henderson v. Ford*, 46 Tex. 627.

<sup>7</sup> *Bunce v. Gallagher*, 5 Blatchf. 481; *Davis v. Lane*, 10 N. H. 156; *Mathiessen & W. Refining Co. v. McMahon*, 38 N. J. L. 536.

the power is coupled with an interest, so that it can be exercised in the name of the agent.<sup>1</sup>

### VIII. *Form of Execution of Deed by Attorney.*

1040. A deed executed by an attorney must purport to be the deed of the principal, and must be executed and delivered in his name.<sup>2</sup> "When any one has authority as attorney to do any act, he ought to do it in his name who gives the authority; for he appoints the attorney to be in his place and to represent his person; and therefore the attorney cannot do it in his own name, nor as his proper act, but in the name and as the act of him who gives the authority."<sup>3</sup> He should add his own name as the attorney in fact, by whom the principal's name is signed.<sup>4</sup>

1041. The proper form for executing a deed by attorney is by signing the name of the principal and adding "By —, his attorney;" but this is not the only form of execution which will make the deed the act of the principal. A deed which purports to be the deed of the principal is well executed where the attorney signs his own name "for" or "in behalf of" his principal.<sup>5</sup>

<sup>1</sup> Davis v. Lane, 10 N. H. 156.

<sup>2</sup> Coombes' Case, 9 Coke, 75 a; Frontin v. Small, 2 Ld. Ray. 1418; White v. Cuyler, 6 Term, 176. **Alabama**: Carter v. Chaudron, 21 Ala. 72. **Arkansas**: Hackney v. Butts, 41 Ark. 393; State v. Jennings, 10 Ark. 428. **California**: Love v. Sierra Nev. L. W. & M. Co. 32 Cal. 639, 91 Am. Dec. 602; Echols v. Cheney, 28 Cal. 157; Fisher v. Salmon, 1 Cal. 413, 54 Am. Dec. 297; Morrison v. Bowman, 29 Cal. 337. **Maine**: Stinchfield v. Little, 1 Me. 231, 10 Am. Dec. 65. **Massachusetts**: Fowler v. Shearer, 7 Mass. 14; Elwell v. Shaw, 16 Mass. 42, 8 Am. Dec. 126. **Michigan**: Davenport v. Parsons, 10 Mich. 42, 81 Am. Dec. 772. **New Hampshire**: Cofran v. Cockran, 5 N. H. 458; Hale v. Woods, 10 N. H. 470, 34 Am. Dec. 176. **New York**: Evans v. Wells, 22 Wend. 324. **North Carolina**: Cadell v. Allen, 99 N. C. 542; Oliver v. Dix, 1 Dev. & B. Eq. 158. **Ohio**: Norris v. Dains (Ohio), 39 N. E. Rep. 660; Hatch v. Barr, 1 Ohio, 390. **South Carolina**: Webster v. Brown, 2 S. C. 428; Pryor

v. Coulter, 1 Bailey, 517; Welsh v. Usher, 2 Hill Ch. 167, 29 Am. Dec. 63.

<sup>3</sup> Coombes' Case, 9 Coke, 75 a. "It does not appear that the authority of Coombes' Case is at all shaken by more modern decisions." Per Wilde, J., in Elwell v. Shaw, 16 Mass. 42, 8 Am. Dec. 126. "It is certain that Coombes' Case has never been departed from, and has often been acted upon as good law." Per Story, J., in Clarke v. Courtney, 5 Pet. 318, 349.

<sup>4</sup> California Civ. Code, § 1095.

<sup>5</sup> Wilks v. Back, 2 East, 142. In this case Mr. Justice Grose says: "I accede to the doctrine in all the cases cited that an attorney must execute his power in the name of his principal, and not in his own name, but here it was so done; for where is the difference between signing 'T. B. by M. W. his attorney,' which must be admitted to be good, and 'M. W. for T. B.?' In either case the act of sealing and delivery is done in the name of the principal and by his authority, and whether the attorney put the name first or last cannot



If a deed is properly signed in the name of the principal by the attorney, and throughout purports to convey the principal's land by the agency of the attorney, it is the deed of the principal, although the *in testimonium* clause recites that the attorney for the principal sets his hand and seal to the deed.<sup>1</sup>

The rule, that a deed executed under a power of attorney must be executed by the attorney in the name of his principal, is not strictly followed; but though the deed be signed by the attorney in his own name instead of the principal's name, it is held to be the principal's deed if there is enough on the face of the deed to show that the attorney in so signing was acting as the attorney and not as principal.<sup>2</sup> The rule, that the power must be executed in the name of the principal, does not apply to contracts and other instruments not required to be under seal.<sup>3</sup> A conveyance which, by being executed in the name of an attorney, transfers no interest at law, may be sustained in equity as an agreement, and be good against the principal and subsequent creditors.<sup>4</sup>

A deed executed by one as attorney for the "heirs of A" conveys no title, where the names of the heirs do not appear in the deed, unless the deed refers to the power of attorney and the names of the heirs appear therein.<sup>5</sup>

1042. If the attorney signs a deed with his own name merely, it is not the deed of his principal, although the principal is named in the body of the deed as grantor, and it is recited in the *in testimonium* clause that the attorney as the attorney of the principal hath set his hand and seal; for in such case neither

affect the validity of the act done." *Mussey v. Scott*, 7 Cush. 215, 54 Am. Dec. 719; *Ramage v. Ramage*, 27 S. C. 39, 2 S. E. Rep. 834; *Wilburn v. Larkin*, 3 Blackf. 55; *Deming v. Bullett*, 1 Blackf. 241; *Hunter v. Miller*, 6 B. Mon. 612; *Vanada v. Hopkins*, 1 J. J. Marsh. 285; *Bryan v. Stump*, 8 Gratt. 241, 56 Am. Dec. 139; *Shanks v. Lancaster*, 5 Gratt. 110, 50 Am. Dec. 108; *Jones v. Carter*, 4 Hen. & M. 184, 196; *Carter v. Chaudron*, 21 Ala. 72; *Robbins v. Austin*, 42 Hun, 469; *Townsend v. Corning*, 23 Wend. 435.

See, however, *Spencer v. Field*, 10 Wend. 87.

<sup>1</sup> *Shanks v. Lancaster*, 5 Gratt. 110, 50 Am. Dec. 108.

<sup>2</sup> *Montgomery v. Dorion*, 7 N. H. 475; *Tenant v. Blacker*, 27 Ga. 418; *Bigelow v. Livingston*, 28 Minn. 57, 9 N. W. Rep. 31; *Williams v. Frost*, 27 Minn. 255, 6 N. W. Rep. 793; *Kansas v. Hannibal & St. Jo. R. Co.* 77 Mo. 180; *Robbins v. Austin*, 42 Hun, 469.

<sup>3</sup> *New England Mar. Ins. Co. v. De Wolf*, 8 Pick. 56; *Townsend v. Hubbard*, 4 Hill (N. Y.), 351; *Yerby v. Grigsby*, 9 Leigh, 387.

<sup>4</sup> *Giddens v. Byers*, 12 Tex. 75.

<sup>5</sup> *Baldwin v. Goldfrank* (Tex. Civ. App.), 26 S. W. Rep. 155, 31 S. W. Rep. 1064.

the hand nor seal of the grantor purport to be affixed to the instrument.<sup>1</sup> Even if the *in testimonium* clause recites that the attorney hath set the hand and seal of the principal, but the deed is signed by the attorney in his own name only, it is not the deed of the principal.<sup>2</sup> Parol evidence that the attorney intended to bind the principal by a deed executed in the attorney's own name is inadmissible.<sup>3</sup>

1043. The attorney executing a deed in the name of his principal should also sign his own name to show that he is the attorney to whom the principal has delegated the authority to sign his name. "It should appear upon the face of the instruments that they were executed by the attorney, and in virtue of the authority delegated to him for this purpose. It is not enough that an attorney in fact has authority, but it must appear by the

<sup>1</sup> *Burger v. Miller*, 4 Wash. 280; *Bassett v. Hawk*, 114 Pa. St. 502; *Morrison v. Bowman*, 29 Cal. 337; *Echols v. Cheney*, 28 Cal. 157; *Townsend v. Hubbard*, 4 Hill (N. Y.), 351; *Townsend v. Corning*, 23 Wend. 435. See, also, *Spencer v. Field*, 10 Wend. 87; *Martin v. Flowers*, 8 Leigh, 158; *Redmond v. Coffin*, 2 Dev. Eq. 437; *State v. Jennings*, 10 Ark. 428; *Farmers v. Respass*, 5 T. B. Mon. 562; *Banks v. Sharp*, 6 J. J. Marsh. 180.

In *Clarke v. Courtney*, 5 Pet. 349, in which the question arose as to the validity of a deed executed by an attorney in his own name, Story, J., said: "The act does not, therefore, purport to be the act of the principals, but of the attorney. It is his deed and his seal, and was not theirs. This may savor of refinement, since it is apparent that the party intended to pass the interest and title of the principals. But the law looks not to the intent alone, but to the fact whether that has been executed in such a manner as to possess a legal validity." In *Fowler v. Shearer*, Chief Justice Parsons said: "If an attorney has authority to convey lands, he must do it in the name of the principal. The conveyance must be the act of the principal, and not of the attorney; otherwise the conveyance is void.

And it is not enough for the attorney, in the form of the conveyance, to declare that he does it as attorney; for he, being in the place of the principal, it must be the act and deed of the principal, done and executed by the attorney in his name."

A deed executed in this form may be valid by statute, as in *Maryland: Citizens' F. Ins. S. & L. Co. v. Doll*, 35 Md. 89; *Posner v. Bayless*, 59 Md. 56. And so in *Ohio: R. S. § 4111*, providing that "no deed of real estate executed by any person acting for another under a power of attorney, duly executed, acknowledged, and recorded, shall be held to be invalid or defective because he is named therein, as such attorney, as the grantor, instead of his principal; nor because his name, as such attorney, is subscribed thereto, instead of the name of the principal." But this statute does not apply to deeds of corporations. *Norris v. Dains* (Ohio), 39 N. E. Rep. 660.

There are also cases in which it has been held that a deed executed by an attorney in his own name will be sustained if he had been given authority to make a proper deed. *Rogers v. Frost*, 14 Tex. 267.

<sup>2</sup> *Elwell v. Shaw*, 16 Mass. 42, 8 Am. Dec. 126; *Fowler v. Shearer*, 7 Mass. 14.

<sup>3</sup> *Hackney v. Butts*, 41 Ark. 393.

instruments themselves which he executes that he intends to execute this authority. The instruments should be made by the attorney expressly as such attorney, and the exercise of his delegated authority should be distinctly avowed upon the instruments themselves. Whatever may be the secret intent and purpose of the attorney, or whatever may be his oral declaration or profession at the time, he does not in fact execute the instrument as attorney in the exercise of his power as attorney unless it is so expressed in the instruments. The instruments must speak for themselves. Though the attorney should intend a deed to be the deed of his principal, yet it will not be the deed of the principal unless the instrument purports on its face to be his deed.”<sup>1</sup>

But if the attorney executing the deed is named in the body of the deed, or his name and authority are recited in the *in testimonium* clause, it would seem that it would not be essential that he should sign his name, but that the deed would be valid if signed by him in the name of the principal alone.<sup>2</sup>

1044. When there are two grantors and one executes the deed as the attorney of the other under a power, he must subscribe his name twice, once as the attorney of the other and once for himself. If he subscribes the name of his principal, adding the words “by his attorney,” and signs his own name, it will be a good execution of the deed by the principal; but though a second seal be affixed, there is no execution of the deed by the attorney acting in his own right as grantor.<sup>3</sup>

1045. Where one has both a part interest in land and a power from another to sell the same land, and he makes a con-

<sup>1</sup> Wood v. Goodridge, 6 Cush. 117, 121, 52 Am. Dec. 771, per Fletcher, J. The decision was not, however, placed on this ground. There is a dictum of Lawrence, J., in Wilks v. Back, 2 East, 142, 145, which seems to import that an agent may sign his principal's name without signing his own as attorney. In Forsyth v. Day, 41 Me. 382, a case not relating, however, to an instrument required to be executed under seal, Rice, J., said: “No case, I apprehend, can be found in the books which will sustain the rule so broadly

laid down by the learned judge in the case of Wood v. Goodridge, cited above.”

In Hunter v. Giddings, 97 Mass. 41, 93 Am. Dec. 54, which also related to an instrument not under seal, Hoar, J., referring to Wood v. Goodridge, said: “Without considering the precise accuracy of all the observations found in the opinion in that case upon a point which was not necessary to its decision, we do not think it applicable to the case at bar.”

<sup>2</sup> Devinney v. Reynolds, 1 Watts & S. 328.

<sup>3</sup> Meagher v. Thompson, 49 Cal. 189.

veyance without referring to the power, his deed is regarded as passing his own interest, but no interest by virtue of the power.<sup>1</sup>

1046. A power of substitution should be executed by the attorney in the name of his principal. If he exercises the power without any reference to his principal, in his own name, and only authorizes his substitute to act in his name, the latter cannot execute a deed in the name of the principal.<sup>2</sup>

1047. An attorney authorized to make a deed cannot delegate his power to another, unless expressly authorized to do so in the power whereby he is constituted his principal's attorney.<sup>3</sup> But while the execution of the power by a substitute is not obligatory upon the principal, he may by his acts satisfy and confirm the deed of such substitute and make it his own.<sup>4</sup>

### IX. *Execution by Private Corporation.*

1048. The technical mode of executing the deed of a corporation is for the proper officer to sign the corporate name, adding his own signature and official title as the agent by whom the act is done, and affixing the corporate seal. Of course the *in testimonium* clause should recite the mode of execution, and especially the name of the officer authorized to sign the corporate name and affix its seal. It is essential that the deed on its face should purport to be executed by the corporation, and that its seal should in fact be affixed by a duly authorized officer or agent. If the proper corporate name is signed to the deed as grantor, but in the body of the deed the words "the president, directors, etc., of" are prefixed to the corporate name, these words may be treated as surplusage, and will not affect the validity of the conveyance.<sup>5</sup>

1049. But an execution of a deed by affixing the corporate seal is good though the officer signs his own name instead of the name of the corporation, especially if the *in testimonium* clause duly recites a signing and sealing by the corporation by the agency of such officer.<sup>6</sup>

<sup>1</sup> Hay v. Mayer, 8 Watts, 203, 34 Am. Dec. 453.

<sup>2</sup> Stinchcomb v. Marsh, 15 Gratt. 202, 210. "A power executed by him under his authority to appoint other agents for his principal should be executed for or in the name of the principal, just as should a

direct deed of conveyance from himself." Per Lee, J.

<sup>3</sup> Bocock v. Pavey, 8 Ohio St. 270.

<sup>4</sup> Bocock v. Pavey, 8 Ohio St. 270.

<sup>5</sup> Shaffer v. Hahn, 111 N. C. 1, 15 S. E. Rep. 1033.

<sup>6</sup> In Haven v. Adams, 4 Allen, 80, the

1050. When, however, the deed on its face purports to be the deed of the officer or agent who executed it, instead of the corporation, it is inoperative to pass any title to the land of the corporation.<sup>1</sup> The deed must be sealed with the common seal of

words were: "In testimony whereof the said party of the first part (the corporation) have caused these presents to be signed by their president and their common seal to be affixed," followed by the signature of the president and the corporate seal. Chapman, J., in pronouncing the opinion, said: "The question is whether the deed purports to be the deed of the principal, or the deed of the agent executed by him in behalf of the principal. In the first case it is held to convey their property, because it is their deed; in the latter case it does not convey their property, because it is his deed."

In *Hutchins v. Byrnes*, 9 Gray, 367, the words were: "In witness whereof the said — Bank, by their treasurer, duly authorized for this purpose, have hereunto set their name and seal," adding the signature of the treasurer and the corporate seal. The instrument was an assignment of a mortgage. It was objected that the assignment was not so executed by the treasurer as to be the act and deed of the corporation. The objection was not sustained, as the plaintiffs claimed to hold the mortgage by an assignment which purported in the body thereof to be from the corporation, — the Bristol County Savings Bank. "The assignment," say the court, "was made in the name and as the act of the corporation, according to the rule laid down in *Coombes' Case*, and always adhered to in England and in this commonwealth."

Even a deed executed in the following form is the deed of the corporation: "In witness whereof the said association, by — its president, duly authorized for this purpose, has hereunto set its seal, and the said —, president as aforesaid, has hereunto set his hand," signed by the president in his own name and sealed. *Murphy v. Welch*, 128 Mass. 489.

Also, *Despatch Line of Packets v. Belamy Manuf. Co.* 12 N. H. 205; *Flint v. Clinton Co.* 12 N. H. 430; *Tenney v. Lumber Co.* 43 N. H. 343; *Decker v. Freeman*, 3 Me. 338; *Porter v. Androscoggin & K. R. Co.* 37 Me. 349; *Bason v. King's Mountain M. Co.* 90 N. C. 417; *Sheehan v. Davis*, 17 Ohio St. 571; *Savannah & Memphis R. R. Co. v. Lancaster*, 62 Ala. 555; *Moore v. Willamette T. & L. Co.* 7 Oregon, 355; *Sawyer v. Cox*, 63 Ill. 130; *Phillips v. Coffee*, 17 Ill. 154, 63 Am. Dec. 357; *Miner's Ditch Co. v. Zellerbach*, 37 Cal. 543, 99 Am. Dec. 30; *Pitman v. Kitner*, 5 Blackf. 250, 33 Am. Dec. 461; *Magill v. Hinsdale*, 6 Conn. 464, 16 Am. Dec. 70; *Blackshire v. Iowa Homestead Co.* 39 Iowa, 624; *Abbey v. Chase*, 6 Cush. 54; *Kansas v. Hannibal & St. Jo. R. Co.* 77 Mo. 180; *McDaniels v. Flower Brook Manuf. Co.* 22 Vt. 274, distinguishing *Isham v. Bennington Iron Co.* 19 Vt. 230; *Frostburg Mut. Build. Assn. v. Brace*, 51 Md. 508, 511; *Osborne v. Tunis*, 25 N. J. L. 633, 661.

In California such a deed is declared to be good in equity. *Love v. Sierra Nevada L. W. & M. Co.* 32 Cal. 639, 91 Am. Dec. 602.

<sup>1</sup> *Commonwealth v. Reading Sav. Bank*, 137 Mass. 431; *Brinley v. Mann*, 2 Cush. 337; *Coburn v. Ellenwood*, 4 N. H. 99; *Miller v. Rutland & W. R. Co.* 36 Vt. 452; *State v. Allis*, 18 Ark. 269; *Zoller v. Ide*, 1 Neb. 439. In this case the deed ran: "I, Thomas H. Buston, Jr., President of the Sulphur Springs Land Co., do hereby convey," and was signed in the same way. In *Hatch v. Barr*, 1 Ohio, 390, the attesting clause was similar.

For an exceptional and doubtful decision, see *Vilas v. Reynolds*, 6 Wis. 214.

the corporation,<sup>1</sup> and must purport to be the deed of the corporation. Where an assignment of lease, in the granting clause, purports to be made in the name of a person who is therein described as the treasurer of an incorporated company, and such named person, as treasurer of and in behalf of such company, sets his hand and the seal of the company to the instrument, the assignment will not be held to be the act of the company.<sup>2</sup>

1051. The authority of an agent or officer of a corporation to execute a deed in its behalf need not be shown by an instrument under seal, as is required in the case of an agent appointed by an individual to execute a deed. A vote or resolution of the corporation, or of its board of directors, is sufficient to confer such power.<sup>3</sup> "If the formality of an instrument under seal, conferring the power upon the agent who is to make the conveyance, should be required, it would add nothing to the authenticity of the conveyance if the individual who affixes the seal to the power derive his authority from a mere vote of the corporation."<sup>4</sup> Such vote or resolution need not be under the seal of the corporation.<sup>5</sup> Though the election of the officer by whom a corporate deed is executed was irregular, the corporation is bound by his acts while he was its officer *de facto*.<sup>6</sup>

1052. Parol evidence is admissible to prove the action of the corporation in conferring authority upon its officers or agents in case the records of the corporation fail to state it.<sup>7</sup>

<sup>1</sup> *Damon v. Granby*, 2 Pick. 345, 353; *Brinley v. Mann*, 2 Cush. 337.

<sup>2</sup> *Norris v. Dains* (Ohio), 39 N. E. Rep. 660.

<sup>3</sup> *Despatch Line v. Bellamy Manuf. Co.* 12 N. H. 205, 37 Am. Dec. 203; *Savings Bank v. Davis*, 8 Conn. 191; *Howe v. Keeler*, 27 Conn. 538; *Beckwith v. Windsor Manuf. Co.* 14 Conn. 594; *Campbell v. Pope*, 96 Mo. 468; *Hopkins v. Gallatin Turnpike Co.* 4 Humph. 403; *Johnston v. Crawley*, 25 Ga. 316, 71 Am. Dec. 173; *Southern Cal. Colony v. Brestamente*, 52 Cal. 192. *New Hampshire*: P. S. 1891, ch. 137, § 2. *Minnesota*: G. S. 1894, § 4161. This provision does not exclude other modes of conveyance, as, for instance, through its regular officers. *Morris v. Keil*, 20 Minn. 531.

<sup>4</sup> *Despatch Line v. Bellamy Manuf. Co.* 12 N. H. 205, 231, 37 Am. Dec. 203, per Parker, C. J. In *Maryland* it is provided by statute that a corporation may appoint an attorney by its corporate seal. Pub. G. L. art. 21, § 25.

<sup>5</sup> *Beckwith v. Windsor Manuf. Co.* 14 Conn. 594.

<sup>6</sup> *Burr v. McDonald*, 3 Gratt. 215.

<sup>7</sup> *Bank of United States v. Dandridge*, 12 Wheat. 72; *Eureka Co. v. Bailey Co.* 11 Wall. 488; *Mining Co. v. Anglo-California Bank*, 104 U. S. 192; *Allis v. Jones*, 45 Fed. Rep. 148; *Davidson v. Bridgeport*, 8 Conn. 472; *Taymouth v. Koehler*, 35 Mich. 22; *Commercial Bank v. Kortright*, 22 Wend. 348; *Ratcliff v. Teters*, 27 Ohio St. 66.

Thus, upon the issue whether a mortgage executed in behalf of a corporation by its officers was authorized by its board of directors in whom the management of its affairs was vested, the action of the board may be proved by parol in case it is not shown by the records of the board.<sup>1</sup>

1053. A corporation may act by any duly authorized agent, though he be not a duly elected officer; and if it appears that a deed was prepared in pursuance of the authority of a corporation or of its directors, and that the nominal president of the company was by resolution directed to execute the same, it is the deed of the company, whether such officer was legally elected to such office or not.<sup>2</sup>

If a conveyance made by a corporation purports to have been executed by the proper officers, and the certificate of acknowledgment or of probate recites that they were such, the conveyance is admissible in evidence without further proof of their official capacity.<sup>3</sup>

1054. As in the case of natural persons the unauthorized acts of agents or officers of corporations may be ratified, and the ratification is equivalent to previous authority. The ratification need not be by vote of the corporation, or declared by any instrument under seal. Their authority is implied by any recognition of their acts by the corporation. It may be inferred from failure to disavow the unauthorized acts.<sup>4</sup>

If the directors of a corporation, having no authority to sell and convey its entire property, nevertheless authorize the execution of such a conveyance, the stockholders, having knowledge of the action of the directors, and taking no steps to prevent or repudiate the conveyance, will be held to have ratified the execution and delivery of the deed.<sup>5</sup>

A corporation ratifies a mortgage executed in its behalf by its

<sup>1</sup> *Allis v. Jones*, 45 Fed. Rep. 148.

<sup>2</sup> *Burr v. M'Donald*, 3 Gratt. 215. See *Miller v. Ewer*, 27 Me. 509, 46 Am. Dec. 619; *Susquehanna Bridge & B. Co. v. General Ins. Co.* 3 Md. 305, 56 Am. Dec. 740.

<sup>3</sup> *Shaffer v. Hahn*, 111 N. C. 1, 15 S. E. Rep. 1033. And see *Heath v. Big Falls Cotton Mills*, 115 N. C. 202, 20 S. E. Rep. 369.

<sup>4</sup> *Allis v. Jones*, 45 Fed. Rep. 148; *Atl. Rep.* 846.

*Campbell v. Pope*, 96 Mo. 468; *Chouteau v. Allen*, 70 Mo. 290; *Kiley v. Forsee*, 57 Mo. 390; *Fort Worth Publishing Co. v. Hitson*, 80 Tex. 216, 14 S. W. Rep. 843; *Sheldon v. Eickemeyer, &c. M. Co.* 90 N. Y. 607; *Kelsey v. National Bank*, 69 Pa. St. 426; *Ragland v. McFall*, 137 Ill. 81, 27 N. E. Rep. 75.

<sup>5</sup> *Stokes v. Detrick*, 75 Md. 256, 23

officers by issuing bonds under it and paying interest upon them,<sup>1</sup> or by receiving and using the money obtained upon the mortgage.<sup>2</sup>

1055. A deed executed under the common seal of a corporation, and signed by its vice-president, is presumed to be properly executed,<sup>3</sup> especially under a statute that provides that a corporation may convey its lands by a deed under its common seal, signed by its president, presiding member, or trustee. It should be presumed that the contingency has arisen which authorized the vice-president to act, and that he is to be deemed *pro hac vice* the presiding member of the corporation.<sup>4</sup> The same presumption of validity that attaches to the acts of the president of a corporation, in absence of direct evidence to the contrary, should be indulged in favor of the validity of the acts of the vice-president, especially when such acts are authenticated by the seal of the corporation.

#### X. Execution by Municipal Corporation.

1056. A conveyance of land by a municipal corporation should be in its corporate name and under its corporate seal.<sup>5</sup>

<sup>1</sup> Jones on Mortg. § 127; Jones on Corp. Bonds & Mortg. § 49; Hotel Co. v. Wade, 97 U. S. 13; Campbell v. Mining Co. 51 Fed. Rep. 1; McCurdy's App. 65 Pa. St. 290.

<sup>2</sup> Mining Co. v. Anglo-Californian Bank, 104 U. S. 192; Merchants' Bank v. State Bank, 10 Wall. 604; Page v. Fall River, &c. R. Co. 31 Fed. Rep. 257; National Bank v. Matthews, 98 U. S. 621; Elwell v. Grand St. & N. R. Co. 67 Barb. 83; England v. Dearborn, 141 Mass. 590, 6 N. E. Rep. 837, 14 Am. & Eng. Corp. Cas. 61; Texas W. Ry. Co. v. Gentry, 69 Tex. 625, 8 S. W. Rep. 98; Fitch v. Lewiston Steam Mill Co. 80 Me. 34, 12 Atl. Rep. 732, 20 Am. & Eng. Corp. Cas. 509.

<sup>3</sup> Smith v. Smith, 62 Ill. 493. The court said: "When an act pertaining to the business of the company is performed by him, it will be presumed the act was legally done, and binding upon the company; and, as a general rule, in the absence of the president the vice-president

may act in his stead, and perform the duties which devolve upon the president." See, also, Sawyer v. Cox, 63 Ill. 130.

<sup>4</sup> Ballard v. Carmichael, 83 Tex. 355, 18 S. W. Rep. 734, 739. Gaines, J., said: "We may safely assume to know judicially that a vice-president, in the common acceptation of that term, is an officer designated for the purpose of performing the functions of the president when, for any reason, the latter cannot act. In case of the absence of the president, or of his inability for any reason to perform the function of his place, as a very general rule, at least, the vice-president becomes invested with his powers and responsibility. In such contingencies the vice-president is in fact and in law the president in all except the name. He certainly becomes the presiding member of the corporation."

<sup>5</sup> Tiffin v. Shawhan, 43 Ohio St. 178; Clark v. Farmers' Woollen Manuf. Co. 15 Wend. 256; De Zeng v. Beekman, 2 Hill (N. Y.), 489; Jameson v. Fopiana, 43



Such a conveyance, when regular upon its face, made by a corporation having power to dispose of its real estate, is presumed to have been executed in pursuance of that power. It is not essential to recite the authority in the deed, and a purchaser claiming under such conveyance need not produce the special ordinance authorizing its execution. The seal of the corporation affixed to the deed is *prima facie* evidence that it was so affixed by the authority of the corporation.

The execution of a power conferred by a municipal corporation upon a public officer to convey land must be in strict pursuance of the power, or no title is conveyed.<sup>1</sup>

The deeds of municipal officers acting under ordinances or resolutions of a municipal corporation need not recite such ordinances or resolutions, nor show on their face that the contingency has happened which would authorize such sale. Such officers are not in the position of trustees acting under special power, and required in their deeds to recite the power and show that the contingency has arisen which authorizes a sale.<sup>2</sup>

A conveyance cannot be effected by a vote or ordinance of a municipal corporation.<sup>3</sup>

**1057.** When officer or agent may execute a deed in his own name. — In the case of a grant of land by a state or other government, an agent authorized to make the conveyance may properly execute the deed by signing his name, instead of the name of the state; for the state may grant without any deed, and in fact the title passes by the resolve rather than by the deed. The agent is merely a conduit to convey the title to the purchaser.<sup>4</sup> A conveyance in this form may also be supported on the ground of the practice of a state continued for many years in conveying lands in this manner. On this latter ground it has been held that lands belonging to a town may be conveyed by a deed in the name of its authorized agent.<sup>5</sup>

Mo. 565, 97 Am. Dec. 414; Henry v. Atkison, 50 Mo. 266; Chouquette v. Barada, 33 Mo. 249; Swartz v. Page, 13 Mo. 603; San Antonio v. Gould, 34 Tex. 49, 77.

<sup>1</sup> Tiffin v. Shawhan, 43 Ohio St. 178; Still v. Lansingburgh, 16 Barb. 107.

<sup>2</sup> Jamison v. Fopiana, 43 Mo. 565, 97 Am. Dec. 414; Swartz v. Page, 13 Mo. 603; Henry v. Atkison, 50 Mo. 266; Haseltine v. Donahue, 42 Wis. 576.

<sup>3</sup> Beaufort v. Duncan, 1 Jones, 239.

<sup>4</sup> Ward v. Bartholomew, 6 Pick. 409; Thompson v. Carr, 5 N. H. 510.

<sup>5</sup> Cofran v. Cockran, 5 N. H. 458, 462.

"It is not doubted that from the earliest times, when agents have been authorized to convey lands belonging to towns, the conveyance has been made most generally in the name of the agent. We are of opinion that the maxim, 'Communis error

A deed which purports to be the deed of a county or town may be executed by the proper officer or agent by signing his own name; <sup>1</sup> and, though he describes himself as agent, parol evidence is admissible to show that he was at the time clerk of the board of county commissioners, and as such was authorized by statute to make the conveyance. <sup>2</sup>

Where trustees of a town are made a body corporate and are authorized to sell land, they may execute the conveyance in their own name and not in the name of the town. <sup>3</sup>

If an officer of a corporation be authorized to execute a conveyance of its land under the corporate seal, a deed sealed with such officer's private seal, or with the seal peculiar to his office, is ineffectual to convey the title to the land. Such a deed by a city clerk, executed under his own name and sealed with his private seal and with the seal of the city clerk, is invalid. <sup>4</sup> It may be questioned whether the city clerk could be authorized to use the corporate seal where the mayor is the chief executive officer of the city and the custody and use of the corporate seal is confided to him. <sup>5</sup>

### XI. *Execution by Executor, Administrator, or Trustee.*

1058. A deed by an administrator in pursuance of a decree to sell the land is properly executed in his own name, and it is not material that he should add any words expressing his representative character; the deed is not impaired by his adding an erroneous description of the character in which he is acting, as commissioner instead of administrator, or administrator instead of commissioner. <sup>6</sup> The administrator should properly recite his authority for selling. An executor selling his testator's property under a power in the will should recite the power and execute the deed in his own name. <sup>7</sup>

A trustee, whether vested with the legal title or having only a

facit jus,' must settle the case. The practice has been too long in existence and too general to admit the validity of such deeds to be called in question." Per Richardson, C. J.

<sup>1</sup> Decker v. Freeman, 3 Me. 338; Haseltine v. Donahue, 42 Wis. 576.

<sup>2</sup> Gourley v. Hankins, 2 Iowa, 75.

<sup>3</sup> De Zeng v. Beekman, 2 Hill (N. Y.),

489. And see Haseltine v. Donahue, 42 Wis. 576.

<sup>4</sup> Tiffin v. Shawhan, 43 Ohio St. 178.

<sup>5</sup> Tiffin v. Shawhan, 43 Ohio St. 178, per Owen, J.

<sup>6</sup> McLean v. Patterson, 84 N. C. 427.

<sup>7</sup> Wolfe v. Hines, 93 Ga. 329, 20 S. E. Rep. 322.

naked power to sell, should execute a conveyance in his own name.

Neither an executor, administrator, or trustee acts as an agent or attorney of a principal, but in his own right under the power conferred. The power is one of personal trust and confidence, and cannot be delegated.

## CHAPTER XXV.

### SEALING.

- |                                                          |                                             |
|----------------------------------------------------------|---------------------------------------------|
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| III. Scrolls and other devices used as seals, 1068-1072. | VI. Seals of corporations, 1079-1084.       |

#### *I. Use and Necessity of Seals.*

1059. Sealing was not in general use among the Saxons.<sup>1</sup> "Their custom was, for such as could write, to sign their names and to affix the sign of the cross; and those who could not write made their mark in sign of the cross, as is still continued to this day. The Normans used the practice of sealing only, without writing their names, and at the Conquest they introduced into England waxen seals, instead of the former English mode of writing their names and affixing the sign of the cross; it being then usual for every freeman to have his distinct and particular seal. The neglect of signing, and resting upon the authenticity of seals alone, continued for several ages, during which time it was held by all the English courts that sealing alone was sufficient. But in process of time, the practice of using particular and appropriate seals was in a great measure disused; and Sir William Blackstone seems to consider the statute of 29 Car. II. c. 3 as reviving the ancient Saxon custom of signing, without dispensing with the seal, as then in use under the custom derived from the Normans."<sup>2</sup>

1060. A seal is essential to a conveyance of land, except in those States in which the use of a seal is dispensed with by stat-

<sup>1</sup> 2 Blackst. Com. 305. "The first sealed charter extant in England is that of King Edward the Confessor, upon his foundation of Westminster Abbey. . . . It was usual in the time of Henry II.,

and before, to seal all grants with the sign of the cross, made in gold, on the parchment." Jacob's Law Dic.

<sup>2</sup> Jackson v. Wood, 12 Johns. 73, 75, per Platt, J.

ute.<sup>1</sup> There are good reasons for retaining this formality in the execution of deeds. "This venerable custom of sealing is a relic of ancient wisdom, and is not without its real use at this day. There is yet some degree of solemnity in this form of conveyance. A seal attracts attention, and excites caution in illiterate persons, and thereby operates as a security against fraud. If a man's freehold might be conveyed by a mere note in writing, he might more easily be imposed on by procuring his signature to such a conveyance when he really supposed he was signing a receipt, a promissory note, or a mere letter."<sup>2</sup> Chief Justice Kent, delivering judgment in an early case, said:<sup>3</sup> "I am aware that ingenious criticism may be indulged at the expense of this and of many of our legal usages; but we ought to require evidence of some positive and serious public inconvenience before we, at one stroke, annihilate so well-established and venerable a practice as the use of seals in the authentication of deeds. . . . The policy of the rule consists in giving ceremony and solemnity to the execution of important instruments, by means of which the attention of the parties is more certainly and effectually fixed, and frauds less likely to be practiced upon the unwary."

The Spanish law which formerly prevailed in the southwestern portion of the United States did not require the sealing of an instrument of conveyance. Upon the formation of Territories and States in the regions where the Spanish law had prevailed, the introduction of the common law, and the enactment of statutes of frauds, an effectual conveyance of land could only be made by deed.<sup>4</sup>

**1061. An unsealed deed confers equitable rights, but not legal.** Although an instrument without a seal is inoperative in law as a conveyance of real property, such an instrument may vest in the grantee an equitable interest, and entitle him in equity

<sup>1</sup> *Barger v. Hobbs*, 67 Ill. 592; *Taylor v. Morton*, 5 Dana, 365; *Kelleran v. Brown*, 4 Mass. 443; *Underwood v. Campbell*, 14 N. H. 393; *Alexander v. Polk*, 39 Miss. 737; *Arms v. Burt*, 1 Vt. 303; *Floyd v. Ricks*, 14 Ark. 286; *Switzer v. Knapps*, 10 Iowa, 72; *Jones v. Crawford*, 1 McMull. 373.

<sup>2</sup> *Jackson v. Wood*, 12 Johns. 73, 76, per Platt, J.

<sup>3</sup> *Warren v. Lynch*, 5 Johns, 239, 245.

<sup>4</sup> *Burton v. Le Roy*, 5 Sawyer, 510, 516, per Sawyer, J.; *Moss v. Anderson*, 7 Mo. 337. That is since 1816.

A seal was essential to a deed in California for the first time in 1850. *Burton v. Le Roy*, 5 Sawyer, 510, 516, per Sawyer, J. And see *Le Franc v. Richmond*, 5 Sawyer, 601.

to have the title conveyed to him by a proper instrument.<sup>1</sup> And such a deed may give color of title to one claiming by adverse possession,<sup>2</sup> or may be received in evidence for the purpose of showing the extent of the adverse possession.<sup>3</sup>

1062. When the seal of a party has been omitted by accident or mistake, a court of chancery, upon fundamental principles of equity jurisprudence, in order to carry out his intention, will, at the suit of those who are justly and equitably entitled to the benefit of the instrument, adjudge it to be as valid as if it had been sealed, and will grant relief accordingly, either by compelling the seal to be affixed, or by restraining the setting up of the want of it to defeat a recovery at law.<sup>4</sup>

A corporation which has executed an instrument, which is invalid for want of a seal, may be compelled in equity to affix it; or the court may declare the instrument good without a seal; or it may restrain the corporation from defending at law upon the ground that the instrument was not sealed.<sup>5</sup>

A deed is not invalidated by the seal's being torn off fraudulently or innocently by the grantor, but upon proof that it was executed with a seal it is to be regarded as a subsisting deed.<sup>6</sup>

1063. A deed *ex vi termini* means a sealed instrument.<sup>7</sup> If it is in fact sealed, the omission of a recital of the fact in the

<sup>1</sup> *Jewell v. Harding*, 72 Me. 124; *Wadsworth v. Wendell*, 5 Johns. Ch. 224; *Grandin v. Hernandez*, 29 Hun. 399; *Wendell v. Wadsworth*, 20 Johns. 659, 662; *Dreutzer v. Baker*, 60 Wis. 179, 18 N. W. Rep. 776; *McCaleb v. Pradat*, 25 Miss. 257; *Brinkley v. Bethel*, 9 Heisk. 786; *Pratt v. Clemens*, 4 W. Va. 443; *Frost v. Wolf*, 77 Tex. 455, 14 S. W. Rep. 440; *Tom v. Sayers*, 64 Tex. 342; *Miller v. Alexander*, 8 Tex. 36; *Martin v. Weyman*, 26 Tex. 460. And see *Rutland v. Paige*, 24 Vt. 181.

<sup>2</sup> *Hamilton v. Boggess*, 65 Mo. 233.

<sup>3</sup> *Barger v. Hobbs*, 67 Ill. 592.

<sup>4</sup> *Bernard's Township v. Stebbins*, 109 U. S. 341, 349, 3 Sup. Ct. Rep. 252, per Gray, J., substantially in his language, citing *Smith v. Ashton*, Freem. Ch. 308; *Finch*, 273; *Cockerell v. Cholmeley*, 1 Russ. & Myl. 418, 424; *Wadsworth v. Wendell*, 5 Johns. Ch. 224; *Montville v. Houghton*,

7 Conn. 543; *Rutland v. Paige*, 24 Vt. 181. To like effect see *Mastin v. Halley*, 61 Mo. 196, 199; *McCarley v. Tippah Co.* 58 Miss. 483; *Brinkley v. Bethel*, 9 Heisk. 786.

<sup>5</sup> *Bernard's Township v. Stebbins*, 109 U. S. 341, 3 Sup. Ct. Rep. 252; *Solon v. Williamsburgh Sav. Bank*, 114 N. Y. 122, 21 N. E. Rep. 168; *Missouri River R. Co. v. Commissioners*, 12 Kans. 482.

See, however, *Springfield Sav. Bank v. Springfield Cong. Soc.* 127 Mass. 516.

<sup>6</sup> *Cutts v. United States*, 1 Gall. 69.

<sup>7</sup> *Le Franc v. Richmond*, 5 Sawyer, 601; *Underwood v. Campbell*, 14 N. H. 393; *Hammond v. Alexander*, 1 Bibb, 333; *Shortridge v. Catlett*, 1 A. K. Marsh. 587; *Taylor v. Morton*, 5 Dana, 365; *Davis v. Brandon*, 2 Miss. 154; *Barger v. Hobbs*, 67 Ill. 592; *Bradford v. Randall*, 5 Pick. 496.

instrument does not destroy its effect as a deed.<sup>1</sup> On the other hand, a recital in the instrument that it is sealed, when in fact it is not sealed, does not make it a deed.<sup>2</sup>

Where a seal is omitted from a deed at the time of its execution, it cannot be added after an acknowledgment without another acknowledgment so as to be available to pass the title.<sup>3</sup>

In States in which a seal is no longer essential to a conveyance of the legal estate in land, the operation and effect of a sealed deed at common law, and the estoppel arising at common law from the recitals and covenants of a deed, still attach to the unsealed conveyance.<sup>4</sup>

Unless a statute dispensing with the use of seals is expressly made applicable to instruments executed before its passage, it does not give any effect to such instruments different from that which they had at the time of their execution. If they were insufficient to convey the legal title when they were made, such a statute does not make them sufficient.<sup>5</sup>

## II. *Seals at Common Law.*

1064. Lord Coke defined a seal as an impression upon wax.<sup>6</sup> "*Segillum est cera impressa, quia cera sine impressione non est sigillum.*" This is not an allegation that an impression without wax is not a seal, and it has for a long time been held that an impression upon any substance capable of receiving an impression is a seal.<sup>7</sup> It is the impression, and not the wax, that makes the seal.<sup>8</sup> It is now held that an impression upon paper without any

<sup>1</sup> Hubbard v. Beckwith, 1 Bibb, 492; Shortridge v. Catlett, 1 A. K. Marsh. 587; Jeffery v. Underwood, 1 Ark. 108; Cummins v. Woodruff, 5 Ark. 116.

<sup>2</sup> Hubbard v. Beckwith, 1 Bibb, 492.

<sup>3</sup> Merritt v. Horne, 5 Ohio St. 307, 67 Am. Dec. 298.

<sup>4</sup> Jones v. Morris, 61 Ala. 518. "The statute is not so broad in its sweep as to blot out the common-law principles which give security to conveyances of real estate." Per Bricknell, C. J.; Vanblaricum v. Yeo, 2 Blackf. 322.

<sup>5</sup> Gibbs v. McGuire, 70 Miss. 646, 12 So. Rep. 829; Moore v. Leseur, 18 Ala. 606; Williams v. Young, 3 Ala. 145.

<sup>6</sup> 3 Inst. 169.

<sup>7</sup> United States v. Stephenson, 1 McLean, 462.

<sup>8</sup> Relph v. Gist, 4 McCord, 267. Reeves, in his History of English Law, vol. i. p. 11, says: "It is generally believed that Edward the Confessor was the first who brought into this kingdom the custom of affixing to charters a seal of wax. It is said that being in Normandy, at the court of his cousin William, he there learned several Norman customs; and among others which he transplanted hither was this of sealing deeds with wax. Though the word *sigillum* often occurs in charters before his time, yet some great antiquarians (among whom is Sir Henry Spelman) have agreed that this did not mean

other substance attached to it is a sufficient seal.<sup>1</sup> There are, however, cases to the effect that an impression upon paper alone is not a seal except where it has been made by statute.<sup>2</sup>

1065. Although the seal is the impression, it is not necessary that the impression should be apparent. A piece of paper affixed to an instrument by a wafer or by mucilage is a sufficient sealing though there is no impression visible upon it.<sup>3</sup> It is sufficient that an impression might be made upon the substance by which the paper is attached to the instrument.<sup>4</sup> The common law in the days of its greatest strictness never prescribed any particular instrument with which the impression should be made, nor fixed the breadth or length or depth of it.<sup>5</sup> The form and color of the piece of paper attached to the instrument is immaterial.<sup>6</sup>

1066. An instrument not sealed will not be treated as sealed merely because it recites that it is sealed, in case no element of equitable estoppel is shown.<sup>7</sup> This rule prevails also in States where by statute a scroll may be used for a seal. There must be some mark intended or presumed to be used for a seal. A statement that the instrument is sealed is not sufficient.<sup>8</sup>

A design printed in ink, without any impression of the seal on the paper itself, or upon some substance attached to the paper, is not a seal at common law.<sup>9</sup> If, however, an impression is made

a seal of wax, but was used synonymously for *signum*, and denoted the sign of the cross and other symbols made use of in those times."

<sup>1</sup> Queen v. St. Paul, 7 Ad. & El. N. S. 232, Lord Denman saying: "We do not wish to encourage the slightest doubt on this point." Pierce v. Indseth, 106 U. S. 546; Roberts v. Pillow, Hemp. 624; Pillow v. Roberts, 13 How. 472, 12 Ark. 822; Carter v. Burley, 9 N. H. 558; Allen v. Sullivan R. R. Co. 32 N. H. 446; Solon v. Williamsburgh Sav. Bk. 114 N. Y. 122, 133, affirming 47 Hun, 632, 21 N. E. Rep. 168; Gillespie v. Brooks, 2 Redf. 349; Ross v. Bedell, 5 Duer, 462.

<sup>2</sup> Coit v. Millikin, 1 Den. 376; Warren v. Lynch, 5 Johns. 238; Bank of Rochester v. Gray, 2 Hill, 227; Farmers', &c. Bank v. Haight, 3 Hill, 493; Ross v. Bedell, 5 Duer, 462; Curtis v. Leavitt, 17 Barb. 309, 318, 15 N. Y. 9, 90.

<sup>3</sup> Milldam Foundry v. Hovey, 21 Pick. 417; Pease v. Lawson, 33 Mo. 35; Turner v. Field, 44 Mo. 382; Hughes v. Debnam, 8 Jones, 127.

<sup>4</sup> Tasker v. Bartlett, 5 Cush. 359.

<sup>5</sup> Pease v. Lawson, 33 Mo. 35, per Dryden, J.

<sup>6</sup> Hughes v. Debnam, 8 Jones, 127.

<sup>7</sup> Alexander v. Polk, 39 Miss. 737; McPherson v. Reese, 58 Miss. 749, distinguishing McCarley v. Tippah Co. 58 Miss. 483, 38 Am. Rep. 338; Deming v. Bullitt, 1 Blackf. 241; Armstrong v. Pearce, 5 Harr. 351; Vance v. Funk, 3 Ill. 263; Taylor v. Glaser, 2 S. & R. 502.

See, however, Shelton v. Armor, 13 Ala. 647; Le Franc v. Richmond, 5 Sawyer, 601; Starkweather v. Martin, 28 Mich. 471.

<sup>8</sup> Vance v. Funk, 3 Ill. 263; Moore v. Leseur, 18 Ala. 606.

<sup>9</sup> Bates v. Boston & N. Y. Cent. R. R.



upon the paper, although made by the printer in printing the paper or afterwards, it is a good seal.<sup>1</sup> But, under statutes allowing the use of a scroll for a seal, the word "seal" or the letters [L. S.], when printed, constitute a seal.<sup>2</sup>

1067. One seal may be adopted by several grantors. Where a deed by several grantors purports to be sealed, and a seal is affixed opposite one or more names, but not opposite names of other grantors, it will be presumed that the latter adopted the seals actually affixed as their own seals.<sup>3</sup>

Where two or more grantors are named in a deed, and a seal has been affixed by one grantor, it will be presumed, from a declaration that the grantors have affixed their seals, that a grantor opposite whose name no seal appears has adopted the seal affixed to the instrument opposite the name of such other grantors.<sup>4</sup> Aside from such presumption, it is a question of fact for the jury whether all the grantors have adopted the single seal. The court cannot, from a mere inspection of the instrument, instruct the jury that a person who has signed the instrument has made it his deed by adopting a seal which has been affixed to it opposite the name of another person.<sup>5</sup>

Co. 10 Allen, 251; *Richard v. Boller*, 6 Daly, 460; *Mitchell v. Union L. Ins. Co.* 45 Me. 104, 71 Am. Dec. 529.

<sup>1</sup> *Hendee v. Pinkerton*, 14 Allen, 381; *Royal Bank v. Grand Junction R. Co.* 100 Mass. 444.

<sup>2</sup> *Ankeny v. M'Mahon*, 4 Ill. 12; *Whittington v. Clarke*, 16 Miss. 480; *Williams v. Starr*, 5 Wis. 534; *Woodman v. York, &c. R. Co.* 50 Me. 549.

<sup>3</sup> *Lord Lovelace's Case*, Sir W. Jones, 268; *Ball v. Dunsterville*, 4 T. R. 313; *Bank v. Bugbee*, 19 Me. 27; *Tasker v. Bartlett*, 5 Cush. 359; *Bradford v. Randall*, 5 Pick. 496; *Mackay v. Bloodgood*, 9 Johns. 285; *Van Alstyne v. Van Slyck*, 10 Barb. 383; *Pequawkett Bridge v. Mathes*, 7 N. H. 230; *Burnett v. McCluey*, 78 Mo. 676; *Lunsford v. La Motte Lead Co.* 54 Mo. 426; *Norvell v. Walker*, 9 W.

Va. 447; *Carter v. Chaudron*, 21 Ala. 72; *Mapes v. Newman*, 2 Ark. 469; *State Bank v. Bailey*, 4 Ark. 453; *Flood v. Yandes*, 1 Blackf. 102; *Bohannon v. Lewis*, 3 T. B. Mon. 376; *Bowman v. Robb*, 6 Pa. St. 302; *Hollis v. Pond*, 7 Humph. 222; *Lambden v. Sharp*, 9 Humph. 224; *Yale v. Flanders*, 4 Wis. 96; *Williams v. Greer*, 12 Ga. 459; *Townsend v. Hubbard*, 4 Hill, 351; *Davis v. Burton*, 4 Ill. 41; *McLean v. Wilson*, 4 Ill. 50; *Yarborough v. Monday*, 3 Dev. 420; *Pickens v. Rymer*, 90 N. C. 282.

<sup>4</sup> *Burnett v. McCluey*, 78 Mo. 676; *Lunsford v. La Motte Lead Co.* 54 Mo. 426.

<sup>5</sup> *Yarborough v. Monday*, 3 Dev. 420; *Pickens v. Rymer*, 90 N. C. 282; *Hollis v. Pond*, 7 Humph. 222; *Bohannon v. Lewis*, 3 T. B. Mon. 376.

### III. *Scrolls and other Devices used as Seals.*

1068. A seal as at common law is now required upon a deed of real property in only a few States.<sup>1</sup> In the greater number of the other States, while a seal of some kind is essential to the valid execution of a conveyance of land, and in many of these the common-law seal is in general use, yet it is provided by statute, or adjudged by the courts, that a scroll or other device may be used and shall answer for a seal.<sup>2</sup>

In many States, however, no seal of any kind is essential to the making of a valid deed, though the common-law seal may be in general use.<sup>3</sup>

<sup>1</sup> **Maine:** *McLaughlin v. Randall*, 66 Me. 226; *Jewell v. Harding*, 72 Me. 124. **Massachusetts:** *Tasker v. Bartlett*, 5 Cush. 359; *Hutchins v. Byrnes*, 9 Gray, 367; *Springfield Sav. Bank v. Springfield Cong. Soc.* 127 Mass. 516. **New Hampshire:** P. S. 1891, ch. 137, § 3. **Rhode Island:** P. S. 1892, ch. 24, § 14. **South Carolina:** G. S. 1882, § 1775. **Vermont:** R. L. 1880, § 1927.

<sup>2</sup> *A seal is requisite, but the word "seal" or the letters [L. S.] are equivalent.* **Connecticut:** G. S. 1888, §§ 1085, 2954. **New York:** Laws 1892, ch. 677, § 13.

*In the following States a seal is required, but a scroll answers for a seal:* **Arizona T.:** R. S. 1887, § 2783. **Delaware:** *Armstrong v. Pearce*, 5 Harr. 351. **Florida:** *Thompson's Dig.* 348; *Comerford v. Cobb*, 2 Fla. 418, 421. **Georgia:** Code 1882, § 5; *Smith v. Baker*, 1 Ga. Dec. 126. **Idaho:** Or with the word "seal." R. S. 1887, § 5989. **Illinois:** R. S. 1889, ch. 29, § 1. **Maryland:** From the earliest period of its judicial history. *Trasher v. Everhart*, 3 G. & J. 234. **Minnesota:** G. S. 1878, ch. 40, § 31, G. S. 1894, § 4190. **Missouri:** R. S. 1889, § 2388. **New Jersey:** R. S. 1877, p. 387, § 52. **New Mexico:** Comp. Laws 1884, § 2771. **North Carolina:** By custom and decision. **Oregon:** Annot. Laws 1887, § 752; Stat. of Provisional Government, June, 1844. **Pennsylvania:** *Long v. Ramsay*, 1 S. & R. 72. **Utah:** Comp. Laws 1888, § 2645.

**Virginia:** Code 1849, ch. 143, § 2; Code 1887, § 5. The word "seal" after a signature has the same effect as a scroll. *Lewis v. Overby*, 28 Gratt. 627. **Washington:** Laws 1877, p. 312; G. S. 1892, § 1427. **West Virginia:** Code 1887, ch. 13, § 15. **Wisconsin:** Annot. Stats. 1889, § 2215. The word "seal," or the letters [L. S.], constitute a seal. Laws 1895, ch. 129.

<sup>3</sup> **Alabama:** If instrument purports to be under seal. Code 1886, §§ 1840, 2694; *Webb v. Mullins*, 78 Ala. 111; *Blackwell v. Hamilton*, 47 Ala. 470. **Arkansas:** Const. 1874, Schedule, § 1; Dig. of Stats. 1894, p. 106. **California:** Civ. Code, § 1629. **Colorado:** Laws 1887, p. 228; Annot. Stats. 1891, § 441. **Indiana:** R. S. 1888, § 2999; R. S. 1894, § 454. **Iowa:** R. S. 1888, § 3289. **Kansas:** G. S. 1889, § 1103. **Kentucky:** G. S. 1894, § 471. **Louisiana:** No distinction between sealed and unsealed instruments. **Michigan:** Annot. Stats. 1882, § 7778. Any device by way of seal is sufficient. Annot. Stats. 1882, § 7510; *Jerome v. Ortman*, 66 Mich. 668, 33 N. W. Rep. 759. **Mississippi:** Annot. Code 1892, § 4079; *Gibbs v. McGuire*, 70 Miss. 646, 12 So. Rep. 829. **Montana:** Comp. Stats. 1887, ch. 107, § 1963; Civil Code 1895, § 2190. **Nebraska:** Comp. Laws 1885, ch. 81, § 1; Comp. Stats. 1895, § 4951. **Nevada:** G. S. 1885, § 2667. **North Dakota:** Dak. Civ. Code 1887, § 3549. **Ohio:** R. S. 1890, § 4. **Oklahoma T.:**

1069. A scroll need not be of any particular form or figure, in the absence of any statutory provision.<sup>1</sup> The form may be such as suits the taste or fancy of the person who executes the instrument. It must of course appear in some manner that the mark used with the signature was intended to be a seal or a scroll. In a deed which purported to be under seal, a dash at the end of the signature, less than an eighth of an inch in length, has been held to be a seal.<sup>2</sup> It is not essential that the scroll should be at the end of the signature; and it has accordingly been held that a flourish of the pen below the signature constitutes a sufficient sealing.<sup>3</sup> But a flourish in continuation of the last letter of the name is not such a scroll as will constitute a seal, where it is not made by way of a seal, though the instrument to which the signature is affixed expresses on its face that it is sealed.<sup>4</sup>

The word "seal" after a signature to a deed which purports to be sealed has the same effect as a scroll in those States in which a scroll is made sufficient by statute.<sup>5</sup> The word "seal," affixed to an instrument, is a sufficient device by way of seal to entitle an instrument to record.<sup>6</sup>

1070. The word "seal" or the letters [L. S.] need not be inclosed in the scroll to render a scroll equivalent to a seal, nor is it essential that this word or these letters should be connected with the scroll in any way.<sup>7</sup>

A recital in the *in testimonium* clause that the instrument is

Comp. Stats. 1893, § 6093. South Dakota: Dak. Civ. Code 1887, § 3549. Tennessee: Code 1884, § 2478. Texas: R. Civ. Stats. 1889, art. 4487; *Frost v. Wolf*, 77 Tex. 455, 14 S. W. Rep. 440. Wyoming: Laws 1895, ch. 93, § 5 1-2.

<sup>1</sup> *Hacker's App.* 121 Pa. St. 192, 1 L. R. A. 861; *Long v. Ramsay*, 1 S. & R. 72.

<sup>2</sup> *Hacker's App.* 121 Pa. St. 192, 15 Atl. Rep. 500; 1 Lawyer's Rep. 861. This case seems to reach the last degree of absurdity in the doctrine of scrolls. If a seal is required, the seal should be a genuine one, or the distinction between sealed and unsealed instruments should be done away with wholly. In this case it appeared that dashes similar to that

following the signature were used for punctuation in the body of the instrument.

<sup>3</sup> *Taylor v. Glaser*, 2 S. & R. 502.

<sup>4</sup> *Grimsley v. Riley*, 5 Mo. 280, 32 Am. Dec. 319.

<sup>5</sup> *Lewis v. Overby*, 28 Gratt. 627; *Groner v. Smith*, 49 Mo. 318; *Underwood v. Dollins*, 47 Mo. 259; *Bertrand v. Byrd*, 4 Ark. 195; *Whitley v. Davis*, 1 Swan, 333; *Williams v. Starr*, 5 Wis. 534. *Contra*, *Moore v. Leseur*, 18 Ala. 606. See *Lindsay v. State*, 15 Ala. 43.

<sup>6</sup> *Cochran v. Stewart* (Minn.), 59 N. W. Rep. 543.

<sup>7</sup> *Anderson v. Wilburn*, 8 Ark. 155; *Kilgore v. Powers*, 5 Blackf. 22.

sealed is sufficient proof that a scroll annexed to the signature, or the word "seal" or the letters [L. S.], was intended as a seal.<sup>1</sup>

1071. Whether a scroll with a pen will be held to be a seal, though the instrument does not recite that it is sealed, is a question upon which the authorities are divided. On the one hand it is said that if it appears from the instrument itself, or from the circumstances attending its execution, or from parol evidence, that the party who signed the instrument intended to adopt the scroll as a seal, it is a seal without any recital in the instrument itself;<sup>2</sup> and that whether a scroll or other mark or impression was intended for a seal is always a question of fact for the jury.<sup>3</sup>

On the other hand, however, it is held in some cases that there must be something in the instrument to show that a scroll, or other device used in place of a common-law seal, was intended for a seal. A scroll or device does not necessarily, as does a common-law seal, establish its own character. In the case of a common-law seal it is not necessary that the instrument itself should, in the *in testimonium* clause or elsewhere, recognize the seal; but the word "seal" or the letters [L. S.], or a scroll placed after a name without any recital in the instrument that it is sealed, does not constitute a seal.<sup>4</sup>

<sup>1</sup> Force v. Craig, 7 N. J. L. 272; O'Cain v. O'Cain, 1 Strobb. 402; Groner v. Smith, 49 Mo. 318; Underwood v. Dollins, 47 Mo. 259; Hudson v. Poindexter, 42 Miss. 304; Whittington v. Clarke, 16 Miss. 480; Lewis v. Overby, 28 Gratt. 627; Ankeny v. M'Mahon, 4 Ill. 12; Sheehan v. Davis, 17 Ohio St. 571; Miller v. Binder, 28 Pa. St. 489.

<sup>2</sup> Burton v. Le Roy, 5 Sawyer, 510; Trasher v. Everhart, 3 G. & J. 234, 246; Comerford v. Cobb, 2 Fla. 418; Relph v. Gist, 4 McCord, 267; M'Kain v. Miller, 1 M'Mullan, 313; Scruggs v. Brackin, 4 Yerg. 528; Whitley v. Davis, 1 Swan, 333; Cummins v. Woodruff, 5 Ark. 116; Williams v. Greer, 12 Ga. 459; Hacker's App. 121 Pa. St. 192, 1 L. R. A. 861, 15 Atl. Rep. 500; Long v. Ramsay, 1 S. & R. 72, where it was determined from the face of the instrument that the scroll was intended as a seal.

<sup>3</sup> Relph v. Gist, 4 M'Cord, 267; McKain v. Miller, 1 McMull. 313.

<sup>4</sup> Brown v. Jordhal, 32 Minn. 135, 19 N. W. Rep. 650; Fleming v. Powell, 2 Tex. 225; English v. Helms, 4 Tex. 228; Carter v. Penn, 4 Ala. 140; Lee v. Adkins, Minor (Ala.), 187; Walker v. Keile, 8 Mo. 301; Glasscock v. Glasscock, 8 Mo. 577; Cartmill v. Hopkins, 2 Mo. 179; Boynton v. Reynolds, 3 Mo. 57; Grimsley v. Riley, 5 Mo. 280; Armstrong v. Pearce, 5 Harr. 351; Hudson v. Poindexter, 42 Miss. 304; Jenkins v. Hurst, 2 Rand. 446; Austin v. Whitlock, 1 Munf. 487; Cromwell v. Tait, 7 Leigh, 301, 30 Am. Dec. 506; Parks v. Hewlett, 9 Leigh, 511; Lewis v. Overby, 28 Gratt. 627; Haseltine v. Donahue, 42 Wis. 576; Long v. Long, 1 Morr. (Iowa) 43; Norvell v. Walker, 9 W. Va. 447; Bell v. Keefe, 13 La. Ann. 524.

**1072.** A scroll does not answer for an official seal. Thus, a scroll is not sufficient when used by a county treasurer in executing a tax deed, under a statute which provides that he shall execute such deed under the seal of his office.<sup>1</sup>

A master's deed of land sold under decree apparently regular on its face, though not sealed, affords color of title, and the informality of want of seal may be cured by the master's sealing the deed several years after its delivery. The sealing, in such case, relates back to the original delivery.<sup>2</sup>

A scroll does not generally answer for a corporate seal in the absence of statutory authority.<sup>3</sup>

#### IV. *Presumptions as to Sealing.*

**1073.** There is a presumption that a deed was sealed when delivered, if, when it is produced at the time of the trial, there is a seal upon it, and the attestation clause recites that it was sealed, in the absence of any direct evidence that the instrument was not sealed. It will be presumed that it was sealed when delivered, even if the attesting witness testifies that he does not recollect whether it had a seal, and that he did not read the attestation at the time he subscribed his name as a witness. Chief Justice Best, delivering a decision to this effect,<sup>4</sup> remarked: "If, on inspection, no seal had been found affixed, then I should have held that it would not do." But it is generally held that a presumption that the instrument was sealed arises from a statement in the instrument itself, either in the *in testimonium* clause, or the attestation clause, that it was sealed.<sup>5</sup>

<sup>1</sup> *Hendrix v. Baggs*, 15 Neb. 469. *Contra*, *Commercial Bank v. Ullman*, 10 Sm. & M. 411.

<sup>2</sup> *Davis v. Hall*, 92 Ill. 85. In *Watson v. Jones*, 85 Pa. St. 117, county commissioners, who had executed a deed without sealing it, were permitted at the time of trial, when its validity was questioned, to seal it.

<sup>3</sup> See § 1079; *Solon v. Williamsburgh Sav. Bank*, 114 N. Y. 122, 21 N. E. Rep. 168. See, however, to the contrary, *Miller v. Superior Machine Co.* 79 Ill. 450; *Ill. Cent. R. Co. v. Johnson*, 40 Ill. 35; *Reynolds v. Glasgow Academy*, 6 Dana,

37; *Johnston v. Crawley*, 25 Ga. 316, 71 Am. Dec. 173.

<sup>4</sup> *Ball v. Taylor*, 1 Carr. & P. 417, per Best, C. J. "If sealing and delivering are not presumed, and it is made to rest upon the fallible memory of a witness, at a distance of time, as to whether all the requisites were performed at the time, great danger would result to bonds, and perhaps to other instruments on which the welfare of families depends." See, also, *Trasher v. Everhart*, 3 G. & J. 234; *Miller v. Binder*, 28 Pa. St. 489.

<sup>5</sup> *In re Sandilands*, L. R. 6 C. P. 411; *Le Franc v. Richmond*, 5 Sawyer, 601,

This rule is especially applicable to official instruments which are required by law to be sealed, such as deeds executed by sheriffs; and the authorities are to the effect that, where the record of such instruments recites that a seal was affixed, a presumption may be indulged in that the original instrument was sealed.<sup>1</sup>

In like manner, where the record of a certificate of acknowledgment made by an officer required to use his official seal does not show that a seal was affixed, but the certificate recites that a seal was affixed, it will be presumed that the original certificate was properly sealed.<sup>2</sup> The presumption is one of the class of presumptions which are constantly allowed in support of the official acts of public officers.

1074. Though an ancient deed, when produced, is without a seal, it may be presumed, from its being duly acknowledged and recorded at the time of its execution, that it was then duly sealed.<sup>3</sup> In the case of an ancient deed which is not produced, but is proved from the record, which fails to indicate in any way that the deed was sealed, there is a presumption that the deed was sealed arising from a recital in the instrument itself that it is sealed, from a like statement in the certificate of acknowledgment, and from its registration under a law which permitted only the registry of sealed instruments.<sup>4</sup>

603; 1 Sugden on Powers, 283; Smith v. Dall, 13 Cal. 510; Jones v. Martin, 16 Cal. 165; Beardsley v. Day, 52 Minn. 451; 55 N. W. Rep. 46; Flowery M. Co. v. North Bonanza M. Co. 16 Nev. 302; Dale v. Wright, 57 Mo. 110; Starkweather v. Martin, 28 Mich. 471; Aycock v. Raleigh, &c. R. Co. 89 N. C. 321; Heath v. Big Falls Cotton Mills, 115 N. C. 202, 20 S. E. Rep. 369.

<sup>1</sup> Carrington v. Potter, 37 Fed. Rep. 767; Flowery M. Co. v. North Bonanza M. Co. 16 Nev. 302; McCoy v. Cassidy, 96 Mo. 429, 9 S. W. Rep. 26, overruling Hamilton v. Boggess, 63 Mo. 233; Long v. Joplin M. & S. Co. 68 Mo. 422.

<sup>2</sup> Hammond v. Gordon, 93 Mo. 223; Addis v. Graham, 88 Mo. 197; Parkinson v. Caplinger, 65 Mo. 290; Norfleet v. Russell, 64 Mo. 176; Geary v. City of

Kansas, 61 Mo. 378; McCoy v. Cassidy, 96 Mo. 429, 432, 9 S. W. Rep. 926, per Norton, C. J.; Griffin v. Sheffield, 38 Miss. 359.

<sup>3</sup> Reusens v. Staples, 52 Fed. Rep. 91, 94. Paul, J., said: "If, at this remote day from the execution of these ancient documents, we are at liberty to ignore their sanctity as sealed instruments, because the impression in wax is not to be found on them, or the scroll, its legally authorized substitute, in its stead, though we have the highest record evidence that the seals were attached to the documents at the time of their execution and delivery, it would go very far towards converting into equitable what have been for a century regarded as legal titles."

<sup>4</sup> Starkweather v. Martin, 28 Mich. 471.

V. *Record of Seals.*

1075. The record of a deed must in some manner represent that the instrument was sealed; otherwise the record is not evidence of a conveyance of a legal title, but only of an equitable title.<sup>1</sup> If, therefore, the record of a conveyance has no statement or mark indicating that the seal of the grantor was attached to the deed, the record is ineffectual as evidence of a conveyance of the legal title to the land, and it is ineffectual as notice to others who may subsequently become interested in the property of the conveyance of such a title.

It will be presumed, however, from a recorded recital of a seal in the deed itself, that the original deed was sealed. In case a deed is in fact sealed, and it is in all respects correctly recorded, except that the record does not show a copy of the seal, or any device representing it, the record is valid and sufficient as notice if it represents that the deed was sealed by the recorded recital in the deed itself.<sup>2</sup> "As the purpose of requiring registration is to give notice of the terms of the deed, and this is fully accomplished in the registry, we can see no reason why some scroll, or attempted imitation of the form of the seal, should be required in addition to the words spoken in the grant. The registry furnishes all the information that could be derived from an examination of the original, as both utter one and the same language."<sup>3</sup>

1076. The usual manner of indicating in the record that an instrument is sealed is by writing after the signature the word "seal," or the words "and a seal," or the letters [L. S].<sup>4</sup> A scroll is copied in the same manner, or by making a scroll on the record. A seal or scroll need not be copied or indicated in the record in any particular manner,<sup>5</sup> but there must be some mark

<sup>1</sup> *Todd v. Union Dime Sav. Inst.* 118 N. Y. 337, 23 N. E. Rep. 299, reversing 44 Hun, 623, 20 Abb. N. C. 270; *Switzer v. Knapps*, 10 Iowa, 72, 74 Am. Dec. 375; *Hamilton v. Boggess*, 65 Mo. 233; *Floyd v. Ricks*, 14 Ark. 286, 58 Am. Dec. 374.

<sup>2</sup> *Beardsley v. Day*, 52 Minn. 451, 55 N. W. Rep. 46; *Smith v. Dall*, 13 Cal. 510; *Gronning v. Behn*, 10 B. Mon. 383.

<sup>3</sup> *Aycock v. Raleigh, &c. R. Co.* 89 N. C. 321, affirmed in *Heath v. Big Falls*

*Cotton Mills*, 115 N. C. 202, 20 S. E. Rep. 369.

<sup>4</sup> *Todd v. Union Dime Sav. Inst.* 118 N. Y. 337, 23 N. E. Rep. 299; *Starkweather v. Martin*, 28 Mich. 471; *Dale v. Wright*, 57 Mo. 110.

<sup>5</sup> *Burton v. Le Roy*, 5 Sawyer, 510, 513, per Sawyer, J.; *Illinois Cent. R. Co. v. Johnson*, 40 Ill. 35; *Starkweather v. Martin*, 28 Mich. 471, 478, per Graves, C. J.

or words sufficient to indicate that the original deed was executed with a seal or scroll.

1077. Evidence of the absence of a seal at the time of recording is afforded by a record or a copy of it which does not by any mark or word indicate that the original deed was sealed.<sup>1</sup> But if the attestation clause as recorded represents the deed to have been sealed, and the deed itself when produced, or a record of it subsequently made, shows a seal, the previous record, though it contains no other indication that the deed was sealed, is not such affirmative evidence of the absence of a seal, at the time it was made, as to require evidence that the seal upon the deed, as produced or subsequently recorded, was surreptitiously placed thereon after the first record was made, in order to sustain the claim that the deed was sealed when it was executed.<sup>2</sup>

1078. It may be shown that a deed was in fact sealed when delivered and recorded, even though the record not only does not indicate any seal, but on the contrary bears a mark which indicates that the instrument was not sealed when recorded. Thus, where the record shows a dash following the grantor's name, and an employee in the register's office testifies that this was the customary mark to indicate that an instrument was not sealed when recorded, these facts do not support a finding that the instrument was not sealed when delivered, where it appears that, when examined three years after its date, it bore a seal, and was then again recorded, and there is a declaration in both the instrument and attestation that it is sealed. The fact that it was customary to make such a mark, to indicate that there was no seal upon the instrument, was not regarded as sufficient to produce the inference, as evidence, that it was made for that reason. It was no part of the record. The mark was no affirmative evidence of the absence of a seal. "When the fact that there was a seal upon the conveyance appeared, as it did, the effect of the record in that respect was in its failure to represent it as sealed, rather than as evidence that it was without seal at the time the delivery and record were made. The record failed to show that there was a seal upon the instrument at the time the record was made." The burden was then cast upon the person claiming a legal title under the deed

<sup>1</sup> Williams v. Bass, 22 Vt. 352; Switzer v. Knapps, 10 Iowa, 72, 74 Am. Dec. 375.

<sup>2</sup> Todd v. Union Dime Sav. Inst. 118 N. Y. 337, 23 N. E. Rep. 299, reversing 44 Hun, 623, 20 Abb. N. C. 270.



to prove that the deed was in fact sealed when delivered. This he did by proving the facts before mentioned, by which it appeared, in addition to the other evidence on the subject, that the deed, when examined three years after it was made, had upon it a seal which is represented by the record then made.<sup>1</sup>

## VI. *Seals of Corporations.*

1079. The deed of a corporation conveying land must be executed under its common seal, or under a seal which it adopts as such.<sup>2</sup> The statutes wholly dispensing with the use of any kind of seal do not apply to corporations, and in some statutes corporations are expressly excepted from their operation.<sup>3</sup> In like manner, the statutes which provide that a scroll may be used for a seal do not always apply to corporations, and in some instances an express exception of corporate seals is made.<sup>4</sup> In several States a corporate seal is expressly defined by statute. Thus, it is declared that a corporate or official seal may be affixed to an instrument by a mere impression upon the paper or other material on which such instrument is written.<sup>5</sup> In several States it is provided that a corporation may convey lands by deed sealed with the common seal, signed by the president, vice-president, or presiding member or trustee.<sup>6</sup>

<sup>1</sup> *Todd v. Union Dime Sav. Inst.* 118 N. Y. 337, 23 N. E. Rep. 299, reversing 44 Hun, 623, 20 Abb. N. C. 270.

<sup>2</sup> *Danville Seminary v. Mott*, 136 Ill. 289, 28 N. E. Rep. 54; *Frankfort Bank v. Anderson*, 3 A. K. Marsh. 1; *Shropshire v. Behrens*, 77 Tex. 275, 13 S. W. Rep. 1043; *Brinley v. Mann*, 2 Cush. 337; *Damon v. Granby*, 2 Pick. 345, 353; *Duke v. Markham*, 105 N. C. 131, 10 S. E. Rep. 1017, 18 Am. St. Rep. 889.

<sup>3</sup> *Iowa*: R. Code 1888, § 3289. *Kansas*: G. S. 1889, §§ 1103, 1198. *Kentucky*: G. S. 1894, § 471. *Mississippi*: Annot. Code 1892, § 4079. *Tennessee*: Code 1884, § 2478. *Texas*: R. Civ. Stats. 1889, art. 4487; *Shropshire v. Behrens*, 77 Tex. 275.

<sup>4</sup> *Arizona T.*: R. S. 1887, § 2783. *Wisconsin*: Annot. Stats. 1889, § 2215. In some States, however, the deed of a corporation may be sealed in any way, or in

the same way as the deed of an individual, as, for instance, by scroll. *Johnston v. Crawley*, 25 Ga. 316, 71 Am. Dec. 173; *Miller v. Superior Machine Co.* 79 Ill. 450; *Illinois Cent. R. Co. v. Johnson*, 40 Ill. 35; *Missouri Fire Clay Works v. Ellison*, 30 Mo. App. 67; *Reynolds v. Glasgow Academy*, 6 Dana, 37.

<sup>5</sup> *California*: Civ. Code, § 1628. *Montana*: Civ. Code 1895, § 2189. *North Dakota*: Comp. Laws 1887, § 3549. *Ohio*: R. S. 1890, § 4. *South Dakota*: Comp. Laws 1887, § 3549. *Virginia*: Code 1887, § 5. *West Virginia*: Code 1891, ch. 13, § 15.

<sup>6</sup> *Colorado*: Annot. Stats. 1891, §§ 453, 622. *Florida*: R. S. 1892, § 1955. *Kansas*: G. S. 1889, §§ 1103, 1198. *Missouri*: R. S. 1889, § 2399. *Nebraska*: Comp. Stats. 1895, § 1840. *Texas*: R. Civ. Stats. 1889, art. 600.

1080. The deed of a corporation must be executed under its name and sealed with its seal. If the instrument purports to be the deed of the corporation, but it is sealed by the officer executing it with his own seal, and signed with his own name, adding a description of his official character, it is not the deed of the corporation.<sup>1</sup> It is true, however, that a seal which bears no stamp or impression denoting that it is the seal of the corporation may be regarded as the seal of the corporation; but it must purport to be the seal of the corporation, and not the seal of the officer. A corporation as well as an individual may adopt and use any seal.<sup>2</sup> The deed need not recite that the seal used is the

In **Connecticut**, a corporation not having an official seal may execute a deed purporting to be under seal by the addition of the word "seal" or the letters [L. S.]. An official or corporate seal may be made by an impression of such seal upon the paper or other material employed. *G. S. 1888, § 1085.* In **New York** and **Wisconsin** a seal of a corporation may be impressed directly upon the instrument to be sealed, or upon wafer, wax, or other adhesive substance, affixed thereto, or upon paper or other similar substance affixed thereto by mucilage or other adhesive substance. An instrument executed in the corporate name of a corporation which has not adopted a corporate seal, when sealed by the proper officers of the corporation under their private seals, is deemed to have been executed under the corporate seal. *N. Y. Laws 1892, ch. 677, § 13; Wis. Laws 1895, ch. 129.*

<sup>1</sup> *Savings Bank v. Davis*, 8 Conn. 191; *Bank of the Metropolis v. Guttschlick*, 14 Pet. 19; *Brinley v. Mann*, 2 Cush. 337. The *in testimonium* clause recited: "I, —, in behalf of said company and as their treasurer, set my hand and seal," &c. *Richardson v. Scott River, &c. Co.* 22 Cal. 150; *Mitchell v. St. Andrews, &c. Co.* 4 Fla. 200; *Female Orphan Asylum v. Johnson*, 43 Me. 180; *Cram v. Bangor House*, 12 Me. 354; *Rauch v. Oil Co.* 8 W. Va. 36; *Zoller v. Ide*, 1 Neb. 439; *Eagle Woollen Mills Co. v. Monteith*, 2 Oreg. 277; *Hatch v. Barr*, 1 Ohio, 390;

*Tiffin v. Shawhan*, 43 Ohio St. 178. In this case a deed conveying land owned by a city, purporting to be made under an ordinance authorizing the city clerk to execute "a proper deed of conveyance under the corporate seal of the city," is ineffectual to convey any title when signed by the city clerk and sealed with his private seal and his official seal as city clerk. See, also, *Randall v. Van Vechten*, 19 Johns. 60, 10 Am. Dec. 193; *Richardson v. Scott River W. & M. Co.* 22 Cal. 150. See, however, *Kansas v. Hannibal & St. Jo. R. Co.* 77 Mo. 180.

<sup>2</sup> *Sheets v. Selden*, 2 Wall. 177; *Mill Dam Foundry v. Hovey*, 21 Pick. 417; *Stebbins v. Merritt*, 10 Cush. 27; *Bradford v. Randall*, 5 Pick. 496; *Tenney v. Lumber Co.* 43 N. H. 343; *Porter v. Androscoggin & K. R. Co.* 37 Me. 349; *Decker v. Freeman*, 3 Me. 338; *Reynolds v. Glasgow Academy*, 6 Dana, 37; *South Baptist Soc. v. Clapp*, 18 Barb. 35; *Richardson v. Scott River W. & M. Co.* 22 Cal. 150; *Gashwiler v. Willis*, 33 Cal. 11, 91 Am. Dec. 607; *Phillips v. Coffee*, 17 Ill. 154; *Bank of Middlebury v. Rutland & W. R. Co.* 30 Vt. 159; *Farmers' & Mechanics' Turnpike Co. v. McCullough*, 25 Pa. St. 303; *Union Gold M. Co. v. Bank*, 2 Colo. 226; *Ransom v. Stonington Sav. Bank*, 13 N. J. Eq. 212, 213; *Danville Seminary v. Mott*, 136 Ill. 289, 28 N. E. Rep. 54; *Illinois Cent. R. Co. v. Johnson*, 40 Ill. 35; *Phillips v. Coffee*, 17 Ill. 154; *South Baptist Soc. v. Clapp*, 18

common seal of the corporation, but it must not describe the seal as the seal of the officer who executes the deed.<sup>1</sup>

A different rule applies as regards a contract which is not required to be executed under the corporate seal. Such a contract, though sealed with the private seal of the officer or agent of the corporation executing it, binds the corporation if it appears that the officer or agent was acting in behalf of the corporation, and had authority so to act.<sup>2</sup>

1081. A quasi corporation, like a board of county commissioners, having no prescribed seal, may adopt any seal as their official seal. Therefore where, in executing a deed, the judge of probate, who is *ex officio* a member and president of the board, affixes the seal of the probate court, and the *in testimonium* clause recites that the commissioners "hereunto set their hands and seal of our probate court," there is such an adoption by the board of the seal named and used as makes the deed upon which it was used the validly sealed instrument of the county.<sup>3</sup>

1082. Proof of seal and authority of officer. — A seal purporting to be the seal of a corporation is presumed to be its common seal and, to be genuine, when the signature of the officer who affixed it is proved.<sup>4</sup> When the signature of the officer is proved, there is *prima facie* evidence that the seal was affixed by the proper authority.<sup>5</sup> But the seal itself is not evidence of its own

Barb. 35; St. Philips' Church v. Zion Presb. Church, 23 S. C. 297; Taylor v. Heggie, 83 N. C. 244.

<sup>1</sup> *In re* St. Helen Mill Co. 3 Sawyer, 88; Richardson v. Scott River, &c. R. Co. 22 Cal. 150, 157; Eagle Woollen Mills Co. v. Monteith, 2 Oreg. 277.

<sup>2</sup> Sherman v. Fitch, 98 Mass. 59; Abbey v. Chase, 6 Cush. 54; Haight v. Sahler, 30 Barb. 218.

<sup>3</sup> Martin v. Townsend, 32 Fla. 318, 13 So. Rep. 887. To like effect see Brown v. Cohn, 85 Wis. 1, 54 N. W. Rep. 1101; Drentzer v. Smith, 56 Wis. 292, 14 N. W. Rep. 465.

<sup>4</sup> Angell v. Ames, Corp. § 226; Stebbins v. Merritt, 10 Cush. 27; Phillips v. Coffee, 17 Ill. 154; Chicago, B. & Q. R. Co. v. Lewis, 53 Iowa, 101, 4 N. W. Rep. 842; Blackshire v. Iowa Homestead Co.

39 Iowa, 624; Kansas v. Hannibal & St. Jo. R. Co. 77 Mo. 180.

<sup>5</sup> Angell & Ames, Corp. § 224; Clarke v. Imperial Gas Light Co. 1 Nev. & M. 206, 4 B. & Ad. 326; Hill v. Manchester, &c. W. Co. 5 B. & Ad. 874; Koehler v. Black River Falls Iron Co. 2 Black, 715; Bank of United States v. Dandridge, 12 Wheat. 64; Mickey v. Stratton, 5 Sawyer, 475; Augusta, &c. R. Co. v. Kittel, 52 Fed. Rep. 63. California: Bliss v. Kaweah Canal Co. 65 Cal. 502, 6 Am. & Eng. Corp. Cas. 273; Miners' Ditch Co. v. Zellerbach, 37 Cal. 543, 597, 99 Am. Dec. 300; Schallard v. Eel River Nav. Co. 70 Cal. 144, 11 Pac. Rep. 590, 14 Am. & Eng. Corp. Cas. 64; Southern Cal. Colony v. Bustamente, 52 Cal. 192; McCracken v. San Francisco, 16 Cal. 591, 638. Colorado: Union Gold M. Co. v. Bank, 2 Colo. 226. Delaware: Conine

authenticity. Some evidence of this must be offered to establish the fact of the execution of the deed by the corporation, and, when this is done, the burden of proving that it is not the deed of the corporation is thrown upon the party who calls in question its authenticity.<sup>1</sup> The deed itself need not recite the authority under which the officer or agent of the corporation acts, unless this is required by some statute. If it becomes necessary to prove such authority, whether it is recited in the deed or not, it must be proved by evidence *aliunde*.<sup>2</sup>

There are cases which hold that the presence of the corporate seal is itself sufficient evidence that the instrument was executed under proper authority and is the deed of the corporation. The party producing the deed need not prove that the seal was regularly affixed by an officer or agent duly authorized.<sup>3</sup>

**1083.** The presumption that a corporate seal was rightfully affixed to a deed on which it appears is not conclusive, but may be repelled by parol evidence. Where it is proved that the officers who executed a deed did not seal it at the time or after-

- v. Junction, &c. R. Co.* 3 *Houst.* 288. **Florida**: *Union Bank v. Call*, 5 *Fla.* 409. **Georgia**: *Solomon's Lodge v. Montmollin*, 58 *Ga.* 547; *Butts v. Cuthbertson*, 6 *Ga.* 166. **Illinois**: *Reed v. Bradley*, 17 *Ill.* 321; *Wood v. Whelen*, 93 *Ill.* 153. **Iowa**: *Blackshire v. Iowa Homestead Co.* 39 *Iowa*, 624. **Maryland**: *Susquehanna Bridge & B. Co. v. General Ins. Co.* 3 *Md.* 305, 56 *Am. Dec.* 740. **Massachusetts**: *Burrill v. Nahant Bank*, 2 *Met.* 163, 35 *Am. Dec.* 395; *Mill Dam Foundry v. Hovey*, 21 *Pick.* 417; **Minnesota**: *Morris v. Keil*, 20 *Minn.* 531. **Missouri**: *St. Louis Public Schools v. Risley*, 28 *Mo.* 415; *Chouquette v. Barada*, 28 *Mo.* 491; *Musser v. Johnson*, 42 *Mo.* 74, 97 *Am. Dec.* 316. **Nevada**: *Evans v. Lee*, 11 *Nev.* 194; *Yellow Jacket Silver M. Co. v. Stevenson*, 5 *Nev.* 224. **New Hampshire**: *Flint v. Clinton Co.* 12 *N. H.* 430. **New York**: *Lovett v. Steam Sawmill Asso.* 6 *Paige*, 54; *New England Iron Co. v. Gilbert El. R. Co.* 91 *N. Y.* 153; *Candaigua Academy*, 90 *N. Y.* 618; *Hoyt v. Thompson*, 5 *N. Y.* 320. **North Carolina**: *Bason v. King's Mountain M. Co.* 90 *N. C.* 417; *Shaffer v. Hahn*, 111 *N. C.* 1, 15 *S. E. Rep.* 1033; *Heath v. Big Falls Cotton Mills*, 115 *N. C.* 202, 20 *S. E. Rep.* 369. **Ohio**: *Sheehan v. Davis*, 17 *Ohio St.* 571. **Pennsylvania**: *Berks & Dauphin Turnpike Road v. Myers*, 6 *S. & R.* 12, 9 *Am. Dec.* 402; *Crossman v. Hilltown Turnpike Co.* 3 *Grant's Cas.* 225. **South Carolina**: *City Council v. Moorhead*, 2 *Rich.* 430. **Tennessee**: *Hopkins v. Gallatin Turnpike Co.* 4 *Humph.* 403; *Levering v. Mayor*, 7 *Humph.* 553.
- <sup>1</sup> *Den v. Vreelandt*, 7 *N. J. L.* 352; *Leggett v. New Jersey, M. & B. Co.* 1 *N. J. Eq.* 541, 23 *Am. Dec.* 728; *Farmers' & Mechanics' Turnpike Co. v. McCullough*, 25 *Pa. St.* 303.
- <sup>2</sup> *Hart v. Stone*, 30 *Conn.* 94; *Isham v. Bennington Iron Co.* 19 *Vt.* 230; *Bank of Middlebury v. Rutland, &c. R. Co.* 30 *Vt.* 159; *Wheelock v. Moulton*, 15 *Vt.* 519.
- <sup>3</sup> *Parker v. Washoe Manuf. Co.* 49 *N. J. L.* 465, 9 *Atl. Rep.* 682, 19 *Am. & Eng. Corp. Cas.* 162; *Leggett v. N. J. Manuf. Co.* 1 *N. J. Eq.* 541; *Whitney v. Union Trust Co.* 65 *N. Y.* 576.

wards, that the officer who had the corporate seal in his custody never affixed it nor authorized another to do so, and that the deed was recorded without a seal, the burden is thrown on the grantee to prove that it was properly sealed, and, if he fails, the conclusion of law is, that the seal was wrongfully and fraudulently affixed.<sup>1</sup> Though the corporate seal be affixed by the officer having the keeping of it, if it be shown that he wrongfully affixed it without authority from the corporation, the deed is void.<sup>2</sup>

The presumption of authenticity which arises from proof of the signature of the officer of the corporation who executed the deed is not overcome by the evidence that the seal used was a mere piece of paper annexed with a wafer, and that a seal with a device bearing the name of the company had been used by it in executing other deeds; for the seal with such device is not the seal of the company exclusive of all other seals, unless the records of the company show a vote adopting such seal.<sup>3</sup>

1084. Whether an instrument is sealed or not is a matter to be determined by the court, but whether the seal is the seal of the corporation which purports to have executed the deed is a question for the jury.<sup>4</sup>

<sup>1</sup> Koehler v. Black River Falls Iron Co.

<sup>2</sup> Black, 715.

<sup>3</sup> Jackson v. Campbell, 5 Wend. 572.

<sup>4</sup> Stebbins v. Merritt, 10 Cush. 27.

<sup>4</sup> Crossman v. Hilltown Turnpike Co.

<sup>3</sup> Grant's Cas. 225; New England Iron Co. v. Gilbert El. R. Co. 91 N. Y. 153.

## CHAPTER XXVI.

### ATTESTATION.

I. At common law and by statute, 1085-1091.	III. Proof by attesting witnesses, 1101- 1108.
II. Requisites of a good attestation, 1092-1100.	

#### I. *At Common Law and by Statute.*

1085. Attestation was not necessary to the validity of a conveyance of land at common law, and is not now necessary except when required by statute.<sup>1</sup> By the ancient common law,

<sup>1</sup> *Dole v. Thurlow*, 12 Met. 157. "At the same time, it is proper to add that, as the attestation of witnesses affords such an easy and effectual mode of proof as may enable a grantee to supply the want of acknowledgment and obtain the registration of his deed, where acknowledgment is wanting and adds greatly to the credit of a deed, every conveyancer of common prudence, and every grantee in the exercise of due care, will perceive the propriety of having a deed duly attested by witnesses." Per Shaw, C. J. Also, *Thacher v. Phinney*, 7 Allen, 146. See, also, *Craig v. Pinson*, Cheves (S. C.), 272; *Leinenkugel v. Kehl*, 73 Wis. 238, 40 N. W. Rep. 683; *Jackson v. Allen*, 30 Ark. 110.

*Requirements as to attestation.* **Alabama**: One witness, but, when grantor cannot write, two. Conveyances by married women to be attested by two witnesses. No witness in any case is required if deed be acknowledged. To prove without acknowledgment two witnesses are necessary. Code 1886, §§ 1789, 1790, 1894. **Arizona T.**: Two witnesses unless acknowledged. R. S. 1887, § 220. **Arkansas**: Two witnesses unless ac-

knowledge. If the witnesses do not subscribe at the time of the execution, the date of the subscribing must be stated with their signatures. Dig. of Stats. 1894, § 707. **Connecticut**: Two witnesses. G. S. 1888, § 2954. So since act Oct. 4, 1860. *Merwin v. Camp*, 3 Conn. 35. **Delaware**: One witness. **Florida**: Two witnesses. R. S. 1892, §§ 1950, 1952. **Georgia**: Two witnesses, one of whom should be the officer who takes the acknowledgment. Code 1882, § 2690. **Idaho**: One witness unless acknowledged. R. S. 1887, § 2964. **Kentucky**: Two witnesses unless acknowledged. G. S. 1894, § 501. **Louisiana**: Two witnesses. **Maryland**: One witness. Pub. G. L. 1888, art. 21, § 10. **Michigan**: Two witnesses. G. S. 1882, § 5658. **Minnesota**: Two witnesses. G. S. 1894, § 4166. **Nebraska**: One witness. Comp. Stats. 1895, § 4092. **New Hampshire**: Two witnesses. P. S. 1891, ch. 137, § 3, statute Feb. 10, 1791; *Smith v. Chamberlain*, 2 N. H. 440; *French v. French*, 3 N. H. 234. **New York**: One witness if not acknowledged. If not attested, the deed does not take effect against a purchaser or incumbrancer until acknowledged. 4 R. S. 8th ed. p. 2451,

sealing and delivery were the only requisites to the validity of a deed, signing by the grantor not being required. At that time, however, it was usual, for the purpose of more readily proving the sealing and delivery, for the scrivener to indorse upon the instrument the names of the persons present at the time, that they might be called as witnesses should occasion require. When the art of writing became more general, it became the custom not only for the grantor, in addition to sealing, to sign his name to the instrument, but for the persons who were present at its execution to sign their names as witnesses.<sup>1</sup>

Under modern rules of law, unless otherwise provided by statute, to pass the title to land it is not necessary that the deed should be witnessed or acknowledged, and of course it is not necessary that it should be recorded. To pass the title, nothing more is necessary than the execution and delivery of the deed by the grantor.<sup>2</sup>

**1086. Attestation is in some States made essential to the validity of a deed.** This is the case in Alabama, though acknowledgment dispenses with attestation.<sup>3</sup> Prior to the Code, the common-law rule that neither attestation nor acknowledgment are necessary to the validity of a deed prevailed; but the Code is regarded as having abrogated the common-law rule, and as having prescribed the essentials of a valid conveyance. Attestation is regarded as having taken the place of livery of seisin, which implied publicity and the presence of witnesses. The statute substitutes attestation, and makes it essential to an alienation of lands.<sup>4</sup>

§ 137. **Ohio:** Two witnesses. R. S. 1890, § 4106. So since 1808. *Patterson v. Pease*, 5 Ohio, 190. **Oregon:** Two witnesses. Annot. Laws 1887, § 3011. **South Carolina:** Two witnesses. G. S. 1882, § 1775. **Vermont:** Two witnesses. R. L. 1880, § 1927. **Washington:** Two witnesses. Laws 1885, p. 177. **Wisconsin:** Two witnesses. Annot. Stats. 1889, § 2216. **Wyoming:** One witness. R. S. 1887, § 8.

*No witness is required*, though one may be customary, in California, Colorado, District of Columbia, Illinois, Indiana, Iowa, Kansas, Maine, Massachusetts, Mississippi, Missouri, Montana, Nevada, New Jersey, New York, North Carolina, North Dakota, Pennsylvania, Rhode Island, South

Dakota, Tennessee, Texas, Utah, Virginia, West Virginia. In these States one or two witnesses are necessary to prove a deed for record when it is not acknowledged.

<sup>1</sup> *Dundy v. Chambers*, 23 Ill. 369.

<sup>2</sup> *Morton v. Leland*, 27 Minn. 35, 6 N. W. Rep. 378; *Johnson v. Sandhoff*, 30 Minn. 197, 14 N. W. Rep. 889; *Conlan v. Grace*, 36 Minn. 276, 30 N. W. Rep. 880; *Price v. Haynes*, 37 Mich. 487; *Johnson v. Jones*, 87 Ga. 85, 13 S. E. Rep. 261.

<sup>3</sup> Code 1886, § 1789. See *Jones v. Hagler*, 95 Ala. 529, 10 So. Rep. 345.

<sup>4</sup> *Hendon v. White*, 52 Ala. 597, 604. "As no conveyances are now in use here

Under some statutes requiring attestation, unattested deeds are in effect void, though the statutes do not in terms declare them so.<sup>1</sup>

A defective acknowledgment may operate as an attestation. On the testimony of the officer who took the acknowledgment that the deed was executed in his presence it is admissible in evidence.<sup>2</sup>

In the absence of a statute to the contrary, a deed must be executed according to the laws of the State where the land is situated. But under a statute which authorizes the execution of a deed in another State according to the laws of that State, though the laws of the State where the land is situated make an attesting witness essential to pass the title, yet, if the deed is executed in a State where no attesting witness is required, such deed is valid in the State where the land is.<sup>3</sup>

A special act authorizing the execution of a particular class of deeds by signing and sealing, without saying anything about attestation, controls a general act requiring attestation.<sup>4</sup>

1087. More generally, however, attestation is not essential to the passing of the title, either as between the parties or as against subsequent purchasers and creditors with notice, or as against mere volunteers; the requirement in this respect being like the requirement of acknowledgment; neither attestation nor acknowledgment being an essential part of the execution of the deed. These are formalities required by the statute to entitle

which livery of seisin ever attended, the purpose was to require, as indispensable to an alienation of lands, an authentication of the act partaking of the character of the conveyance by which it was done; as the title could pass only by writing, that there must be witnesses to its execution subscribing in writing, or an acknowledgment before an officer of the law authorized to take and certify it. A safeguard against fraud, perjury, and clandestine conveyances is thus provided. Such safeguard is a necessity to the security of titles." Per Brickell, C. J. See, also, *Caperton v. Hall*, 83 Ala. 171, 3 So. Rep. 234; *Lord v. Folmer*, 57 Ala. 615; *Stewart v. Beard*, 69 Ala. 470; *Evans v. Richardson*, 76 Ala. 329.

<sup>1</sup> *Clark v. Graham*, 6 Wheat. 577; *Tarpey v. Deseret Salt Co.* 5 Utah, 205, 14 Pac. Rep. 338; *Day v. Adams*, 42 Vt. 510; *Stone v. Ashley*, 13 N. H. 38; *Kingley v. Holbrook*, 45 N. H. 313, 320; *Raggen v. Avery*, 63 Barb. 65; *Winsted Sav. Bank v. Spencer*, 26 Conn. 195; *Richardson v. Bates*, 8 Ohio St. 257, 261; *Patterson v. Pease*, 5 Ohio, 190; *Wallace v. Minor*, 7 Ohio, 249; *Crane v. Rieder*, 21 Mich. 24, 60.

<sup>2</sup> *Jones v. Hagler*, 95 Ala. 529, 10 So. Rep. 345.

<sup>3</sup> *Green v. Gross*, 12 Neb. 117, 10 N. W. Rep. 459.

<sup>4</sup> *Townsend v. Little*, 109 U. S. 504, 3 Sup. Ct. Rep. 357.



the deed to be recorded, so as to operate as notice to subsequent purchasers, but are not essential to transfer the title as between the parties. The title to the land passes by the execution and delivery of the deed by the grantor to the grantee; and the execution of the deed consists of the signing and sealing of it by the grantor.<sup>1</sup>

**1088. Acknowledgment does not dispense with the requirement of attestation, unless so provided by statute.** The certificate of acknowledgment is only *prima facie* evidence of the facts therein stated. Attestation is an additional solemnity in the execution of a deed, and is an additional protection against the making of a fraudulent or forged deed. A statute which clearly provides for this formality should have effect in all cases, unless the statute indicates an exception.<sup>2</sup>

**1089. A grantor may be estopped to claim that his deed is invalid because it is not duly attested, as where a mortgagor delivers a mortgage fully executed, and apparently executed by him in the presence of attesting witnesses, and it appears that he thereby acquires a valuable consideration from the mortgagee.** "To permit him now to take advantage of his own error or omission in not, in fact, executing it in the presence of subscribing witnesses, if such witnesses were absolutely necessary to its binding efficacy upon him, when the instrument upon its face pur-

<sup>1</sup> **Arkansas**: *Jackson v. Allen*, 30 Ark. 110; *Stirman v. Cravens*, 29 Ark. 548. A deed not witnessed or acknowledged is good against a sale under judgment, if acknowledged and recorded before the sale. **Georgia**: *Johnson v. Jones*, 87 Ga. 85, 13 S. E. Rep. 261; *Gardner v. Moore*, 51 Ga. 268; *Downs v. Yonge*, 17 Ga. 295; *Marable v. Mayer*, 78 Ga. 60. **Kentucky**: *Fitzhugh v. Croghan*, 2 J. J. Marsh, 429. **Minnesota**: *Dobbin v. Cordiner*, 41 Minn. 165, 42 N. W. Rep. 870; *Conlan v. Grace*, 36 Minn. 276, 30 N. W. Rep. 880; *Morton v. Leland*, 27 Minn. 35, 6 N. W. Rep. 378. **Nebraska**: *Pearson v. Davis*, 41 Neb. 608, 59 N. W. Rep. 885; *Kittle v. St. John*, 10 Neb. 605, 7 N. W. Rep. 271; *Missouri Val. Land Co. v. Bushnell*, 11 Neb. 192, 8 N. W. Rep. 389; *Harrison v. McWhirter*, 12 Neb. 152, 10 N. W. Rep. 545; *Weaver v. Coumbe*,

15 Neb. 167, 17 N. W. Rep. 357. **Texas**: *McLane v. Canales* (Tex. Civ. App.), 25 S. W. Rep. 29. **Wisconsin**: *Leinenkugel v. Kehl*, 73 Wis. 238, 40 N. W. Rep. 683; *Gilbert v. Jess*, 31 Wis. 110; *Hewitt v. Week*, 59 Wis. 444, 456, 18 N. W. Rep. 417; *Myrick v. McMillan*, 13 Wis. 188; *Dreutzsr v. Lawrence*, 58 Wis. 594, 17 N. W. Rep. 423; *Dreutzer v. Baker*, 60 Wis. 179, 18 N. W. Rep. 776.

<sup>2</sup> *Tarpey v. Deseret Salt Co.* 5 Utah, 205, 14 Pac. Rep. 338. "It may be true that, where the reason of a rule or requirement fails, the rule or requirement itself fails. But such an axiom applies only where the plain import of the words is dubious. The spirit and reason of the law cannot be appealed to when the words of the statute are clear and unambiguous." Per Boreman, J.

ported at its delivery to have been duly witnessed and acknowledged for record, in the absence of proof showing knowledge to the contrary by the bank, would be to allow him to perpetrate a fraud upon the bank, which has acted upon the representation involved in the delivery by him of an instrument executed by him, having all the appearance of a formally witnessed and acknowledged document.”<sup>1</sup>

1090. An unattested deed under a statute making attestation essential may operate as an agreement of sale, performed on the part of the purchaser;<sup>2</sup> and after a long acquiescence by the grantor in the purchaser's possession, without making any claim to the land, the latter is entitled to a decree quieting his title. Even a sheriff's deed, neither witnessed nor acknowledged, is merely an agreement to convey.<sup>3</sup>

But an unattested deed cannot be admitted in evidence as a contract to convey in a legal action to recover possession of land against a stranger to the deed without notice, because the plaintiff in such action must recover upon his legal title, and not upon an equitable title.<sup>4</sup>

1091. There is usually an attestation clause, declaring that the deed was signed, sealed, and delivered in the presence of the witness or witnesses. But such a clause is not essential to a valid attestation. If in fact the deed was attested and signed by the witnesses, the attestation is sufficient, though there is no recital of delivery.<sup>5</sup> A recital of delivery may be of importance in case the witnesses are called upon to prove the execution of the deed in order to admit it of record. Thus, where the proof of the execution of a mortgage relied on to admit it to record was the affidavit of a subscribing witness to the effect that he saw the grantors named in the mortgage sign the same and acknowledge that they did so for the purpose therein expressed, and that affiant and the other subscribing witness signed the same as witnesses, it was held that the proof was not sufficient to admit the

<sup>1</sup> First Nat. Bank v. Ashmead, 33 Fla. 416, 14 So. Rep. 886, per Taylor, J.

<sup>2</sup> Hyne v. Osborn, 62 Mich. 235, 28 N. W. Rep. 821; Herren v. Strong, 62 Wis. 223, 22 N. W. Rep. 408; Caperton v. Hall, 83 Ala. 171, 3 So. Rep. 234; Louisville & N. R. Co. v. Boykin, 76 Ala. 560; Pollard v. Maddox, 28 Ala. 321;

Young v. Young, 27 S. C. 202, 3 S. E. Rep. 202.

<sup>3</sup> Eureka Lumber Co. v. Brown (Ala.), 15 So. Rep. 518.

<sup>4</sup> Tarpey v. Deseret Salt Co. 5 Utah, 205, 14 Pac. Rep. 338.

<sup>5</sup> Blalock v. Miland, 87 Ga. 573, 13 S. E. Rep. 551.

instrument to record as against a subsequent *bona fide* mortgagee without notice.<sup>1</sup> But such proof, aided by an attestation clause which recites a delivery of the deed, is sufficient.<sup>2</sup>

## II. *Requisites of a Good Attestation.*

1092. The witness must subscribe the deed as a witness in the presence of the grantor, or, if in his absence, at the grantor's special request to attest the instrument.<sup>3</sup> But though the witness was present at the time of the execution, if he did not subscribe the instrument at the time, but did it afterwards without the request of the parties, he is not a good attesting witness.<sup>4</sup>

Ordinarily an attesting witness must sign the instrument as such, though possibly one who was present for the purpose of being a witness, and was present when the instrument was signed by the grantor, but inadvertently omitted to subscribe the deed as a witness, may attest it afterwards. But there is certainly no attestation by a person who was not present for the purpose of being a witness, but was in and out of the room where the deed was executed at the time it was executed.<sup>5</sup>

1093. It is not necessary that an attesting witness should actually see the grantor sign, nor is it necessary that he should actually be present at the moment of signing. He may attest the grantor's signature, already made, if before delivery of the deed the grantor acknowledges the signature to him and requests him to subscribe as a witness.<sup>6</sup> If such acknowledgment be made after delivery, the deed may be considered as re-delivered at the time of such attestation.<sup>7</sup> But it is necessary either that the witness should see the grantor sign, or should hear him acknowledge its execution.<sup>8</sup>

A deed invalid when executed because not attested, or not

<sup>1</sup> Edwards v. Thom, 25 Fla. 222, 5 So. Rep. 707.

<sup>2</sup> Cleland v. Long, 34 Fla. 353, 16 So. Rep. 272.

<sup>3</sup> Park v. Mears, 3 Esp. 171, 2 Bos. & Pull. 217; Munns v. Dupont, 3 Wash. C. C. 31; Hollenback v. Fleming, 6 Hill, 303; Mutual Life Ins. Co. v. Corey, 54 Hun, 493, 7 N. Y. Supp. 939; Tate v. Lawrence, 11 Heisk. 503; Dorn v. Best, 15 Tex. 62; Downs v. Porter, 54 Tex. 64; Sowers v. Peterson, 59 Tex. 216; Jones

v. Robbins, 74 Tex. 615, 12 S. W. Rep. 824; Cox v. Rust (Tex. Civ. App.), 29 S. W. Rep. 807.

<sup>4</sup> Hollenback v. Fleming, 6 Hill, 303, per Bronson, J.; Kenyon v. Segar, 14 R. I. 490; Tate v. Lawrence, 11 Heisk. 503.

<sup>5</sup> Kenyon v. Segar, 14 R. I. 490.

<sup>6</sup> Jackson v. Phillips, 9 Cow. 94; Tate v. Lawrence, 11 Heisk. 503.

<sup>7</sup> Jackson v. Phillips, 9 Cow. 94, 113.

<sup>8</sup> Poole v. Jackson, 66 Tex. 380, 1 S. W. Rep. 75.

attested by the requisite number of witnesses, may be rendered effectual afterwards by a proper attestation in the presence of the parties, both as against the grantor and against others subsequently claiming under him with notice.<sup>1</sup>

1094. An attestation by a witness who makes his mark only is sufficient under a statute which in general terms requires the witness to subscribe or sign the deed as a witness;<sup>2</sup> but such an attestation is, of course, not sufficient under a statute which provides that the witness must be able to write and must write his name as a witness.<sup>3</sup> An attesting witness by his signature identifies himself with the deed as such witness, and thereby declares that he saw the grantor execute the deed, or that the grantor acknowledged to him that he had done so. A person who cannot write, but signs by his mark, also identifies himself with the deed, though less effectually. He may remember his mark, or he may make it in such a manner that he or others would easily recognize it.<sup>4</sup>

1095. Where there are several grantors, it is presumed, in absence of proof, that all the grantors executed the deed in the presence of the subscribing witness. This presumption is not overcome by the fact that the deed purports to be acknowledged by some of the grantors in different counties and before different officers; for it does not follow that the grantors were all together when they executed the deed.<sup>5</sup>

1096. A defective attestation as to one grantor is not aided by a perfect attestation as to other grantors in the same deed. The record of such a deed is only evidence of the deed as to those parties whose execution of the deed has been duly witnessed so as to entitle it to record.<sup>6</sup> Where by statute two witnesses were

<sup>1</sup> Brown v. Eastman, 16 N. H. 588.

<sup>2</sup> Devereux v. McMahon, 102 N. C. 284, 9 S. E. Rep. 635; Tatom v. White, 95 N. C. 453; State v. Byrd, 93 N. C. 624; Pridgen v. Pridgen, 13 Ired. 259.

So a will may be attested by the mark of a witness. Addy v. Grix, 8 Ves. 504; Doe v. Davies, 9 Q. B. 648; Wright v. Wright, 7 Bing. 457; Jackson v. Van Dusen, 5 Johns. 144, 4 Am. Dec. 330; Chase v. Kittredge, 11 Allen, 49, 87 Am. Dec. 687; Montgomery v. Perkins, 2 Met. (Ky.) 448, 74 Am. Dec. 419; Pridgen v.

Pridgen, 13 Ired. 259; Davis v. Semmes, 51 Ark. 48, 9 S. W. Rep. 434, though the person who writes the name of the witness fails to attest that fact by signing his own name as provided by statute. To same effect, *Ex parte* Miller, 49 Ark. 18, 3 S. W. Rep. 883.

<sup>3</sup> Stewart v. Beard, 69 Ala. 470; Harrison v. Simons, 55 Ala. 510.

<sup>4</sup> Tatom v. White, 95 N. C. 453.

<sup>5</sup> Hrouska v. Janke, 66 Wis. 252, 28 N. W. Rep. 166.

<sup>6</sup> Hall v. Redson, 10 Mich. 21.

required, and to a deed executed by a husband and wife there appeared to be one witness to the husband's signature and two witnesses to the signature of the wife, but following the attestation was a certificate in regard to the interlineation of a word signed by two witnesses, it was held that the execution of the deed was properly attested.<sup>1</sup>

1097. It is not necessary that two witnesses should be together when they witness the grantor's signature,<sup>2</sup> under a statute requiring two attesting witnesses. Thus where a bond, having been executed by the obligor and attested by one witness, was carried into an adjoining room and shown to another person, who by request also attested it in the presence of the obligor, although the other attesting witness was not present, nor was the first attesting witness present when the second attesting witness affixed his signature, it was held that the bond was properly attested.<sup>3</sup>

1098. Some authorities hold that it is not essential that an attesting witness should be a competent witness at the time of the attestation. If the statute merely requires that there shall be a witness, without describing him as credible or competent, all that is required is that the deed should be executed in the presence of a witness who signs his name to the deed as a witness. It is regarded as idle to make the validity of the deed depend upon the competency of a witness at a time when he would not be wanted to prove the execution of the deed. A witness competent at the time of the execution of the deed might be incompetent when needed to prove it.<sup>4</sup>

1099. A competent attesting witness is one who would be a competent witness in an action at law between the parties

<sup>1</sup> *Culbertson v. Witbeck Co.* 127 U. S. 326, 8 Sup. Ct. Rep. 1136, a case from Michigan.

<sup>2</sup> *Little v. White*, 29 S. C. 170, 7 S. E. Rep. 72. "It is true that it is the better practice to have the deed executed in the presence of two subscribing witnesses who are together at the time; for when the execution of the deed is called in question, either one of the witnesses would be sufficient to prove the essential fact that it was executed in the presence of two subscribing witnesses; whereas, if the sub-

scribing witnesses are not together at the time, neither one of them alone could prove the essential fact that it was executed in the presence of two subscribing witnesses, and it would be necessary to examine both, if alive, or prove the handwriting of the one who might be dead, in addition to the evidence of the one who might be alive." Per McIver, J.

<sup>3</sup> *Park v. Mears*, 2 Bos. & Pull. 217, 3 Esp. 171.

<sup>4</sup> *Smith v. Chamberlain*, 2 N. H. 440; *Johnson v. Turner*, 7 Ohio, 568.

to the deed involving the subject-matter of the conveyance. If a person having a direct legal interest in a suit would not be a competent witness in support of his interest, he would not be a competent attesting witness to a deed of another in which he has a direct legal interest.<sup>1</sup> Moreover, a statute providing for attestation by a competent witness must be construed with reference to the law of the State at the time of the enactment of such statute in regard to the competency of witnesses. Thus if, at the time of the enactment of such a statute, the law of the State excluded parties and interested persons from testifying in suits, that law must govern as to the competency of attesting witnesses; and although, after the enactment of the statute relating to attesting witnesses, the law of the State is changed, and parties and interested persons are empowered to testify in suits, it has been held that such change does not change the construction of the existing statute in regard to attesting witnesses.<sup>2</sup> Accordingly, where a married woman was, at the time the statute was passed, incompetent to testify with respect to any deed made by or to her husband, she is not a competent subscribing witness to such an instrument.<sup>3</sup> Of course the same rule applies in case of a husband who is an attesting witness to a deed executed to his wife.<sup>4</sup>

But while the wife of a grantor is not a competent witness to attest his deed,<sup>5</sup> she is competent to witness a deed made by her husband as administrator.<sup>6</sup>

An interest subsequently acquired by an attesting witness does not affect the validity of his attestation.<sup>7</sup>

1100. On the ground of interest, a stockholder in a private corporation is disqualified to be an attesting witness to the execution of a deed to the corporation.<sup>8</sup> But the trustee of an incorporated school, who was not shown to have any pecuniary inter-

<sup>1</sup> Third Nat. Bank v. O'Brien (Tenn.), 28 S. W. Rep. 293; Coleman v. State, 79 Ala. 49.

<sup>2</sup> Child v. Baker, 24 Neb. 188, 38 N. W. Rep. 725. In Connecticut the same construction was adopted, but it was based upon a clause of the statute empowering interested parties to testify, which provided that it should not affect the law relating to the attestation of instruments. Winsted Sav. Bank v. Spencer, 26 Conn. 195.

<sup>3</sup> Third Nat. Bank v. O'Brien (Tenn.), 28 S. W. Rep. 293; Corbett v. Norcross, 35 N. H. 99.

<sup>4</sup> Hardin v. Sparks, 70 Tex. 429, 7 S. W. Rep. 769.

<sup>5</sup> Corbett v. Norcross, 35 N. H. 99; Smith v. Chapman, 4 Conn. 344; Carter v. Champion, 8 Conn. 549.

<sup>6</sup> Carter v. Jackson, 58 N. H. 156.

<sup>7</sup> Carter v. Corley, 23 Ala. 612.

<sup>8</sup> Winsted Sav. Bank v. Spencer, 26 Conn. 195.

est therein, is a competent witness to a deed executed by the president of the corporation.<sup>1</sup>

### III. *Proof by Attesting Witnesses.*

1101. If there are attesting witnesses, they must be first called to prove a deed, either because they are by statute requisite to the validity of the deed, or if not so requisite, then for the reason that the parties have chosen them as the witnesses to the fact of its execution.<sup>2</sup> A party relying upon the deed cannot resort to other evidence of its execution until he has produced the attesting witness and he has denied his attestation or the execution of the deed, or it appears that he is incompetent or disqualified from testifying.

When the testimony of no subscribing witness can be had, the deed must be proved by proving the handwriting of the witnesses, or of one of them, and perhaps that of the grantor.<sup>3</sup> Evidence of inability to procure proof of the handwriting of the witnesses will excuse the want of that proof, as in the case of instruments not required to be witnessed.<sup>4</sup>

In other courts, however, the rule is that, if the attesting witnesses are not within the State, the deed may be proved by evidence of the handwriting of the grantor, without proving the handwriting of the subscribing witnesses or of either of them.<sup>5</sup> In case there is no subscribing witness, the deed is proved by proof of the handwriting of the grantor.<sup>6</sup>

1102. Secondary evidence of the execution of a deed may be introduced upon showing the presumptive absence of the witness. His attestation of the deed in another State raises a presumption of his residence in that State, and a presumption that he is not within the jurisdiction of the trial court.<sup>7</sup> Such

<sup>1</sup> *Canandarqua Academy v. McKechnie*, 19 Hun, 62.

<sup>2</sup> *Dundy v. Chambers*, 23 Ill. 369; *Markley v. Swartzlander*, 8 Watts & S. 172; *Martin v. Bowie*, 37 S. C. 102, 15 S. E. Rep. 736.

<sup>3</sup> *Gelott v. Goodspeed*, 8 Cush. 411; *Cram v. Ingalls*, 18 N. H. 613; *Heckert v. Haine*, 6 Binn. 16; *Houston v. Blythe*, 60 Tex. 506; *Hogans v. Carruth*, 19 Fla. 84; *Howell v. Ray*, 92 N. C. 510; *Davis v. Higgins*, 91 N. C. 382; *Martin v.*

*Bowie*, 37 S. C. 102, 15 S. E. Rep. 736; *Little v. White*, 29 S. C. 173, 7 S. E. Rep. 72.

<sup>4</sup> *Cram v. Ingalls*, 18 N. H. 613, where a doubt is expressed.

<sup>5</sup> *Valentine v. Piper*, 22 Pick. 85; *Gelott v. Goodspeed*, 8 Cush. 411, 413; *Wiggins v. Fleishel*, 50 Tex. 57.

<sup>6</sup> *Love v. Harbin*, 87 N. C. 249; *Black v. Justice*, 86 N. C. 504.

<sup>7</sup> *Buchanan v. Wise*, 34 Neb. 695, 52 N. W. Rep. 163; *Smith Charities v. Con-*

presumption of absence is sufficient to allow of the use of his deposition.<sup>1</sup>

When the foundation for secondary evidence is laid, and the execution of the deed is not proved by proof of the handwriting of the subscribing witness or that of the grantor, it may be proved by evidence of the grantor's admissions that he executed the deed, or even by circumstantial evidence.<sup>2</sup>

1103. At common law and in those States where attesting witnesses are not essential to the validity of a conveyance, if there are no attesting witnesses, the execution may be proved by any competent evidence, such as the grantor's handwriting, or his admission of the execution of the deed, or the testimony of any person who saw its execution.<sup>3</sup> If the deed be acknowledged, the certificate of acknowledgment is at least *prima facie* evidence that the grantor signed the deed.<sup>4</sup>

1104. A deed is admissible in evidence upon the testimony of one of the subscribing witnesses, the other not being within the process of the court,<sup>5</sup> unless there is some reason to suspect that the instrument was forged.<sup>6</sup> Under a statute requiring only one subscribing witness, or not requiring any, a deed attested by two witnesses may be proved by one of them.<sup>7</sup> Under a statute requiring two attesting witnesses, the testimony to the execution

nolly (Mass.), 31 N. E. Rep. 1058; Valentine v. Piper, 22 Pick. 85, 90; Gelott v. Goodspeed, 8 Cush. 411; Clark v. Houghton, 12 Gray, 38.

<sup>1</sup> Patterson v. Wabash, &c. Ry. Co. 54 Mich. 91, 19 N. W. Rep. 761; Bronner v. Frauenthal, 37 N. Y. 166.

<sup>2</sup> Bohn v. Davis, 75 Tex. 24, 12 S. W. Rep. 837, by grantor; Bounds v. Little, 75 Tex. 316, 12 S. W. Rep. 1109, by circumstantial evidence; De Vaughn v. McLeRoy, 82 Ga. 687, 703, 10 S. E. Rep. 211.

<sup>3</sup> Dundy v. Chambers, 23 Ill. 369, 373. "If the law at most only requires signing, sealing, and delivery as essential to the validity of a deed, and deems the further ceremony of attestation by witnesses as unnecessary to give it force and validity, it must follow that there is some other competent mode of proving the deed other than by subscribing witnesses. To attribute to such a deed validity be-

cause it possessed those essential parts, and yet to hold that it could not be used in evidence until it was established by subscribing witnesses, would be an absurdity that the law cannot recognize." Per Walker, J.

<sup>4</sup> Meazles v. Martin (Ky.), 18 S. W. Rep. 1028. Civ. Code, § 732, pl. 7, requiring an attestation to a signature by mark, applies only to instruments required to be executed under the code.

<sup>5</sup> Hodnett v. Forman, 1 Stark. 90; Allred v. Elliott, 71 Ala. 224; Gelott v. Goodspeed, 8 Cush. 411; Russell v. Coffin, 8 Pick. 143; Jackson v. Burton, 11 Johns. 64; Jackson v. Sheldon, 22 Me. 569. And see Adam v. Kerr, 1 Bos. & Pull. 360; Wallis v. Delancey, 7 Term, 266.

<sup>6</sup> Norris v. Freeman, 3 Wils. 38.

<sup>7</sup> Shirley v. Fearn, 23 Miss. 653, 69 Am. Dec. 375; McGowan v. Reid, 27 S. C. 262, 3 S. E. Rep. 337.



of a deed of one of such witnesses is *prima facie* proof of its execution.<sup>1</sup> In either case, if the two subscribing witnesses are in court, the deed may be proved by the testimony of one of them without calling the other.<sup>2</sup>

1105. Where a deed is both signed and witnessed by mark, and neither the grantor nor the witness can identify the paper or the mark, its execution may be proved by the testimony of the grantee, or of any one who saw the execution of the deed.<sup>3</sup> If the attesting witness signed the deed, the deed may be proved by the witness if living, or, if dead, by proving the handwriting of the witness. In such case proof that the grantor made his mark as his signature is not indispensable.<sup>4</sup>

1106. The execution and delivery of an ancient deed, one more than thirty years old, duly recorded, is sufficiently proved by proof of the handwriting of the attesting witnesses, they being dead, or beyond the process of the court.<sup>5</sup> Moreover, it is held that in such case the presumption is that the witnesses are dead.<sup>6</sup>

1107. It is not essential that the attesting witness should be able to recollect the fact of his attestation, if he knows the attestation to be in his handwriting; and though he does not recollect having seen the grantor sign his name to the deed, if he has received letters from the grantor, and is able to testify that he believes the signature to the deed to be genuine, the proof of the deed is sufficient for the purpose of putting it in evidence. Such proof is not conclusive, but is presumptive.<sup>7</sup>

Inquiry should be made of the attesting witness whether the signature purporting to be his is genuine. Testimony of an alleged subscribing witness that on the day when the deed purports to have been executed he was not in the county, and did not on that day witness a deed from the grantors to the grantee, is not a denial of the genuineness of his signature on such deed.<sup>8</sup>

<sup>1</sup> O'Sullivan v. Overton, 56 Conn. 102, 14 Atl. Rep. 300; Frink v. Pond, 46 N. H. 125.

<sup>2</sup> White v. Wood, 8 Cush. 413; O'Sullivan v. Overton, 56 Conn. 102, 14 Atl. Rep. 300.

<sup>3</sup> Jones v. Hough, 77 Ala. 437.

<sup>4</sup> Lyons v. Holmes, 11 S. C. 429.

<sup>5</sup> Prince v. Blackburn, 2 East, 250; Hoggans v. Carruth, 19 Fla. 84; Baldwin v.

Goldfrank (Tex. Civ. App.), 26 S. W. Rep. 155; Thompson v. Brannon, 14 S. C. 542.

<sup>6</sup> Baldwin v. Goldfrank (Tex. Civ. App.), 26 S. W. Rep. 155; Hollis v. Dashiell, 52 Tex. 187.

<sup>7</sup> Russell v. Coffin, 8 Pick. 143.

<sup>8</sup> Sutherland v. Ross, 160 Pa. St. 29, 28 Atl. Rep. 437.

1108. The burden of proving the execution of a deed which has been lost or destroyed is upon the party who claims any right under it to establish it by clear evidence and a satisfactory preponderance of proof.<sup>1</sup> The contents of the deed, as well as the execution and loss of it, must be proved. But a witness to the contents is not to be expected to repeat it verbatim. All he can be expected to remember is the execution of the deed, and about the time of it, the parties to it, the consideration, the description of the property, and whether it contained covenants of title.<sup>2</sup>

If there were articles of agreement for the sale of the land, the presumption is that the deed was made in conformity to them.<sup>3</sup> If the subscribing witnesses to such deed are known and can be found, their testimony has been said to be the primary evidence to prove the execution of it.<sup>4</sup> But it would seem that when the deed is lost or destroyed, inasmuch as the subscribing witness could not identify the instrument or his signature, and could not testify as to whether it bore his signature, his evidence would be of no higher or greater value than that of any other eyewitness to the transaction.<sup>5</sup> For this reason it would seem to be unnecessary to call the subscribing witness. The due execution of the deed may be proved by the testimony of the grantee.<sup>6</sup> The grantee may also prove the loss or destruction of the paper preliminary to the introduction of secondary evidence.<sup>7</sup>

After a great lapse of time, strict proof of a lost or destroyed deed, under which possession has been held, is not required.<sup>8</sup>

<sup>1</sup> *Metcalf v. Van Benthuyzen*, 3 N. Y. 424; *Kelley v. Divver*, 6 Mack, 440; *Cooley v. Cooley* (Ky.), 1 S. W. Rep. 491; *Sims v. Sims*, 5 Humph. 370; *McCain v. Hill*, 2 Ired. Eq. 176. See *Colchester v. Culver*, 29 Vt. 11, as to evidence sufficient to prove a lost deed.

<sup>2</sup> *Perry v. Burton*, 111 Ill. 138.

<sup>3</sup> *Patterson v. Forry*, 2 Pa. St. 456.

<sup>4</sup> *Felton v. Pitman*, 14 Ga. 530.

<sup>5</sup> *Simmons v. Havens*, 29 Hun, 119; *Ketcham v. Brooks*, 27 N. J. Eq. 347; *Eslow v. Mitchell*, 26 Mich. 500. See, also, *Jackson v. Frier*, 16 Johns. 193.

<sup>6</sup> *Simmons v. Havens*, 29 Hun, 119.

<sup>7</sup> *Blade v. Noland*, 12 Wend. 173; *Chamberlain v. Gorham*, 20 Johns. 144; *Metcalf v. Van Benthuyzen*, 3 N. Y. 424.

<sup>8</sup> *Lewis v. Baird*, 3 McLean, 56; *Berry v. Jourdan*, 11 Rich. 67.

## CHAPTER XXVII.

### ACKNOWLEDGMENT.

- |                                                         |                                                                         |
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#### *I. The Purpose and Effect of Acknowledgment.*

1109. The acknowledgment of a deed is required by statute chiefly for the purpose of affording proof of the due execution of the deed by the grantor, sufficient to authorize the register of deeds to record it. The statutes in general declare that a deed shall not be admitted of record unless it is acknowledged or proved by attesting witnesses in the mode prescribed. A deed without acknowledgment, or defectively acknowledged, passes the title equally with one acknowledged, as against the grantor and his heirs;<sup>1</sup> but without an effectual acknowledgment a deed can-

<sup>1</sup> *Sicard v. Davis*, 6 Pet. 124; *Hepburn v. Dubois*, 12 Pet. 345. **Arkansas**: *Jackson v. Allen*, 30 Ark. 110. **California**: *Ricks v. Reed*, 19 Cal. 551; *Hastings v. Vaughn*, 5 Cal. 315; *Landers v. Bolton*, 26 Cal. 393. **Florida**: *Stewart v. Mathews*, 19 Fla. 752; *Hogans v. Carruth*, 18 Fla. 587. **Illinois**: *Robinson v. Robinson*, 116 Ill. 250, 5 N. E. Rep. 118. **Indiana**: *Stevenson v. Cloud*, 5 Blackf. 92. **Iowa**: *Hoy v. Allen*, 27 Iowa, 208; *Blain v. Stewart*, 2 Iowa, 378; *Dussaume v. Burnett*, 5 Iowa, 95; *McMaken v. Niles* (Iowa), 60 N. W. Rep. 199. **Kansas**: *Missouri Pac. Ry. Co. v. Houseman*, 41 Kans. 300, 21 Pac. Rep. 284; *Simpson v. Mundee*, 3 Kans. 181; *Gray v. Ulrich*, 8 Kans. 112; *Furrow v. Chapin*, 13 Kans. 107; *Munger v. Baldrige*, 41 Kans. 236, 21 Pac. Rep. 159. **Massachusetts**: *Dole v. Thurlow*, 12 Met. 157, 164; *Gibbs v. Swift*, 12 Cush. 393. **Minnesota**: *Lydiard v. Chute*, 45 Minn. 277, 47 N. W. Rep. 967; *Tidd v. Rines*, 26 Minn. 201, 2 N. W. Rep. 497; *Dobbin v. Cordiner*, 41 Minn. 165, 42 N. W. Rep. 870. **Missouri**: *Stevens v. Hampton*, 46 Mo. 404; *Dail v. Moore*, 51 Mo. 589; *Bennett v. Shipley*, 82 Mo. 448; *Saunders v. Blythe*, 112 Mo. 1, 20 S. W. Rep. 319; *Wilson v. Kimmel*, 109 Mo. 260, 19 S. W. Rep. 24; *Hannah v. Davis*, 112 Mo. 599, 20 S. W. Rep.

not be recorded so as to afford notice of the conveyance to all the world. Acknowledgment has reference, therefore, to the proof of execution, and not to the force, effect, or validity of the instrument.<sup>1</sup> Acknowledgment is a prerequisite to recording the deed and making it constructive notice of all the facts set forth in it. The record of a deed without acknowledgment or proof as prescribed by statute does not afford constructive notice of it.<sup>2</sup> In like manner, the record of a deed defectively acknowledged does not impart constructive notice.<sup>3</sup>

**1110.** Generally the acknowledgment of a deed is required merely to afford evidence of its execution upon which the recording officer may act in recording the instrument, though

686; *Strickland v. McCormick*, 14 Mo. 166; *Harrington v. Fortner*, 58 Mo. 468; *Bennett v. Shipley*, 82 Mo. 448; *Chandler v. Bailey*, 89 Mo. 641, 1 S. W. Rep. 745. **Montana**: *Taylor v. Holter*, 1 Mont. 688. **Nebraska**: *Harrison v. McWhirter*, 12 Neb. 152, 10 N. W. Rep. 545; *Connell v. Galligher*, 36 Neb. 749, 55 N. W. Rep. 229, 39 Neb. 793, 58 N. W. Rep. 438; *Keeling v. Hoyt*, 31 Neb. 453, 48 N. W. Rep. 66. **New Hampshire**: *Brown v. Manter*, 22 N. H. 468; *Wark v. Willard*, 13 N. H. 389. **New York**: *Chamberlain v. Spargur*, 86 N. Y. 603; *Elwood v. Klock*, 13 Barb. 50; *Hutton v. Webber*, 17 N. Y. Supp. 463. **North Carolina**: Contrary to the general rule, no legal estate in lands passes until the deed of conveyance has been duly proved and registered. *Anderson v. Logan*, 99 N. C. 474, 6 S. E. Rep. 704; *Rollins v. Henry*, 78 N. C. 342; *Hare v. Jeringan*, 76 N. C. 471; *Triplett v. Witherspoon*, 74 N. C. 475. **Oregon**: *Goodenough v. Warren*, 5 Sawyer, 494; *Musgrove v. Bonser*, 5 Ore. 313, 20 Am. Rep. 737; *Moore v. Thomas*, 1 Ore. 201; *Manaudas v. Mann*, 14 Ore. 450, 13 Pac. Rep. 449. **Pennsylvania**: *Cable v. Cable*, 146 Pa. St. 451, 23 Atl. Rep. 223. **South Dakota**: *Banbury v. Sherin*, 4 S. D. 88, 55 N. W. Rep. 723. **Texas**: *Kimmarle v. Houston & T. C. Ry. Co.* 76 Tex. 686, 12 S. W. Rep. 698; *Frank v. Frank* (Tex. Civ. App.), 25 S. W. Rep. 819; *Smith v. Dunman* (Tex. Civ. App.), 29 S. W. Rep. 432. **Virginia**: *Raines v.*

*Walker*, 77 Va. 92. **Washington**: *Edson v. Knox*, 8 Wash. 642, 36 Pac. Rep. 698. **Wisconsin**: *Myrick v. McMillan*, 13 Wis. 188; *McMahon v. McGraw*, 27 Wis. 614; *Knight v. Leary*, 54 Wis. 459, 11 N. W. Rep. 600.

<sup>1</sup> *Brown v. Manter*, 22 N. H. 468; *Gray v. Ulrich*, 8 Kans. 112; *Coffey v. Hendricks*, 66 Tex. 676, 2 S. W. Rep. 47.

<sup>2</sup> *Shultz v. Moore*, 1 McLean, 520; *Blood v. Blood*, 23 Pick. 80; *Barney v. Sutton*, 2 Watts, 31; *Johns v. Scott*, 5 Md. 81; *Price v. McDonald*, 2 Md. 403, 54 Am. Dec. 657; *Raines v. Walker*, 77 Va. 92; *Pringle v. Dunn*, 37 Wis. 449, 19 Am. Rep. 772; *Bass v. Estill*, 50 Miss. 300; *Stevens v. Hampton*, 46 Mo. 404; *Baze v. Arper*, 6 Minn. 220; *Irwin v. Welch*, 10 Neb. 479, 6 N. W. Rep. 753; *Banbury v. Sherin*, 4 S. D. 88, 55 N. W. Rep. 723.

<sup>3</sup> *Willard v. Cramer*, 36 Iowa, 22; *Livingston v. Hudson*, 85 Ga. 835, 12 S. E. Rep. 17; *Hayden v. Moffat*, 74 Tex. 647, 12 S. W. Rep. 820; *Keeling v. Hoyt*, 31 Neb. 453, 48 N. W. Rep. 66; *Snowden v. Tyler*, 21 Neb. 199, 31 N. W. Rep. 661; *Merriman v. Hyde*, 9 Neb. 113, 2 N. W. Rep. 218; *Cannon v. Deming*, 3 S. D. 421, 53 N. W. Rep. 863. In **Illinois**, however, the statute provided that deeds shall be deemed notice to subsequent purchasers and creditors though not acknowledged or proved. *Reed v. Kemp*, 16 Ill. 445; *Carpenter v. Dexter*, 8 Wall. 513, 532. So in **Kansas**: *Simpson v. Munde*, 3 Kans. 172.

it has sometimes been made a part of the execution of the instrument essential to the passing of title. Thus, in New York,<sup>1</sup> it is provided that a grant in fee of a freehold estate not duly acknowledged or attested "shall not take effect as against a purchaser or incumbrancer until so acknowledged." The purpose of this statute was held to be to make the formality of acknowledgment useful to the grantor as well as to the grantee, to make it effective to protect the grantor against his own recklessness or haste, and to place a future difficulty in the way of fraud or forgery. Such being the object of the statute, a grantor who has signed but who has not acknowledged a conveyance may make an effectual conveyance of the same land to another grantee by a deed properly executed and acknowledged; and it does not matter upon what consideration or for what purpose the subsequent deed was executed, or whether the grantee therein had notice of the prior conveyance.<sup>2</sup> It is to be observed that the statute makes an unacknowledged deed without effect as against a purchaser, not as between the parties to such deed. The "purchaser" in this statute means one who mediately or immediately derived title from the grantor in the unacknowledged deed. As between the parties themselves the unacknowledged deed is good.<sup>3</sup>

<sup>1</sup> 1 R. S. 738, § 137, 2 R. S. 1889, 2451, § 137.

<sup>2</sup> *Chamberlain v. Spargur*, 86 N. Y. 603, 607, 22 Hun, 437. In the Court of Appeals, Finch, J., delivering judgment, said: "The solemnities which were thrown around the due execution of a deed of land originated, not in care for the grantee alone, but even more for the safety of the grantor. When he came to part with his freehold, to transfer his inheritance, the law bade him deliberate. It put in his path formalities to check haste and foster reflection and care. It required him not only to sign, but to seal, and then to acknowledge or procure an attestation, and finally to deliver. Every step of the way he is warned by the requirements of the law not to act hastily, or part with his freehold without deliberation. But even this was not all the purpose and aim of the forms attending the executed deed.

An element of public policy, a wisdom having a broader range, entered into the requirements. The importance of the act made it useful and wise to guard as completely as possible against fraud, and hinder attempts to divest inheritance by deception or crime." In *Alabama* acknowledgment dispenses with the necessity of attestation, but without attestation or acknowledgment the conveyance is ineffectual. *Hendon v. White*, 52 Ala. 597; *Lord v. Folmar*, 57 Ala. 615. In *Maryland* acknowledgment was essential under Act of 1766, ch. 14, § 2. *Trustees Catholic Cathedral Ch. v. Manning*, 72 Md. 116, 19 Atl. Rep. 599. In *Ohio* acknowledgment is an essential part of the execution of a deed. *Smith v. Hunt*, 13 Ohio, 260, 42 Am. Dec. 201.

<sup>3</sup> *Strough v. Wilder*, 119 N. Y. 530, 23 N. E. Rep. 1057, affirming 3 N. Y. Supp. 567; *Wood v. Chapin*, 13 N. Y. 509, 67

1111. In some States acknowledgment dispenses with proof of the execution of a deed. A deed executed, witnessed, and acknowledged, with all formalities essential to entitle it to be recorded, is entitled to be read in evidence without further proof of its execution, although it has never been recorded.<sup>1</sup> For the purpose of admission as evidence, it is immaterial whether the acknowledgment was made before or after the bringing of the suit in which such evidence is offered. If the paper shows an acknowledgment when it is offered, it may be read in evidence.<sup>2</sup> If it is necessary to record the deed before it is offered in evidence, it may be acknowledged and recorded at any time before it is so offered.<sup>3</sup> A deed not executed and recorded in the manner prescribed by statute is inadmissible in evidence without proof of its execution *aliunde*.<sup>4</sup>

1112. A certified copy from the registry of a deed acknowledged and recorded in accordance with the statutes is original evidence, and dispenses with calling attesting witnesses, or making other proof of execution, with the exception afterwards to be noted.<sup>5</sup> Such copy is not, perhaps, of the same weight as evidence as the deed itself, and such evidence is liable to be rebutted by

Am. Dec. 62. **California:** Landers *v.* Bolton, 26 Cal. 393; Hastings *v.* Vaughn, 5 Cal. 315. **Delaware:** Doe *v.* Prettyman, 1 Houst. 334, 339. In Illinois, however, the statute on this subject provides that deeds shall be deemed notice to subsequent purchasers and creditors, though not acknowledged or proven according to law; but the same shall not be read as evidence unless their execution be proved in the manner required by the rules of evidence applicable to such writings, so as to supply the defects of such acknowledgment or proof. In other words, the execution of such deeds must be proved. Reed *v.* Kemp, 16 Ill. 445; Carpenter *v.* Dexter, 8 Wall. 513, 532.

<sup>1</sup> **Kansas:** Comp. Laws 1885, ch. 26, §§ 51, 52; Stinson *v.* Geer, 42 Kans. 520, 22 Pac. Rep. 586. **Maine:** The statute applies to mortgages as well as to other deeds. New England Wiring Co. *v.* Farmington Electric Light Co. 84 Me. 284, 24 Atl. Rep. 848. **Minnesota:** McMillan *v.* Edfast, 50 Minn. 414, 52 N. W. Rep. 907;

Ferris *v.* Boxell, 34 Minn. 262, 25 N. W. Rep. 592; Ellingboe *v.* Brakken, 36 Minn. 156, 30 N. W. Rep. 659. **Pennsylvania:** Kirchline *v.* Kirchline, 54 Pa. St. 75. **Wisconsin:** Hinchliff *v.* Hinman, 18 Wis. 130.

<sup>2</sup> Pierce *v.* Brown, 24 Vt. 165; Kelly *v.* Dunlap, 3 Pen. & W. 136; Fisher *v.* Butcher, 19 Ohio, 406, 53 Am. Dec. 436.

<sup>3</sup> Harrington *v.* Gage, 6 Vt. 532; Pierce *v.* Brown, 24 Vt. 165.

<sup>4</sup> Lydiard *v.* Chute, 45 Minn. 277, 47 N. W. Rep. 967; L'Engle *v.* Reed, 27 Fla. 345, 9 So. Rep. 213.

<sup>5</sup> Dick *v.* Balch, 8 Pet. 30; Samuels *v.* Borrowscale, 104 Mass. 207; Fellows *v.* Fellows, 37 N. H. 75; Apel *v.* Kelsey, 47 Ark. 413, 2 S. W. Rep. 102; Boogher *v.* Neece, 75 Mo. 383; Dempsey *v.* Tylee, 3 Duer, 73; Skinner *v.* Pinney, 19 Fla. 42; Warner *v.* Hardy, 6 Md. 525; McMillan *v.* Edfast, 50 Minn. 414, 52 N. W. Rep. 907; Hancock *v.* Tram Lumber Co. 65 Tex. 232; Moses *v.* Dibrell, 2 Tex. Civ. App. 457, 21 S. W. Rep. 414.

any evidence which would have been admissible to disprove the execution of the original deed, if that had been produced.<sup>1</sup> But such evidence is of the same degree as the deed itself. The registry, when authorized by an acknowledgment in due form, is *prima facie* proof of the execution of the deed, but it is not conclusive.<sup>2</sup>

It seems that the office copy is evidence not because the deed is recorded, but because it could not be recorded until it had been acknowledged before a competent magistrate.<sup>3</sup> If there was no acknowledgment, or the certificate of acknowledgment is substantially defective, a certified copy is not admissible as evidence without further proof,<sup>4</sup> unless the deed has been recorded more than twenty years, in which case there is a presumption that the execution had been legally proved or acknowledged.<sup>5</sup> The certified copy of a deed is admissible in evidence, although the record itself is within reach and might be produced.<sup>6</sup>

1113. An exception to the rule that an office copy of a deed is original evidence is made in case a party relies upon a deed made directly to himself or to the other party, for such deed is presumed to be in the custody of one or the other. If the party who relies upon a deed is the grantee, he is presumed to be able to produce it; and it is also within his power, when the other party to the suit is the grantee, because upon notice to such adverse party to produce the deed he may give secondary evidence of it.<sup>7</sup> This exception is made in view of the customary practice in this country for the grantor to retain his own title-deeds, instead of delivering them to the grantee, and consequently it is not presumed that the grantee has possession of any deeds except those to which he is himself a party. If, therefore, a grantee wishes to offer in evidence a record copy of a deed to

<sup>1</sup> *Samuels v. Borrowscale*, 104 Mass. 207; *Ward v. Fuller*, 15 Pick. 185; *Thacher v. Phinney*, 7 Allen, 146.

<sup>2</sup> *O'Neil v. Webster*, 150 Mass. 572, 23 N. E. Rep. 235; *Samuels v. Borrowscale*, 104 Mass. 207; *Eaton v. Campbell*, 7 Pick. 10; *Pidge v. Tyler*, 4 Mass. 541.

<sup>3</sup> *Ward v. Fuller*, 15 Pick. 185, per Morton, J.

<sup>4</sup> *England v. Hatch*, 80 Ala. 247; *Roney v. Moss*, 76 Ala. 491; *Hill v. Taylor*, 77 Tex. 295, 14 S. W. Rep. 366.

<sup>5</sup> *White v. Hutchings*, 40 Ala. 247.

<sup>6</sup> *Preston v. Evans*, 56 Md. 476.

<sup>7</sup> *Brooks v. Marbury*, 11 Wheat. 78; *Samuels v. Borrowscale*, 104 Mass. 207; *Commonwealth v. Emery*, 2 Gray, 80; *Eaton v. Campbell*, 7 Pick. 10; *Scanlan v. Wright*, 13 Pick. 523, 25 Am. Dec. 344; *Woodman v. Coolbroth*, 7 Me. 181; *Wilson v. Wright*, 8 Utah, 215, 30 Pac. Rep. 754.

which he is a party, he must first lay the foundation for such secondary evidence by showing that the original deed has been lost or destroyed. Such evidence is not admissible when it appears that the grantee has left the original with a person in the city where the trial is had, and no effort has been made to produce it.<sup>1</sup>

When the original deed is the proper evidence, its execution must be proved as if it were not recorded. When a copy of a deed from the registry is competent, the registry is *prima facie* proof of its execution, but not conclusive.<sup>2</sup>

## II. Who may make an Acknowledgment.

1114. In general. — A deed can be acknowledged only by a person who has signed and sealed it as a grantor. Though a person be named in a deed as a grantor with others, the deed is not his until he has executed it, and of course he cannot acknowledge it as his deed.<sup>3</sup>

A deed executed by the selectmen of a town, or by commissioners empowered to convey public land, may be acknowledged by such selectmen or commissioners after their term of office has expired or their authority has been revoked.<sup>4</sup>

1115. A deed executed by an attorney under a power should be acknowledged by the attorney as the deed of his principal, and the certificate should recite that the attorney appeared and acknowledged the instrument to be the deed of his principal. But a certificate which recites that the principal appeared by his attorney, who acknowledged that he signed, sealed, and delivered the same as his voluntary act, is held to be sufficient, for the certificate is in effect that the attorney appeared before the officer taking the acknowledgment and acknowledged that the deed was the act of the principal.<sup>5</sup>

<sup>1</sup> Wilson v. Wright, 8 Utah, 215, 30 Pac. Rep. 754.

<sup>2</sup> O'Neil v. Webster, 150 Mass. 572, 23 N. E. Rep. 235, per W. Allen, J.; Samuels v. Borrowscale, 104 Mass. 207; Eaton v. Campbell, 7 Pick. 10; Commonwealth v. Emery, 2 Gray, 80; Pidge v. Tyler, 4 Mass. 541.

<sup>3</sup> Adams v. Medsker, 25 W. Va. 127; Pratt v. Clemens, 4 W. Va. 443; Crom-

well v. Tate, 7 Leigh, 301, 30 Am. Dec. 506.

<sup>4</sup> New Hampshire Land Co. v. Tilton, 19 Fed. Rep. 73; Lemington v. Stevens, 48 Vt. 38.

<sup>5</sup> Talbert v. Stewart, 39 Cal. 602; Bigelow v. Livingston, 28 Minn. 57; Huey v. Van Wie, 23 Wis. 613; Terrell v. Martin, 64 Tex. 121; McAdow v. Black, 6 Mont. 601, 13 Pac. Rep. 377; Frostburg Mut. Build. Asso. v. Brace, 51 Md. 508.



An instrument executed by one acting under a power of attorney, the acknowledgment of which is insufficiently executed, passes no title.<sup>1</sup>

In case a deed is executed by one as attorney for another and also in his own right, he should acknowledge it both in his individual and his representative capacity, and in the latter capacity he should acknowledge the deed as the act of his principal. But a certificate of acknowledgment which states that the principal by his attorney appeared and acknowledged is sufficient.<sup>2</sup>

**1116. Acknowledgment by trustee, guardian, etc.**—A certificate of acknowledgment of a deed made by one as trustee need not describe him as trustee, though he signed the instrument as trustee. It is sufficient to describe him by his name alone, though it is better to describe his fiduciary capacity as it is described in the deed.<sup>3</sup>

A deed executed under a decree by a guardian *ad litem*, acknowledged by the guardian to be "his act and deed as guardian as aforesaid, and thereby the act and deed of the said infant," was held to be in substantial compliance with the laws.<sup>4</sup>

A deputy sheriff who has executed in the name of the sheriff a certificate of sale under foreclosure proceedings, signing the sheriff's name and adding his own name as deputy, may acknowledge such certificate as executed by the sheriff, since both the execution of the certificate and the acknowledgment of it, being acts of the deputy, are acts of the sheriff.<sup>5</sup>

**1117. The deed of a corporation should be acknowledged by the officer who executed the deed and affixed the corporate seal.**<sup>6</sup> The certificate of acknowledgment should state the position and authority of the officer affixing the corporate seal, that the seal is the corporate seal, and that the instrument was signed and sealed in behalf of the corporation by authority of the board of directors or other trustees of the corporation, and that such corporate officer acknowledged the instrument to be the free act and

<sup>1</sup> McKinney v. Rodgers (Tex. Civ. App.), 29 S. W. Rep. 407.

<sup>2</sup> Munger v. Baldrige, 41 Kans. 236, 21 Pac. Rep. 159.

<sup>3</sup> Dail v. Moore, 51 Mo. 589.

<sup>4</sup> Van Ness v. Bank of U. S. 13 Pet. 17.

<sup>5</sup> Wilson v. Russell, 4 Dak. 376, 31 N. W. Rep. 645.

<sup>6</sup> Kelly v. Calhoun, 95 U. S. 710; Lovett v. Steam Saw Mill Asso. 6 Paige, 54; Hopper v. Lovejoy, 47 N. J. Eq. 573, 21 Atl. Rep. 298; Merrill v. Montgomery, 25 Mich. 73; Bowers v. Hechtman, 45 Minn. 238, 47 N. W. Rep. 792.

deed of the corporation.<sup>1</sup> These facts may properly be stated on the oath or affirmation of the corporate officer who makes the acknowledgment.<sup>2</sup>

A deed of a corporation under its corporate seal, signed by the president and secretary or cashier, is properly acknowledged by the secretary or cashier in behalf of the corporation, for usually the one or the other is the proper custodian of the seal. The object of the acknowledgment is to show that the deed is the act of the corporation, and the officer charged with the custody of the corporate seal is the proper person to show the corporate character of the deed.<sup>3</sup>

An acknowledgment of a deed of a corporation by its officer or agent as his act and deed should be read and understood, according to the manifest intention, as the acknowledgment of the corporation by its attorney.<sup>4</sup>

Under a statute requiring the officer of a corporation in making a deed to acknowledge it to be "the act of the corporation," an acknowledgment "for the purpose and considerations therein contained" is a substantial compliance.<sup>5</sup>

1118. The "personal knowledge" required of the officer taking the acknowledgment of a deed of a corporation is not merely acquaintance with the individual making the acknowledgment, but knowledge that such individual is the incumbent of the office in which he assumes to act for the corporation in the execution of the deed.<sup>6</sup> But the officer taking the acknowledg-

<sup>1</sup> Lovett v. Steam Saw Mill Asso. 6 Paige, 54; Jinwright v. Nelson (Ala.), 17 So. Rep. 91.

<sup>2</sup> For form, see Jones's Forms in Conveyancing, p. 2.

<sup>3</sup> Merrill v. Montgomery, 25 Mich. 73.

<sup>4</sup> Tenney v. East Warren Lumber Co. 43 N. H. 343; McDaniels v. Flower Brook Mannf. Co. 22 Vt. 274; Frostburg Mut. Build. Asso. v. Brace, 51 Md. 508; Bosshor v. Stewart, 54 Md. 376; Muller v. Boone, 63 Tex. 91; Huey v. Van Wie, 23 Wis. 613; Kansas City v. Hannibal St. Jo. R. Co. 77 Mo. 180; Eppright v. Nick-

michael (Tex.), 18 S. W. Rep. 734; Eppright v. Nickerson, 78 Mo. 482.

<sup>6</sup> Kelly v. Calhoun, 95 U. S. 710. In Hopper v. Lovejoy, 47 N. J. Eq. 573, 21 Atl. Rep. 298, Dixon, J., delivering the opinion, said: "The act says the officer taking the acknowledgment must be satisfied that the person executing and acknowledging the deed is the grantor mentioned in it. With regard to corporate deeds, he must, therefore, be satisfied that such person is, in the eye of the law, the grantor mentioned in it, — that is, authorized to represent the corporation in executing and acknowledging the conveyance. Being so satisfied, he accepts the acknowledgment of the representative as that of the grantor itself."

<sup>5</sup> Muller v. Boone, 63 Tex. 91; Monroe v. Arledge, 23 Tex. 478; Ballard v. Car-

ment is not required to take evidence that the corporate seal was affixed by authority, or to examine into the title of the person who assumes to be the officer of the corporation. The seal of the corporation proves itself, and is presumptive evidence that it was so affixed by due authority. It is for the party objecting to the instrument to show that the seal was improperly affixed.<sup>1</sup>

1119. The certificate of acknowledgment of a deed by a firm, in the firm name, should show by which member of the firm the signature was made and acknowledged. An acknowledgment purporting to have been made by the firm in the firm name is not sufficient to entitle the instrument to be recorded.<sup>2</sup> The certificate of acknowledgment need not state that the signing partner was authorized by the other to sign his name to the instrument.<sup>3</sup>

When a surviving partner has executed an instrument in his own right and "as surviving partner," he may acknowledge it as his free act and deed, and the certificate need not show that the deed was acknowledged by him "as surviving partner."<sup>4</sup>

### III. *Who may take an Acknowledgment.*

1120. In general. — The statutes of the several States designate the officers who may take acknowledgments.<sup>5</sup> The authority must be explicitly conferred and cannot be implied. Thus, a

<sup>1</sup> *Canandarqua Academy v. McKechnie*, 19 Hun, 62.

<sup>2</sup> *Sloan v. Owens, & Co.* 70 Mo. 206. The proper form of a certificate of acknowledgment to a deed of personal property executed in the partnership name is given in the case of *Keck v. Fisher*, 58 Mo. 532. In that case the instrument was signed "H. Helmreich & Co." The form of the certificate was as follows: "Be it remembered that H. Helmreich & Co., by Charles Baber, of the firm of H. Helmreich & Co., who is personally known, etc., appeared before me and acknowledged," etc. An acknowledgment of a deed of land which was executed in the firm name, and acknowledged in the form used in the last case, is sufficient, it appearing on the face of the deed that the person acknowledging was a member of the firm. *Leon Land Co.*

*v. Dunlap* (Tex. Civ. App.), 23 S. W. Rep. 473.

<sup>3</sup> *National Bank v. Scriven*, 18 N. Y. Supp. 277.

<sup>4</sup> *Hanson v. Metcalf*, 46 Minn. 25, 48 N. W. Rep. 441, 442. "The instrument was executed by but one and the same person. It shows on its face what was intended to be conveyed thereby, and the purposes thereof. The acknowledgment is the proof of its execution. Where the certificate identifies the party who alone executed the deed, and affirms that he personally acknowledged its execution, it must be interpreted to be for the uses and purposes disclosed by the instrument itself, and the omission of matter of description is not fatal." Per *Vanderburgh, J.*

<sup>5</sup> For a full statement of the statutory provisions, see *Jones's Forms in Conveyancing*, 2d ed. 1891.

statute authorizing mayors of cities to take acknowledgments gives the mayor of a town no authority to act.<sup>1</sup> But under a statute which required acknowledgments to be made before a justice of the peace, it had long been the established practice for a justice of the supreme court of a State to take acknowledgments, and Chief Justice Marshall considered this practice to be an exposition or construction of the law.<sup>2</sup>

The record of a deed purporting to be acknowledged before an officer not known to our laws is not admissible in evidence without proof of his authority.<sup>3</sup>

1121. Under a statute authorizing an acknowledgment before a "court of law," the acknowledgment is a ministerial and not a judicial act, and is not a matter to be entered of record. It is sufficient if done before the persons constituting the court; but, where the court is composed of several members, the acknowledgment is invalid unless taken before a sufficient number to constitute the court.<sup>4</sup>

Under a provision that an acknowledgment taken in another State may be taken before any "court of record," a certificate of acknowledgment purporting to be taken by a judge of a superior court which fails to show that such court was a court of record is invalid, yet the signature is valid as the attestation of a witness.<sup>5</sup>

1122. An acknowledgment made before a *de facto* officer is valid as between the parties, and authorizes the recording of the instrument, which thereupon becomes legal notice to the public. So far as the public and third persons are concerned, the acts of an officer *de facto* done by virtue of his office are as valid as if he were an officer *de jure*, and neither his title to the office nor his official acts can be indirectly called in question.<sup>6</sup> In order to constitute

<sup>1</sup> *Dundy v. Chambers*, 23 Ill. 369.

<sup>2</sup> *M'Keen v. Delancy*, 5 Cranch, 22; *Middlebury College v. Cheney*, 1 Vt. 336.

<sup>3</sup> *De Segond v. Culver*, 10 Ohio, 188.

<sup>4</sup> *Loree v. Abner*, 6 C. C. A. 302, 57 Fed. Rep. 159. Thus, under a statute making three justices necessary to constitute the court of common pleas for the county of Philadelphia, and an acknowledgment of a Virginia deed before two of them only was invalid.

<sup>5</sup> *Torrey v. Forbes*, 94 Ala. 135, 10 So. Rep. 320.

<sup>6</sup> *Woodruff v. McHarry*, 56 Ill. 218; *Prescott v. Hayes*, 42 N. H. 56; *People v. Collins*, 7 Johns. 549; *Brown v. Lunt*, 37 Me. 423; *Hamilton v. Pitcher*, 53 Mo. 334; *Wilson v. Kimmel*, 109 Mo. 260, 19 S. W. Rep. 24; *State v. Douglass*, 50 Mo. 593; *State v. Dierberger*, 90 Mo. 369, 2 S. W. Rep. 286; *Hamlin v. Kas-safer*, 15 Oreg. 456, 15 Pac. Rep. 778; *Macey v. Stark*, 116 Mo. 481, 21 S. W. Rep. 1088; *Bullene v. Garrison*, 1 Wash. T. 587.

an officer *de facto*, there must be some color of right to the office. One who assumes to execute the duties of an office without any color of title is a mere usurper, and his acts are void in all respects.<sup>1</sup> A justice of the peace duly commissioned for the county of Strafford, in the State of New Hampshire, having removed into the State of Maine, continued to act under his commission in the county of Strafford during the time for which he was originally appointed. It was held that after his removal from the State he was a *de facto* justice of the peace, and that an acknowledgment taken by him in the county of Strafford, in New Hampshire, was valid, and could not be inquired into collaterally.<sup>2</sup>

One is an officer *de facto* when he takes an acknowledgment after his commission has expired without being aware of the fact.<sup>3</sup> An alien who has been duly commissioned as a notary public is a *de facto* notary, and has authority to take acknowledgments of deeds.<sup>4</sup>

Commissioners appointed to take acknowledgments in other States, under a statute which provides that they "shall continue in office during the pleasure of the governor," are authorized to act until removed from office, and their authority does not cease when the governor who appointed them goes out of office.<sup>5</sup>

1123. An officer authorized to take an acknowledgment may do this by his deputy, in case he has power by law to appoint a deputy. As a general rule, a deputy has power to do all ministerial acts which his principal may do by virtue of his office.<sup>6</sup> The statutes sometimes expressly authorize acknowledgments to be taken before a deputy, but without the aid of such a statute it seems that where an officer is authorized to take an acknowledgment his deputy may also take the acknowledgment.<sup>7</sup>

<sup>1</sup> Prescott v. Hayes, 42 N. H. 56.

<sup>2</sup> Prescott v. Hayes, 42 N. H. 56.

<sup>3</sup> Brown v. Lunt, 37 Me. 423; Gilbraith v. Gallivan, 78 Mo. 452. See, however, Fitzgerald v. Milliken, 83 Ky. 70.

<sup>4</sup> Wilson v. Kimmel, 109 Mo. 260, 19 S. W. Rep. 24.

<sup>5</sup> Thorn v. Frazer, 60 Tex. 259.

<sup>6</sup> Parker v. Kett, 1 Salk. 95; Summer v. Mitchell, 29 Fla. 179, 30 Am. St. Rep. 106; Stewart v. Perkins, 110 Mo. 660, 19 S. W. Rep. 989.

<sup>7</sup> Lynch v. Livingston, 6 N. Y. 422; Muller v. Boggs, 25 Cal. 175; Touchard

v. Crow, 20 Cal. 150, 81 Am. Dec. 108; Emmal v. Webb, 36 Cal. 197; Woodruff v. McHarry, 56 Ill. 218; Hope v. Sawyer, 14 Ill. 254; Abrams v. Ervin, 9 Iowa, 87; Kemp v. Porter, 7 Ala. 138; Piper v. Chippewa Iron Co. 51 Minn. 495, 53 N. W. Rep. 870; Babbitt v. Johnson, 15 Kans. 252; Drye v. Cook, 14 Bush, 459; Gordon v. Leech, 81 Ky. 229; Gibbons v. Gentry, 20 Mo. 468; Rose v. Newman, 26 Tex. 131, 80 Am. Dec. 646; Cook v. Nott, 28 Tex. 85; McCravin v. McGuire, 23 Miss. 100.

This is sometimes put upon the ground that an officer taking an acknowledgment acts ministerially and not judicially, and that a ministerial act may always be performed by a deputy if the officer has power to appoint one.<sup>1</sup>

In like manner the clerk of a judge of probate who is authorized to take acknowledgments may take the acknowledgment and make the certificate in the name of the judge.<sup>2</sup>

But the admitting of a deed to probate and ordering it to be registered, as is required in some States, is a judicial act which cannot be delegated to a deputy.<sup>3</sup>

The power of an officer to appoint a deputy may be implied from the nature of his office. Thus the office of clerk of a court seems to be one which, from its nature and constitution, implies such a power. Every presumption of law is in favor of the rightful authority of such a deputy.<sup>4</sup>

The seal of the court being affixed to the certificate carries with it *prima facie* evidence that it was rightfully affixed, and throws the burden of overcoming the *prima facie* case thus made on the objectors to the sufficiency of the certificate.<sup>5</sup>

1124. Whether a deputy taking an acknowledgment should act in the name of his principal, or in his own name, is a question upon which the authorities in different States are at variance. On the one hand, it is said that the deputy is but the "officer's shadow," and must do all things in the name of his principal, and not in his own name. "Authority is not given to the deputy, but to the principal, and is exercised by the principal, either by himself or his deputy." Therefore a deputy clerk taking an acknowledgment should fill out the body of the certificate in the same manner as if the clerk himself had taken the acknowledgment; and the deputy should sign the name of his principal to the certificate, adding his own name as deputy,<sup>6</sup>

<sup>1</sup> Lynch v. Livingston, 8 Barb. 463; Rep. 815; Summer v. Mitchell, 29 Fla. Abrams v. Ervin, 9 Iowa, 87; Beaumont 179, 10 So. Rep. 562.  
v. Yeatman, 8 Humph. 542; McCraven v. <sup>5</sup> Musser v. Johnson, 42 Mo. 74, 97  
McGuire, 23 Miss. 100. Am. Dec. 316; Piper v. Chippewa Iron  
Co. 51 Minn. 495, 53 N. W. Rep. 870.

<sup>2</sup> Shelton v. Aultman T. Co. 82 Ala. 315, 8 So. Rep. 232; Halso v. Seawright, 65 Ala. 431.

<sup>3</sup> White v. Connelly, 105 N. C. 65, 11 S. E. Rep. 177.

<sup>4</sup> Small v. Field, 102 Mo. 104, 14 S. W.

<sup>6</sup> Talbott v. Hooser, 12 Bush, 408; Hope v. Sawyer, 14 Ill. 254; Drye v. Cook, 14 Bush, 459; Abrams v. Ervin, 9 Iowa, 87; Gibbons v. Gentry, 20 Mo. 468; Muller v. Boggs, 25 Cal. 175; Mc-

though it has been held that the certificate is not invalid in case the deputy signs his principal's name and omits to add his own name as acting for his principal.<sup>1</sup> It is said, however, in some cases, that the deputy should certify over his own signature, and not over the signature of his principal, although he adds his own name as deputy.<sup>2</sup>

But a deputy taking an acknowledgment may make the certificate in the usual form for an acknowledgment, and it will be sufficient though it be throughout in the deputy's name, without mentioning the principal either in the body of the certificate or in the signature, and he signs only his own name as deputy.<sup>3</sup> It is not essential that the name of the principal should appear either in the certificate or the signature.<sup>4</sup> It is, however, more regular in point of form for the deputy to act in the name of his principal.<sup>5</sup> If a deputy be expressly mentioned in a statute as an officer authorized to take an acknowledgment, he may, of course, certify the acknowledgment in his own name alone as such deputy.<sup>6</sup>

**1125. The grantee or trustee in a deed cannot himself take the grantor's acknowledgment.** The deed in such case remains operative between the parties, but though it is recorded the record does not afford constructive notice under the registry laws.<sup>7</sup> "A

*Craven v. Doe*, 23 Miss. 100; *Lynch v. Livingston*, 6 N. Y. 422.

<sup>1</sup> *Talbott v. Hooser*, 12 Bush, 408.

<sup>2</sup> *Mackenzie v. Jackson*, 82 Ga. 80, 8 S. E. Rep. 77.

<sup>3</sup> *Touchard v. Crow*, 20 Cal. 150, 81 Am. Dec. 108; *Cook v. Knott*, 28 Tex. 85; *Gordon v. Leech*, 81 Ky. 229; *Woods v. James*, 87 Ky. 511; *Summer v. Mitchell*, 29 Fla. 179, 10 So. Rep. 562. See, however, *Beuley v. Curtis*, 92 Ky. 505, 18 S. W. Rep. 357.

<sup>4</sup> *Beaumont v. Yeatman*, 8 Humph. 542.

<sup>5</sup> *McCraven v. Doe*, 23 Miss. 100.

<sup>6</sup> *Herndon v. Reed*, 82 Tex. 647, 18 S. W. Rep. 665.

<sup>7</sup> *Arkansas*: *Green v. Abraham*, 43 Ark. 420. *Colorado*: *Brereton v. Bennett*, 15 Colo. 254, 25 Pac. Rep. 310. *Florida*: *Hogans v. Carruth*, 18 Fla. 587. *Illinois*: *Darst v. Gale*, 83 Ill. 136; *West v. Kre-*

*baum*, 88 Ill. 263; *Hammers v. Dole*, 61 Ill. 307. *Iowa*: *Wilson v. Traer*, 20 Iowa, 231; *Dussuame v. Burnett*, 5 Iowa, 95. *Maine*: *Beaman v. Whitney*, 20 Me. 413. *Michigan*: *Groesbeck v. Seeley*, 13 Mich. 329. *Mississippi*: *Wasson v. Conner*, 54 Miss. 351; *Jones v. Porter*, 59 Miss. 628. *Missouri*: *Bennett v. Shipley*, 82 Mo. 448; *Stevens v. Hampton*, 46 Mo. 404; *Dail v. Moore*, 51 Mo. 589; *Black v. Gregg*, 58 Mo. 565; *Hainey v. Alberry*, 73 Mo. 427. *North Carolina*: *Freeman v. Person*, 106 N. C. 251, 10 S. E. Rep. 1037. *Pennsylvania*: *Withers v. Baird*, 7 Watts, 227, 32 Am. Dec. 754. *Texas*: *Brown v. Moore*, 38 Tex. 645; *Rothschild v. Daugher*, 85 Tex. 332, 20 S. W. Rep. 142, 34 Am. St. Rep. 816, 16 L. R. A. 719; *Sample v. Irwin*, 45 Tex. 567. *Virginia*: *Corey v. Moore*, 86 Va. 721, 11 S. E. Rep. 114; *Davis v. Beazley*, 75 Va. 491; *Bowden v. Parrish*, 86 Va. 67, 9 S. E. Rep.

deed acknowledged before one named as grantee carries upon its face notice of that fact, or, what is equivalent, notice of circumstances sufficient to put a reasonable man upon inquiry. But when the name of the officer taking the acknowledgment does not appear as grantee, or as otherwise interested, no such notice or presumption accompanies the deed or its record.”<sup>1</sup> Where a recorded instrument shows upon its face that the acknowledgment was taken by a party in interest, it cannot be properly recorded, and is not constructive notice; but when it is fair upon its face, it is the duty of the register to receive and record it, and its record operates as notice, notwithstanding that there may be some hidden defect.<sup>2</sup> A trust deed, in which the acknowledgment is taken before the trustee named therein, is void.<sup>3</sup>

Neither can a clerk of court who is the grantee in a deed which has been acknowledged before the proper officer adjudge that the acknowledgment is in due form and order the registration of the deed.<sup>4</sup>

An acknowledgment taken by a grantee or trustee named in the deed is, however, validated by a general act curing defective acknowledgments.<sup>5</sup>

A grantor cannot, of course, acknowledge his own deed before himself as an officer, though attempts to do this have been known.<sup>6</sup>

**1126. An interest under a deed not apparent on its face does not disqualify an officer to take and certify an ordinary acknowledgment.** Thus, if he is one of the beneficiaries in a

616, 19 Am. St. Rep. 873; *Clinch Riv. Veneer Co. v. Kurth* (Va.), 19 S. E. Rep. 878. *West Virginia*: *Tavener v. Barrett*, 21 W. Va. 656.

There seems to be an exception to this general rule in case the grantee happens to be the only person authorized by law to take acknowledgment. *Stevenson v. Brasher*, 90 Ky. 23, 13 S. W. Rep. 242; *Lewis v. Curry*, 74 Mo. 49.

<sup>1</sup> *National Bank of Fredericksburg v. Conway*, 1 Hughes, 37, 45, per Waite, C. J.

<sup>2</sup> *Stevens v. Hampton*, 46 Mo. 404; *National Bank of Fredericksburg v. Conway*, 1 Hughes, 37. In *Corey v. Moore*, 86 Va. 721, 11 S. W. Rep. 114, it ap-

peared that to a deed made to “L. Triplett, Jr.,” as trustee, there was attached a certificate of the grantor’s acknowledgment, in the body of which the notary taking the same was described as “L. Triplett, Jr.,” but the certificate was signed simply “L. Triplett, N. P.” It was held that it did not appear that the notary was the same person as the trustee.

<sup>3</sup> *Clinch Riv. Veneer Co. v. Kurth* (Va.), 19 S. E. Rep. 878.

<sup>4</sup> *Turner v. Connelly*, 105 N. C. 72, 11 S. E. Rep. 179.

<sup>5</sup> *Apel v. Kelsey*, 47 Ark. 413, 2 S. W. Rep. 102.

<sup>6</sup> *Beaman v. Whitney*, 20 Me. 413; *Davis v. Beazley*, 75 Va. 491.



deed of trust, he may take the grantor's acknowledgment, when his interest under the deed does not appear on the face of it.<sup>1</sup> The fact that he acted as the agent of the mortgagor in obtaining the money does not disqualify him to take the mortgagor's acknowledgment.<sup>2</sup>

The chief use of an acknowledgment, as already noticed, is to perfect the deed for record. The grantor can select such authorized officer before whom to acknowledge his deed as he chooses. He may refuse to make his acknowledgment before an interested officer. Having voluntarily acknowledged the deed, the grantor is presumed to have voluntarily consented to its record. "If his deed is found on record, apparently executed according to the forms of law, and without any circumstances of suspicion against it, the plainest principle of equity would hold him estopped from setting up an undisclosed interest of the officer before whom he made his acknowledgment, to defeat his conveyance, as against an innocent purchaser relying upon the record as the evidence of his title."<sup>3</sup>

1127. But the taking of an ordinary acknowledgment is generally regarded as a ministerial and not a judicial act,<sup>4</sup> and an officer is not disqualified to act for the reason that the grantee is his wife;<sup>5</sup> or a near relative or attorney of the grantee;<sup>6</sup> or his partner;<sup>7</sup> or that he is an officer of the corporation that executed the deed, provided his signature is not necessary to its validity.<sup>8</sup>

<sup>1</sup> *National Bank v. Conway*, 1 Hughes, 37; *Dussaume v. Burnett*, 5 Iowa, 95.

See, however, *Wilson v. Traer*, 20 Iowa, 231, 233.

<sup>2</sup> *Penn v. Garvin*, 56 Ark. 511, 20 S. W. Rep. 410.

<sup>3</sup> *National Bank v. Conway*, 1 Hughes, 37, 46, per Waite, C. J.

<sup>4</sup> *Schults v. Moore*, 1 McLean, 520; *Lynch v. Livingston*, 6 N. Y. 422; *Learned v. Riley*, 14 Allen, 109; *Odiorne v. Mason*, 9 N. H. 24; *Biscoe v. Byrd*, 15 Ark. 655; *Gill v. Fauntleroy*, 8 B. Mon. 177; *Crumbaugh v. Kugler*, 2 Ohio St. 373; *Truman v. Lore*, 14 Ohio St. 144; *Williamson v. Carskadden*, 36 Ohio St. 664; *Hill v. Bacon*, 43 Ill. 477; *People v. Bartels*, 138 Ill. 322, 27 N. E. Rep. 1091; *Halso v.*

*Seawright*, 65 Ala. 431; *Curtiss v. Colby*, 39 Mich. 456; *Doran v. Butler*, 74 Mich. 643, 42 N. W. Rep. 273; *Fogarty v. Finlay*, 10 Cal. 239, 70 Am. Dec. 714. *Contra*, *Wasson v. Connor*, 54 Miss. 351, 357.

<sup>5</sup> *Kimball v. Johnson*, 14 Wis. 674. *Contra*, *Jones v. Porter*, 59 Miss. 628.

<sup>6</sup> *Remington Paper Co. v. O'Dougherty*, 81 N. Y. 474; *Lynch v. Livingston*, 6 N. Y. 422, 8 Barb. 463; *First Nat. Bank v. Roberts*, 9 Mont. 323, 23 Pac. Rep. 718; *Barber v. Briscoe*, 9 Mont. 341, 23 Pac. Rep. 726.

<sup>7</sup> *Brereton v. Bennett*, 15 Colo. 254, 25 Pac. Rep. 310.

<sup>8</sup> *Sawyer v. Cox*, 63 Ill. 130. It was held that a notary was not disqualified

1128. But the taking and certifying the acknowledgment of a married woman upon a separate examination is a judicial act, and not ministerial only;<sup>1</sup> and therefore it is held that an officer interested in a deed requiring such acknowledgment is disqualified from taking and certifying it.<sup>2</sup> The magistrate should be in a position of judicial impartiality. Though he is not a direct party to the deed, if he is under obligation to make title to the land by obtaining a conveyance from a third person, he is incompetent to take the acknowledgment of the grantor's wife.<sup>3</sup>

#### IV. *Jurisdiction of Officer.*

1129. The taking of the acknowledgment of a deed is a ministerial act, which may be done by a justice of the peace or notary public in case his jurisdiction is not expressly limited, within the limits of the State in which he is commissioned to act, though not within his county.<sup>4</sup> The taking of an acknowledgment involves no compulsion or summons of any person who does not appear of his own accord; and it requires no investigation of the circumstances under which the deed was executed, or of the condition of mind of the person making the acknowledgment,<sup>5</sup> except in case of the separate examination of a married woman; in that case it seems that the taking of an acknowledgment is regarded as a judicial act, and a justice of the peace is confined

from taking the acknowledgment of a deed of a corporation executed under its seal by the proper officer, though countersigned by the notary as secretary of the corporation, his signature not being necessary to the validity of the instrument.

In Virginia, a recent statute, Acts 1893-94, p. 580, provides that a notary public or other officer may take the acknowledgment of a deed executed by a corporation in which he is a shareholder or officer.

<sup>1</sup> *National Bank of Fredericksburg v. Conway*, 1 Hughes, 37; *Freeman v. Love*, 14 Ohio St. 531; *Lynch v. Livingston*, 6 N. Y. 422; *People v. Bartels*, 138 Ill. 322, 27 N. E. Rep. 1091, per Magruder, J.; *Calumet, &c. Dock Co. v. Russell*, 68 Ill. 426; *Kerr v. Russell*, 69 Ill. 666, 18 Am. Rep. 634; *Long v. Crews*, 113 N. C. 256, 18 S. E. Rep. 499. It is not to be cured

by probate upon such acknowledgment before the clerk and registration. *White v. Connelly*, 105 N. C. 65, 11 S. E. Rep. 177; *Freeman v. Person*, 106 N. C. 251, 10 S. E. Rep. 1037.

<sup>2</sup> *Withers v. Baird*, 7 Watts, 227, 32 Am. Dec. 754.

<sup>3</sup> *Withers v. Baird*, 7 Watts, 227, 32 Am. Dec. 754.

<sup>4</sup> *Odiorne v. Mason*, 9 N. H. 24; *Learned v. Riley*, 14 Allen, 109; *Pearson v. Howey*, 11 N. J. L. 12; *Biscoe v. Byrd*, 15 Ark. 655; *Crumbaugh v. Kugler*, 2 Ohio St. 373; *Moore v. Moore*, 33 Ohio St. 154; *Moore v. Vance*, 1 Ohio, 1; *Duly v. Brooks*, 30 Mo. 515; *Hughes v. Wilkinson*, 37 Miss. 482, since Act of 1836. *Contra*, *Share v. Anderson*, 7 S. & R. 43, 10 Am. Dec. 421.

<sup>5</sup> *Learned v. Riley*, 14 Allen, 109.

to his own county.<sup>1</sup> The general rule is, however, that an officer having authority to take and certify acknowledgments may exercise this authority wherever he may be, unless his authority is expressly restricted within territorial limits.<sup>2</sup>

1130. The presumption always is that the officer exercises his functions within his jurisdiction, though this does not appear on the face of the certificate, or the venue appears only by inference.<sup>3</sup> If the caption of the certificate names the State and county, and the certificate states that the officer is a justice of the peace in and for the said county, the certificate is sufficient although it does not show that the grantor appeared before him in that county. It is presumed that the justice did not do an illegal act by taking an acknowledgment out of his county.<sup>4</sup>

1131. The certificate must show in what State the acknowledgment was taken, though it may sometimes happen that the State where the acknowledgment was taken may be inferred from the contents of the deed. If the certificate states the venue simply as the county of New York, and nothing appears in the body of the deed, or in other parts of the certificate, to indicate in what State the acknowledgment was taken, the acknowledgment is insufficient to authorize the recording of the deed and to make it admissible in evidence.<sup>5</sup> But the defect may be cured by reference to a certificate of authentication made by the county clerk of such county in the State of New York, which shows that the officer who took the acknowledgment was a duly authorized officer for the county of New York in the State of New York.<sup>6</sup>

1132. An omission to name the State in which the acknowledgment was taken may be supplied by reference to the

<sup>1</sup> *Share v. Anderson*, 7 S. & R. 63, 11 Am. Dec. 421; *Watson v. Bailey*, 1 Binn. 470, 2 Am. Dec. 462.

<sup>2</sup> Thus it has been held that a judge may act outside his State in taking acknowledgments which he was authorized to take within the State. *Moore v. Vance*, 1 Ohio, 1; *Kinsman v. Loomis*, 11 Ohio, 475. But, *contra*, see *Jackson v. Colden*, 4 Cow. 266; *Jackson v. Humphrey*, 1 Johns. 498.

<sup>3</sup> *Carpenter v. Dexter*, 8 Wall. 513; *People v. Snyder*, 41 N. Y. 397; *Rackleff v. Norton*, 19 Me. 274; *Sidwell v. Birney*,

69 Mo. 144; *Owen v. Baker*, 101 Mo. 407, 14 S. W. Rep. 175; *Huxley v. Harrold*, 62 Mo. 516; *Bradley v. West*, 60 Mo. 33; *Graham v. Anderson*, 42 Ill. 514, 92 Am. Dec. 89; *Dunlap v. Daugherty*, 20 Ill. 397; *Williams v. Kerr*, 113 N. C. 306, 18 S. E. Rep. 501; *Morrison v. White*, 16 La. Ann. 100.

<sup>4</sup> *Bensimer v. Fell*, 35 W. Va. 15, 12 S. E. Rep. 1078.

<sup>5</sup> *Hardin v. Kirk*, 49 Ill. 153, 95 Am. Dec. 581.

<sup>6</sup> *Hardin v. Osborne*, 60 Ill. 93.

deed. Thus, when a deed shows that the grantor was a resident of Hartford County, in the State of Connecticut, and the acknowledgment taken two days after the date of the deed had as its venue Hartford County, without naming any State, it was held to be a fair presumption that the acknowledgment was made in the same county of Hartford in which the deed was supposed to have been executed.<sup>1</sup> Though a notary's certificate of acknowledgment fails to show in what State it was taken, the defect is made good by his official seal which gives the name of the State, and complies with the statutory provision of that State as to its form.<sup>2</sup>

1133. The certificate must show the county in which the officer taking the acknowledgment acted, in case such officer's jurisdiction is confined to the county for which he received his appointment. In some of the States the jurisdiction of justices of the peace and some other officers in the taking of acknowledgments is expressly confined to the county for which they are appointed, or to the county in which the land lies, or in which the grantor resides; and of course such statutory restrictions of their jurisdiction must be strictly observed to make the acknowledgments taken by such officers valid.<sup>3</sup> If no county is named in the certificate, there may be a presumption that the acknowledgment was taken in the county in which the officer in fact had jurisdiction;<sup>4</sup> and in case the certificate described the officer as "a justice of the peace in and for said county," and one county only was named in the deed, the venue will be regarded as sufficiently described by such reference.<sup>5</sup>

<sup>1</sup> *Brooks v. Chaplin*, 3 Vt. 281, 23 Am. Dec. 209, cited and approved in *Carpenter v. Dexter*, 8 Wall. 513. See, also, *Touchard v. Crow*, 20 Cal. 150, 81 Am. Dec. 108; *Fuhrman v. Loudon*, 13 S. & R. 386, 15 Am. Dec. 608; *Luffborough v. Parker*, 12 S. & R. 48; *Truluck v. Peeples*, 1 Ga. 3; *Oney v. Clendenin*, 28 W. Va. 84; *Adams v. Medsker*, 25 W. Va. 127; *Robidoux v. Cassilegi*, 10 Mo. App. 516.

<sup>2</sup> *Stephens v. Motl*, 81 Tex. 115, 16 S. W. Rep. 731.

<sup>3</sup> *Johns v. Reardon*, 3 Md. Ch. 57; *Hedger v. Ward*, 15 B. Mon. 106; *Dickerson v. Talbot*, 14 B. Mon. 60; *Ferebee*

*v. Hinton*, 102 N. C. 99, 8 S. E. Rep. 922; *Long v. Crews*, 113 N. C. 256, 18 S. E. Rep. 499, per Clark, J.; *Williams v. Kerr*, 113 N. C. 306, 18 S. E. Rep. 501; *De Courcy v. Barr*, 1 Busb. Eq. 181; *Todd v. Outlaw*, 79 N. C. 235; *Duke v. Markham*, 105 N. C. 138, 10 S. E. Rep. 1017.

<sup>4</sup> *Rackleff v. Norton*, 19 Me. 274; *Thurman v. Cameron*, 24 Wend. 87, 92, per Cowen, J.; *Douglas v. Bishop*, 45 Kans. 200, 25 Pac. Rep. 628; *Bradley v. West*, 60 Mo. 33; *Sidwell v. Birney*, 69 Mo. 144. See, however, *Willard v. Cramer*, 36 Iowa, 22; *Smith v. Garden*, 28 Wis. 685.

<sup>5</sup> *Fuhrman v. Loudon*, 13 S. & R. 386,

Other parts of the certificate, such as the seal<sup>1</sup> or the caption,<sup>2</sup> may be referred to in its aid in case of an error or omission as to the venue; and for the same purpose an accompanying certificate of authentication may be referred to.<sup>3</sup>

If the certificate upon its face shows that the acknowledgment was taken out of the county in which the officer had jurisdiction, the acknowledgment is invalid, and insufficient to authorize the recording of the deed; and, although the deed is recorded, an office copy of it is not admissible in evidence.<sup>4</sup>

**1134.** When the venue is falsely laid within the officer's jurisdiction, as where an officer having jurisdiction only within his county takes an acknowledgment outside his county, though his certificate is correct in form, and lays the venue within the county of his jurisdiction, its validity may be contested.<sup>5</sup> This being a question of jurisdiction, the certificate, though correct in form, may be contradicted.<sup>6</sup> An act done by the officer beyond the boundaries of his local jurisdiction, no matter how formal he may make it appear, is a sheer usurpation, having no more effect than the act of a private person. But where an officer has authority to take acknowledgments anywhere in the State, the addition, in the venue to the certificate, of a wrong county, does not affect its validity.<sup>7</sup>

15 Am. Dec. 608; *Bensimer v. Fell*, 35 W. Va. 15, 12 S. E. Rep. 1078.

<sup>1</sup> *Broussard v. Dull*, 3 Tex. Civ. App. 59, 21 S. W. Rep. 937; *Chiniquy v. Catholic Bishop*, 41 Ill. 148, where a seal of a county was used by the clerk of a county court. But where it is requisite that the officer should set forth his title in his certificate, the requirement is not fulfilled by the affixing of his notarial seal bearing the name of the county. *Willard v. Cramer*, 36 Iowa, 22.

<sup>2</sup> *Sidwell v. Birney*, 69 Mo. 144; *Wright v. Wilson*, 17 Mich. 192.

<sup>3</sup> *Adams v. Medsker*, 25 W. Va. 127; *Dunlap v. Daugherty*, 20 Ill. 397.

<sup>4</sup> *Hughes v. Wilkinson*, 37 Miss. 482. In *Pennsylvania*, however, where a certificate on its face purported to have been made by a justice of the peace in Erie County, when in fact it was made in Crawford County by a justice of the peace

of that county, evidence *aliunde* was admitted to establish this fact, and the acknowledgment was held sufficient. *Angier v. Schieffelin*, 72 Pa. St. 106, 13 Am. Rep. 659. But it is contrary to the well-established rule that parol evidence is not admissible to contradict a certificate, or to supply defects in it.

<sup>5</sup> *Mutual Life Ins. Co. v. Corey*, 54 Hun, 493, 7 N. Y. Supp. 939. In *New York* the jurisdiction of a notary public is confined to the county for which he is appointed. *Share v. Anderson*, 7 Serg. & R. 43; *Bradley v. West*, 60 Mo. 33; *Rackleff v. Norton*, 19 Me. 274; *Edinburgh Am. Land Mortg. Co. v. Peoples (Ala.)*, 14 So. Rep. 656; *New Eng. Mortg. Security Co. v. Payne (Ala.)*, 18 So. Rep. 164.

<sup>6</sup> *Thurman v. Cameron*, 24 Wend. 87.

<sup>7</sup> *Roussain v. Norton*, 53 Minn. 560, 55 N. W. Rep. 747; *Clague v. Washburn*,

1135. Domicil of persons making acknowledgment. — It is immaterial whether the persons whose acknowledgments are taken in a foreign state, before a commissioner or other officer duly authorized for the purpose, are then domiciled in the State in which the acknowledgments are taken, or are only temporarily in that State, and are domiciled in the State where the land conveyed is situated.<sup>1</sup>

### V. *Manner of Taking and Certifying.*

1136. In general. — The acknowledgment must be certified in writing; it cannot be proved by parol evidence.<sup>2</sup> It cannot be partly in writing and partly in parol.<sup>3</sup>

The certificate may be written upon any part of the deed, even in case the statute in terms requires it to be indorsed.<sup>4</sup> It may be in the body of the deed, instead of the usual place at the foot of it.<sup>5</sup> Unless the statute requires the certificate to be written upon the deed, it may be written on a paper separate from the deed, and pasted or attached to that.<sup>6</sup>

Under a statute requiring the officer to certify the acknowledgment on the same sheet on which the deed is printed or written, a certificate made upon a separate strip of paper, and attached to the deed by a wafer, with the officer's seal upon the same, does not meet the requirement.<sup>7</sup>

1137. An officer who has taken an acknowledgment may make his certificate at any time afterwards while he remains in office, but intervening rights of third persons are not affected.<sup>8</sup> He may correct his certificate after its execution by inserting words to make it conform to the facts and the requirements of

42 Minn. 371, 44 N. W. Rep. 130; Bank v. Hove, 45 Minn. 40, 47 N. W. Rep. 449.

<sup>1</sup> Maphis v. Pegram, 107 N. C. 505, 12 S. E. Rep. 235; Buggy Co. v. Pegram, 102 N. C. 540, 9 S. E. Rep. 412.

<sup>2</sup> Pendleton v. Button, 3 Conn. 406.

<sup>3</sup> Lindley v. Smith, 46 Ill. 523.

<sup>4</sup> Thurman v. Cameron, 24 Wend. 87.

<sup>5</sup> Brownson v. Scanlan, 59 Tex. 222; Snowden v. Rush, 69 Tex. 593, 6 S. W. Rep. 767.

<sup>6</sup> Schramm v. Gentry, 63 Tex. 583.

<sup>7</sup> Winkler v. Higgins, 9 Ohio St. 599. Per Sutliff, J.: "The facility with which such a certificate of acknowledgment might be removed from one instrument and attached to others would greatly impair the public security against intentional frauds. Indeed, such a certificate of acknowledgment upon a separate piece of paper is alike in contravention of the express language and the undoubted meaning of the statute."

<sup>8</sup> Harmon v. Magee, 57 Miss. 410.

the statute ; as, for instance, by inserting words to show that the parties were personally known to him.<sup>1</sup>

The certificate, as regards its form and contents, must meet the requirements of the statute.<sup>2</sup> The form is sometimes given in the statute, but usually such form is only a suggestion of what is sufficient, and not strictly obligatory.<sup>3</sup>

**1138. An official taking an acknowledgment is not required to explain the contents of the deed to the grantor, although, if he is known to the officer to be illiterate, aged, or weak in mind, it would be eminently proper that the officer should read and explain the contents of the instrument, so that it might be understood by the party executing it.<sup>4</sup> It is only in case the grantor is a married woman that the officer is required to explain the contents of the deed.<sup>5</sup>**

A certificate of acknowledgment of a married woman which shows that she was deaf and dumb, but that the nature and purport and contents of the deed were fully explained to her through a third person who was accustomed to converse with her by signs, and that she freely and voluntarily acknowledged the execution of the same, is sufficient.<sup>6</sup>

**1139. An acknowledgment taken through an interpreter is valid.** In taking the acknowledgment of a married woman under a statute which requires that she shall be made acquainted with the contents of the conveyance, the contents may be made known to her through a sworn interpreter.<sup>7</sup> If such information is imparted through the interpreter in the officer's presence and by his direction, it is the same as if imparted by the officer himself. The officer is authorized to use the ordinary and customary mode of

<sup>1</sup> *Hanson v. Cochran*, 9 *Houst.* 184, 31 *Atl. Rep.* 880.

<sup>2</sup> *Huse v. Ames*, 104 *Mo.* 91, 15 *S. W. Rep.* 965.

<sup>3</sup> *Hughes v. McDivitt*, 102 *Mo.* 77, 15 *S. W. Rep.* 756.

<sup>4</sup> *Beville v. Jones*, 74 *Tex.* 148, 11 *S. W. Rep.* 1128. See § 1009.

<sup>5</sup> In *Alabama*, however, the statute provides that a person making acknowledgment shall be informed of the contents of the deed, and under such statute a certificate which does not make such statement is substantially defective. *Roney v. Moss*,

76 *Ala.* 491 ; *Keller v. Moore*, 51 *Ala.* 340 ; *Boykin v. Smith*, 65 *Ala.* 294.

<sup>6</sup> In the *Matter of Harper*, 6 *Man. & G.* 732, 7 *Scott, N. R.* 431.

<sup>7</sup> *De Arnaz v. Escandon*, 59 *Cal.* 486 ; *Waltee v. Weaver*, 57 *Tex.* 569. In this case the married woman did not speak English, and the deed was explained to her by the officer through an interpreter of her own selection, who seems not to have been sworn. It was held that she could not be heard to say that the interpreter was incompetent or corrupt, or failed to interpret correctly.

communicating the information to the married woman.<sup>1</sup> Mr. Justice Field, delivering the opinion, said: "If she understands our language, that would be the appropriate vehicle of communication; if a foreigner, ignorant of our language, the employment of a sworn interpreter would be the natural means, in analogy to the course pursued in taking testimony in the courts of justice; if deaf, and she reads writing, the information might be given by the pen, or, if she understood them, by the signs employed by mutes. The officer will comply with the law when he avails himself of the common means used by men in the ordinary transactions of life, exacting from the agents employed the security of an oath. It is not necessary, however, for him to state in his certificate in what manner the information is imparted."<sup>2</sup>

Evidence that the grantor of a deed, acknowledged by him as such, was informed by one who acted as interpreter, the grantor being ignorant of English, that the instrument was a mortgage, was inadmissible to prove that the deed was intended as a mortgage, since the certificate of acknowledgment is conclusive of the facts therein stated, no fraud being alleged on the part of the grantee.<sup>3</sup>

In Michigan, however, it seems that an acknowledgment by an officer unacquainted with the language of the grantor, but acting through the medium of an interpreter, is not valid, in the absence of any statute authorizing the use of an interpreter for such purpose.<sup>4</sup> The officer must certify the facts stated in his certificate upon his own knowledge, obtained by an intelligent interchange of conversation, and not upon hearsay.<sup>5</sup> The officer's certificate is of little force when the person making the acknowledgment and the officer taking it have no common language and cannot understand each other.<sup>6</sup>

A certificate of acknowledgment made by an officer merely upon the assurance of another that the grantee executed the deed is a nullity.<sup>7</sup>

**1140. An acknowledgment by use of a telephone, certified in due form, is conclusive of the facts stated, so long as it is not**

<sup>1</sup> Norton v. Meader, 4 Sawyer, 603.

<sup>4</sup> Dewey v. Campau, 4 Mich. 565.

<sup>2</sup> The statement last quoted is confirmed by the case of Chesnut v. Shane, 16 Ohio, 599, 47 Am. Dec. 387.

<sup>5</sup> Fisher v. Meister, 24 Mich. 447.

<sup>6</sup> Harrison v. Oakman, 56 Mich. 390, 23 N. W. Rep. 164.

<sup>8</sup> Herring v. White, 6 Tex. Civ. App. 249, 25 S. W. Rep. 1016.

<sup>7</sup> Mays v. Hedges, 79 Ind. 288.



impeached for fraud, duress, or mistake. It is immaterial that the acknowledgment was of a deed by a married woman upon an examination without the hearing of her husband, and that the woman was three miles distant from the notary at the time of the acknowledgment.<sup>1</sup>

1141. The certificate must show upon its face what acts were done. Thus a certificate that a married woman making acknowledgment was examined "according to law" does not show a compliance with the requirement that she shall be examined separate and apart from her husband; that she was made acquainted with the contents of the deed, and acknowledged that she voluntarily sealed and delivered it. Such a certificate is no more than the opinion of the officer that he has complied with the requirements of the statute.<sup>2</sup>

1142. Whether an acknowledgment taken on Sunday is valid depends upon the terms and policy of the Sunday statute in force where such acknowledgment is taken. Thus, under a statute making it unlawful "to do any manner of labor, business, or work, except only works of necessity or charity," on Sunday, an acknowledgment taken on that day is undoubtedly "business" prohibited by the statute, and therefore invalid.<sup>3</sup> But under a statute making "the doing or exercising any of the common avocations of life" an offence punishable by fine, an acknowledgment made on Sunday is not for that reason void.<sup>4</sup>

1143. The official character of the person taking the acknowledgment must in some manner appear, or it will be held insufficient to authorize the recording of the deed; and, if recorded, the registry will be irregular; and, whether recorded or not, the deed cannot be admitted in evidence without proof of its execution as at common law.<sup>5</sup> The officer's official seal affixed to

<sup>1</sup> *Banning v. Banning*, 80 Cal. 271, 22 Pac. Rep. 210.

<sup>2</sup> *Meddock v. Williams*, 12 Ohio, 377; *Gill v. Fauntleroy*, 8 B. Mon. 177; *Flanagan v. Young*, 2 Har. & M. 38; *Jones v. Lewis*, 8 Ired. 70, 47 Am. Dec. 338; *Lucas v. Cobbs*, 1 Dev. & B. 228. The case of *Newcomb v. Smith*, Wright (O.), 208, is not in accord with this rule.

<sup>3</sup> *De Forth v. Wis. & Minn. R. Co.* 52 Wis. 320, 9 N. W. Rep. 17, 38 Am. Rep. 737.

<sup>4</sup> *Lucas v. Larkin*, 85 Tenn. 355, 3 S. W. Rep. 647.

<sup>5</sup> *Johnson v. Haines*, 2 Ohio, 55, 15 Am. Dec. 533; *Coffey v. Hendricks*, 66 Tex. 676, 2 S. W. Rep. 47; *Holiday v. Cromwell*, 26 Tex. 188; *Ballard v. Perry*, 28 Tex. 347; *McKellar v. Peck*, 39 Tex. 381; *Gulf, &c. Ry. Co. v. Carter*, 5 Tex. Civ. App. 675, 24 S. W. Rep. 1083; *Phillips v. People*, 11 Ill. App. 340; *Cassell v. Cooke*, 8 S. & R. 268, 11 Am. Dec. 610; *Carlisle v. Carlisle*, 78 Ala. 542.

his certificate is evidence of his official character, and under the statutes of some States no other evidence is required.<sup>1</sup>

A certificate which styles the officer taking the acknowledgment as an officer authorized by law to perform the act is itself *prima facie* evidence of his official character.<sup>2</sup> The fact that he is authorized to take the acknowledgment need not also be stated.<sup>3</sup>

But in some States it is held that, in the absence of a statutory requirement that the certificate shall state the official character of the person taking the acknowledgment when it is not shown by the certificate, it may be proved by evidence *aliunde*.<sup>4</sup>

1144. The official title of the officer is properly recited in the body of the certificate, and, when so recited, it need not appear after his signature,<sup>5</sup> but it is sufficient if his official character appears by additions and descriptions attached to his signature; and abbreviations may be used for this purpose if their import is generally understood.<sup>6</sup> Thus the letters "J. P." are sufficient to indicate the official character of a justice of the peace.<sup>7</sup> A statement in the certificate that the officer taking the acknowledgment is an officer authorized by law to perform the act is *prima facie* evidence of his official character, although the specific office under which he acts is not declared.<sup>8</sup> But it is not necessary that the officer should state in his certificate that he is

<sup>1</sup> Summer v. Mitchell, 29 Fla. 179, 10 So. Rep. 562.

<sup>2</sup> Rhoades v. Selin, 4 Wash. C. C. 715, 718; Carpenter v. Dexter, 8 Wall. 513; Ruggles v. Bucknor, 1 Paine, 358; Thompson v. Morgan, 6 Minn. 292; Cales v. Miller, 8 Gratt. 6; Hassler v. King, 9 Gratt. 115; Tuten v. Gazan, 18 Fla. 751; Sparrow v. Hovey, 41 Mich. 708, 3 N. W. Rep. 198.

<sup>3</sup> Livingston v. McDonald, 9 Ohio, 168; Sparrow v. Hovey, 41 Mich. 708, 3 N. W. Rep. 198.

<sup>4</sup> Van Ness v. Bank, 13 Pet. 17, 21; Shults v. Moore, 1 McLean, 520; Rhoades v. Selin, 4 Wash. C. C. 715; Jeffreys v. Callis, 4 Dana, 465; Russ v. Wingate, 30 Miss. 440; Bennet v. Paine, 7 Watts, 334, 32 Am. Dec. 765; Scott v. Gallagher, 14 S. & R. 333, 16 Am. Dec. 508.

<sup>5</sup> Colby v. McOmber, 71 Iowa, 469, 32

N. W. Rep. 459; Brown v. Farran, 3 Ohio, 140; Summer v. Mitchell, 29 Fla. 179, 10 So. Rep. 562, 30 Am. St. Rep. 106.

<sup>6</sup> Russ v. Wingate, 30 Miss. 440; Summer v. Mitchell, 29 Fla. 179, 10 So. Rep. 562, 30 Am. St. Rep. 106; Final v. Backus, 18 Mich. 218.

<sup>7</sup> Russ v. Wingate, 30 Miss. 440; Final v. Backus, 18 Mich. 218; Sparrow v. Hovey, 41 Mich. 708, 3 N. W. Rep. 198; State v. Manley, 1 Tenn. 428; Stinson v. Russell, 2 Tenn. 40; Major v. State, 2 Sneed, 11; Burton v. Pettibone, 5 Yerg. 442. The addition "N. P." is sufficient to denote a notary public. Rowley v. Berrian, 12 Ill. 198, 200; Summer v. Mitchell, 29 Fla. 179, 10 So. Rep. 562; Shattuck v. People, 5 Ill. 477; Russ v. Wingate, 30 Miss. 440.

<sup>8</sup> Thompson v. Morgan, 6 Minn. 292; Tuten v. Gazan, 18 Fla. 751.

authorized by law to take acknowledgments. If he states his office, his authority to act is an inference from this fact.<sup>1</sup>

Where the title of the officer stated in the body of the certificate of acknowledgment is of one whom the law does not authorize to take an acknowledgment, but the suffix to the signature, read in connection with the deed, if not alone, indicates an officer having such authority, the suffix will control.<sup>2</sup>

Where a clerk of court is *ex officio* recorder of deeds, but is authorized as clerk, and not as recorder, to take acknowledgments, a certificate of acknowledgment signed by him under the official title of "recorder," and sealed with the seal of the court, is sufficient. His description of himself as "recorder" necessarily indicates that he was the clerk of the court, and makes it clear that the acknowledgment was taken by him as clerk. The acknowledgment is considered as made before the officer as the clerk of court; and the word "recorder" is treated as a mere description of the person whom the law also designates as clerk as well as recorder.<sup>3</sup>

**1145. The officer taking the acknowledgment must subscribe his name to the certificate.** A certificate not subscribed is not sufficient to make the record evidence of the execution of the deed.<sup>4</sup> It is not enough that the officer's name appears in the body of the certificate.<sup>5</sup> But if an officer has taken the separate acknowledgments of a husband and wife, and has made separate certificates on the deed, one following the other, though each has a separate caption, it is sufficient if the officer's signature is attached to the last only.<sup>6</sup> It is not necessary that the officer's name should be set out in the body of the certificate.<sup>7</sup> When the acknowledgment is taken by a proper officer, it does not matter that the name of another person is by mistake recited in the body of the certificate, the acknowledgment being actually taken by the officer who subscribed the certificate.<sup>8</sup>

<sup>1</sup> *Livingston v. M'Donald*, 9 Ohio, 168.

<sup>2</sup> *Summer v. Mitchell*, 29 Fla. 179, 10 So. Rep. 562.

<sup>3</sup> *Owen v. Baker*, 101 Mo. 407, 14 S. W. Rep. 175.

<sup>4</sup> *Carlisle v. Carlisle*, 78 Ala. 542; *Clark v. Wilson*, 127 Ill. 449, 19 N. E. Rep. 860, 27 Ill. App. 610; *Jefferson Co. Building Assn. v. Heil*, 81 Ky. 513.

<sup>5</sup> *Marston v. Brashaw*, 18 Mich. 81, 100 Am. Dec. 152; *Bigelow v. Booth*, 39 Mich. 622; *Carlisle v. Carlisle*, 78 Ala. 542.

<sup>6</sup> *Wright v. Wilson*, 17 Mich. 192.

<sup>7</sup> *Fogg v. Holcomb*, 64 Iowa, 621, 21 N. W. Rep. 111.

<sup>8</sup> *Agan v. Shannon*, 103 Mo. 661, 15 S. W. Rep. 757, overruling *Lincoln v. Thompson*, 75 Mo. 613, 623.

A notary's signature by the use of the initials of his given name is sufficient, where the name appears in the same form in the impression of his notarial seal, though the certificate of authentication attached to the certificate of acknowledgment gives the notary's full name. The discrepancy is not sufficient to warrant the rejection of the deed as evidence of title.<sup>1</sup>

1146. The requirement that the officer taking an acknowledgment shall certify his act under his official seal is one that cannot be dispensed with. It must appear, either from the words used in the certificate or from inspection of the original paper, that the officer's official seal was affixed to the certificate to entitle the instrument to be recorded.<sup>2</sup>

Of course the seal should be affixed near the officer's signature to his certificate. But where a mortgage was written upon one side of a sheet of paper and the certificate of acknowledgment upon the other side, which was duly signed by a notary public, but the notarial seal was impressed upon the other side upon which the mortgage was written, the impression being distinctly visible through the sheet, and upon the side containing the certificate of acknowledgment, but at the opposite end of the sheet, the seal was held to be sufficient.<sup>3</sup> It is no objection, to an acknowledgment taken before a justice of the peace or other officer, that the seal precedes the officer's signature. It is sufficient if it is affixed anywhere near the officer's signature.<sup>4</sup>

If the use of a seal by a notary public is required by statute, a deed the acknowledgment of which is so certified takes priority over a deed already recorded, the acknowledgment of which was certified by a notary public without using his seal of office. The

<sup>1</sup> Denny v. Ashley, 12 Colo. 165, 20 Pac. Rep. 331.

<sup>2</sup> Richards v. Randolph, 5 Mason, 115. **Alabama**: Dunn v. Adams, 1 Ala. 527, 35 Am. Dec. 42. **Arkansas**: Little v. Dodge, 32 Ark. 453. **California**: Hastings v. Vaughn, 5 Cal. 315. **Illinois**: Mason v. Brock, 12 Ill. 273, 52 Am. Dec. 490; Skinner v. Fulton, 39 Ill. 484; Booth v. Cook, 20 Ill. 129; Moore v. Titman, 33 Ill. 358; Holbrook v. Nichol, 36 Ill. 161; Robinson v. Robinson, 116 Ill. 250, 5 N. E. Rep. 118. **Kansas**: Meskimen v. Day, 35 Kans. 46, 10 Pac. Rep. 14. **Kentucky**: Kemper v. Hughes, 7 B. Mon. 255; Miller

v. Henshaw, 4 Dana, 325. **Michigan**: Buell v. Irwin, 24 Mich. 145. **Pennsylvania**: Duncan v. Duncan, 1 Watts, 322; Barney v. Sutton, 2 Watts, 31. **South Carolina**: McCreary v. McCreary, 9 Rich. Eq. 34. **Texas**: Ballard v. Perry, 28 Tex. 347; McKellar v. Peck, 39 Tex. 381; Texas Land Co. v. Williams, 51 Tex. 51; Masterson v. Todd, 6 Tex. Civ. App. 131, 24 S. W. Rep. 682.

<sup>3</sup> Evans v. Smith, 43 Minn. 59, 44 N. W. Rep. 880.

<sup>4</sup> Gilbreath v. Dilday, 152 Ill. 207, 38 N. E. Rep. 572.

deed first recorded was not properly recorded, and the record did not make it notice to the world.<sup>1</sup>

1147. If an original deed be produced, and it shows upon its face that an official seal was in fact affixed to the officer's certificate, though this does not state affirmatively that a seal was affixed, or that an official seal was affixed, the certificate meets the requirement of being sealed with an official seal.<sup>2</sup> And on the other hand there are decisions to the effect that, in case the certificate declares that an official seal was affixed, a presumption arises that such a seal was in fact affixed, though a record copy of the deed does not indicate the seal.<sup>3</sup>

1148. A record copy of a deed is admissible in evidence though it does not contain anything to represent the seal required to accompany the certificate of acknowledgment of the deed, if the record copy recites that the officer affixed to the certificate his official seal.<sup>4</sup> It seems that, from such statement in the certificate, and from the fact that the recorder admitted the deed to record upon the certificate, it may be presumed that the officer's seal was properly attached to the original certificate, although no evidence of that fact appears on the face of the copy of the record.<sup>5</sup> If the original deed has the seal of the officer, it may be proved that he affixed the seal, even if the recorder makes

<sup>1</sup> *Herd v. Cist* (Ky.), 12 S. W. Rep. 466.

<sup>2</sup> *Webb v. Huff*, 66 Tex. 677; *Monroe v. Arledge*, 23 Tex. 478; *Moore v. Titman*, 33 Ill. 358; *Nichols v. Stewart*, 15 Tex. 726; *Harrington v. Fish*, 10 Mich. 415; *Dale v. Wright*, 57 Mo. 110.

<sup>3</sup> *Addis v. Graham*, 88 Mo. 197; *Geary v. Kansas City*, 61 Mo. 378; *Norfleet v. Russell*, 64 Mo. 176; *Ballard v. Perry*, 28 Tex. 347; *Summer v. Mitchell*, 29 Fla. 179, 10 So. Rep. 562. It is said that the recorder is not required to copy the seal of the officer who took the acknowledgment. *Addis v. Graham*, 88 Mo. 197.

<sup>4</sup> *Bucklen v. Hasterlik* (Ill.), 40 N. E. Rep. 561; *Witt v. Harlan*, 66 Tex. 660, 2 S. W. Rep. 41.

The case of *Wetmore v. Laird*, 5 Biss. 160, is to the contrary. In that case it was held that where, in a certified copy of a deed offered in evidence, the attesting

clause to the notary's certificate was, "Witness my hand and seal," and the certified copy contained merely a scrawl, the copy was not admissible in evidence, for the certificate did not show affirmatively that the seal affixed to the instrument was the officer's official seal; and it is impossible to conclude that an official seal was annexed to the original deed. See, also, *Smith v. Butler*, 25 N. H. 521; *Illinois Cent. R. Co. v. Johnson*, 40 Ill. 35; *Had-den v. Larned*, 87 Ga. 634, 13 S. E. Rep. 806; *Flowery Min. Co. v. North Bonanza Min. Co.* 16 Nev. 302.

<sup>5</sup> *Witt v. Harlan*, 66 Tex. 660, 2 S. W. Rep. 41; *Coffey v. Hendricks*, 66 Tex. 676, 2 S. W. Rep. 47; *Ballard v. Perry*, 28 Tex. 347; *Geary v. Kansas City*, 61 Mo. 378; *Parkinson v. Caplinger*, 65 Mo. 290; *Hines v. Thorn*, 57 Tex. 98, 104; *Alexander v. Houghton* (Tex. Civ. App.), 26 S. W. Rep. 1102.

a memorandum upon the record of the words "No seal."<sup>1</sup> Two presumptions in favor of the regularity of official conduct can be indulged. It was the duty of the officer to affix his seal to his certificate of acknowledgment; and if the record is simply silent, with nothing to rebut the presumption of regularity, and the instrument was admitted to record by the recorder, there is the further presumption of regularity arising under the law on the ground that only those instruments which are proved or acknowledged and certified in the manner prescribed by law are entitled to be recorded.<sup>2</sup>

After the lapse of a very long period, the fact that no seal appears upon an instrument, nor any indications that there ever was one save the recital of a seal in the attestation clause, and the acknowledgment of the instrument as a deed, does not overcome the presumption that a seal was duly affixed.<sup>3</sup>

**1149. Private seal.** — Under a statute which provides that an officer authorized to take acknowledgments shall certify the same under his seal, he may use his private seal for the purpose, unless he is directed to use an official seal.<sup>4</sup> He may in some States use a scroll inclosing the letters "L. S." in place of an official seal.<sup>5</sup>

If a certificate by a notary public bears the impress of his notarial seal, it is sufficient that the notary attests it under his hand and *seal* instead of *official seal*, though the statute provides that he shall seal the certificate with his *seal of office*.<sup>6</sup>

If the mayor of a city be authorized to take acknowledgments and certify the same under the seal of the city, but the city in fact provides no seal, the mayor may adopt as an official seal a scroll or other device, and his certificate of acknowledgment declaring that it was executed under the seal of the city is sufficient; though it would not be sufficient had it recited that it was given under his private seal, there being no official seal of office provided.<sup>7</sup>

**1150. Statutory seal.** — The absence from a notary's seal of the emblems and devices required by the statute does not invali-

<sup>1</sup> *Equitable Mortg. Co. v. Kemper*, 84 Tex. 102, 19 S. W. Rep. 358; *Jones v. Martin*, 16 Cal. 165. *v. Gazea*, 18 Fla. 751; *Collins v. Boyd*, 5 Dana, 316; *Ingoldsby v. Juan*, 12 Cal. 564.

<sup>2</sup> *Mitchner v. Holmes*, 117 Mo. 185, 22 S. W. Rep. 1070.

<sup>3</sup> *Rensens v. Staples*, 52 Fed. Rep. 91.

<sup>4</sup> *Davis v. Roosevelt*, 53 Tex. 305; *Tuten*

<sup>5</sup> *Benefiel v. Aughe*, 93 Ind. 401.

<sup>6</sup> *Monroe v. Arledge*, 23 Tex. 478.

<sup>7</sup> *Geary v. Kansas City*, 61 Mo. 378.

date his certificate of acknowledgment.<sup>1</sup> The statute is regarded as directory merely, and failure to use the statutory seal does not render the instrument void. The seal of a notary is a good official seal, provided it has upon it the name of the State and county and the words "Notary public," and is the seal customarily used by the notary in certifying his acts.

If the form of a notarial seal is not prescribed by statute, a notary may adopt a seal with such inscriptions as he may choose as his official seal, provided it bears the words "Notary public," and is capable of making a definite and uniform impression on the paper upon which the certificate is written.<sup>2</sup> It seems that it need not bear the notary's name,<sup>3</sup> but it should bear the name of the State and county of his jurisdiction.

**1151.** If the statute does not require the use of a seal, none need be used, though the acknowledgment is taken by a notary public who by the common law or the law merchant is required to authenticate his acts by his notarial seal.<sup>4</sup> A notary public should, however, always use a seal of office. The courts take judicial notice of the notarial seal.<sup>5</sup>

In Illinois it is held that without any special requirement a notary public should attest his act by his notarial seal.<sup>6</sup> He must use his official seal and not a private seal.<sup>7</sup> His official seal is evidence of his official character.<sup>8</sup>

**1152.** A justice of the peace does not commonly have an official seal. His signature is presumed to be known within the

<sup>1</sup> *Sonfield v. Thompson*, 42 Ark. 46, 48 Am. Rep. 49; *Davis v. Roosevelt*, 53 Tex. 305. See, however, *Hewitt v. Morgan*, 88 Iowa, 468, 55 N. W. Rep. 478.

For a case where the devices prescribed by statute were so dim that they were visible only under a magnifying-glass, see *Stearns v. Chenault* (Ky.), 23 S. W. Rep. 351, holding the seal to be sufficient.

Where the impression or marks of the seal used are very obscure, it is a question for the jury whether the prescribed seal was used. *Stooksbury v. Swan*, 85 Tex. 563, 21 S. W. Rep. 694.

<sup>2</sup> *Mason v. Brock*, 12 Ill. 273, 52 Am. Dec. 490.

<sup>3</sup> *Sparrow v. Hovey*, 41 Mich. 708, 3 N. W. Rep. 198; name on seal partly legible.

<sup>4</sup> *Farnum v. Buffum*, 4 Cush. 260; *Harrison v. Simons*, 55 Ala. 510; *Powers v. Bryant*, 7 Port. (Ala.) 9; *Baze v. Arper*, 6 Minn. 220; *Thompson v. Morgan*, 6 Minn. 292; *Muskingum Co. v. Glass*, 17 Ohio, 542; *Davis v. Roosevelt*, 53 Tex. 305; *Irving v. Brownell*, 11 Ill. 402; *Cox v. Coleman* (Ga.), 14 S. E. Rep. 608.

<sup>5</sup> *Porter v. Judson*, 1 Gray, 175; *Chagnome v. Fowler*, 3 Wend. 173; *Stoddard v. Sloan*, 65 Iowa, 680, 22 N. W. Rep. 924, per Adams, J.

<sup>6</sup> *Booth v. Cook*, 20 Ill. 129.

<sup>7</sup> *Mason v. Brock*, 12 Ill. 273, 52 Am. Dec. 490; *Skinner v. Fulton*, 39 Ill. 484. *Contra*, *Collins v. Boyd*, 5 Dana, 316.

<sup>8</sup> *Harding v. Custis*, 45 Ill. 252.

territory in which he has jurisdiction. No substantial benefit can be derived from his use of a private seal.<sup>1</sup>

If a justice of the peace uses a seal, his certificate is not invalidated by his statement that he has affixed his "notarial seal." The word "notarial" is regarded as surplusage merely.<sup>2</sup>

## VI. *Authentication of Official Character.*

1153. Authentication of the official character of the officer taking the acknowledgment is not necessary, unless it is required by the statute of the State where the land is situated.<sup>3</sup> The certificate is *prima facie* evidence of the official character of the officer granting it; the contrary must be shown by the objecting party.<sup>4</sup> When the laws of a State provide that a deed executed out of the State may be acknowledged or proved in conformity with the laws of the State where it is executed, no certificate of the official character of the officer taking such acknowledgment in another State, or that his certificate was in conformity with the laws of that State, is necessary. Where a State recognizes acts done in pursuance of the laws of another State, its courts will take judicial cognizance of those laws, so far as it may be necessary to determine the validity of the acts alleged to be in conformity with them.<sup>5</sup>

A certificate made by statute evidence of certain facts requires no proof of its genuineness when on its face it appears to be regular. The certificate is received without proof of the official character of the officer granting it, of his signature, or that it was granted within the jurisdiction within which he is authorized to act. The certificate, however, is only *prima facie* evidence, and may be rebutted.<sup>6</sup>

<sup>1</sup> Lineberger v. Tidwell, 104 N. C. 506, 10 S. E. Rep. 758; Lucas v. Larkin, 85 Tenn. 355, 3 S. W. Rep. 647.

<sup>2</sup> Foster v. Latham, 21 Ill. App. 165.

<sup>3</sup> Carpenter v. Dexter, 8 Wall. 513; Willink v. Miles, 1 Pet. C. C. 429; Thurman v. Cameron, 24 Wend. 87; Irving v. Brownell, 11 Ill. 402; Vance v. Schuyler, 6 Ill. 160; Thompson v. Schuyler, 7 Ill. 271; Harding v. Curtis, 45 Ill. 252; Williams v. Ten Eyck, 5 Mackey, 168; Knight v. Leary, 54 Wis. 459, 11 N. W. Rep. 600.

<sup>4</sup> Jinwright v. Nelson (Ala.), 17 So. Rep. 91, citing 1 Devlin's Deeds, § 500; Holleman v. De Nyse, 51 Ala. 95; Keller v. Moore, 51 Ala. 340; Thurman v. Cameron, 24 Wend. 91; Trustees v. McKechie, 90 N. Y. 618.

<sup>5</sup> Carpenter v. Dexter, 8 Wall. 513. And see McCammon v. Detroit, L. & N. R. Co. (Mich.) 61 N. W. Rep. 273.

<sup>6</sup> Thurman v. Cameron, 24 Wend. 87.



Proof of the official character of a notary public using a notarial seal is not necessary unless required by statute.<sup>1</sup>

**1154. Judicial notice is taken of the acts of a commissioner appointed by the governor of a State to take acknowledgments in another State.<sup>2</sup>** The courts, being a department of the government of a State, take notice of the official acts of its executive.

Under a statute authorizing an acknowledgment in a foreign country or state before any judge of a superior court of record, an acknowledgment taken before "an associate judge of the sixth judicial district of the State of Maryland," there being nothing in the certificate or elsewhere in the record tending to show that the person who certified to the acknowledgment of the execution of the deed was a judge of a superior court of record, is not properly taken, for the court cannot judicially know that such judge was a judge of a "superior court of record."<sup>3</sup>

**1155. A statutory requirement of authentication must be strictly complied with.** Under a provision of statute that a certificate of acknowledgment taken out of the State, unless taken before a commissioner appointed for the purpose, must be authenticated by the certificate of a clerk of a court of record, an acknowledgment not so authenticated is ineffectual.<sup>4</sup> It seems, however, that the certificate of authentication is sufficient, though it is made long after the taking of the acknowledgment.<sup>5</sup>

When the statute provides that the clerk shall certify to the genuineness of the officer's signature, he must certify positively that the signature is genuine, and not merely that he believes it to be genuine.<sup>6</sup>

**1156. Who may make such certificate.** — The certificate of authentication, in the absence of statutory direction, may be made by any clerk of court in whose office the evidence of the official character of the officer taking the acknowledgment is

<sup>1</sup> *Harding v. Curtis*, 45 Ill. 252; *Green v. Gross*, 12 Neb. 117, 10 N. W. Rep. 459; *Galley v. Galley*, 14 Neb. 174, 15 N. W. Rep. 318.

<sup>2</sup> *Keller v. Moore*, 51 Ala. 340; *Tuten v. Gazan*, 18 Fla. 751; *Smith v. Van Gilder*, 26 Ark. 527; *Vance v. Schuyler*, 6 Ill. 160; *Irving v. Brownell*, 11 Ill. 402; *Hultz v. Ackley*, 63 Pa. St. 142;

*Hadden v. Larned*, 87 Ga. 634, 13 S. E. Rep. 806.

<sup>3</sup> *Hill v. Taylor*, 77 Tex. 295, 14 S. W. Rep. 366.

<sup>4</sup> *Morton v. Smith*, 2 Dill. 316; *Knighton v. Smith*, 1 Oreg. 276; *Phillips v. People*, 11 Ill. App. 340.

<sup>5</sup> *Dunlap v. Daugherty*, 20 Ill. 397.

<sup>6</sup> *MacKenzie v. Jackson*, 82 Ga. 80, 8 S. E. Rep. 77.

kept by law, and he need not certify that he is a clerk of a court of record.<sup>1</sup>

If the statute requires the certificate of authentication to be made by a clerk of a court of record, his certificate must show that he is a clerk of such a court,<sup>2</sup> and must bear the seal of the court.<sup>3</sup>

A clerk of court certifying to the official character of an officer who is taking acknowledgment acts ministerially, and the act may be performed by a deputy.<sup>4</sup>

1157. The certificate of authentication, like the certificate of acknowledgment, should be reasonably construed, and upheld if substantially correct. It is not the act of either party, but only evidence in regard to the acknowledgment.<sup>5</sup> Thus, where the certificate of authentication referred to the officer "whose name is subscribed to the annexed deed," and declared that he was duly qualified by law, and that his signature was genuine, it was held that the reference to the deed, instead of the certificate of acknowledgment, was an obvious misnomer of the instrument, and that the authentication was sufficient.<sup>6</sup> When the certificate of authentication was that the instrument was executed and *proved or acknowledged* according to the laws of the foreign state, it was objected that the expression *proved or acknowledged* left it uncertain which was done, and consequently there was no authentication in favor of either the one or the other; but it was held that the use of the word "proved" was surplusage, as there was no certificate of proof to which it could apply.<sup>7</sup>

1158. A certificate authenticating the acknowledgment is not an essential part of the deed, and is not necessary to its validity. It is part of the evidence of the due acknowledgment of the deed. It is not a part of the deed itself. It is not the act of the parties to the deed, and it should not be construed as if it were. Like other evidence, it should be construed in a reasonable manner rather than with technical nicety. Thus, where such

<sup>1</sup> Grand Tower M. M. & T. Co. v. Gill, 111 Ill. 541.

<sup>2</sup> MacKenzie v. Jackson, 82 Ga. 80, 8 S. E. Rep. 77; Fogg v. Holcomb, 64 Iowa, 621, 21 N. W. Rep. 111; Fisher v. Vaughn, 75 Wis. 609, 44 N. W. Rep. 833. Grand Tower M. M. & T. Co. v. Gill, 111 Ill. 541.

<sup>3</sup> Fisher v. Vaughn, 75 Wis. 609, 44 N. W. Rep. 833.

<sup>4</sup> Lynch v. Livingston, 6 N. Y. 422.

<sup>5</sup> Wells v. Atkinson, 24 Minn. 161.

<sup>6</sup> Wells v. Atkinson, 24 Minn. 161.

<sup>7</sup> Nelson v. Graff, 44 Mich. 433, 6 N. W. Rep. 872.

a certificate is attached to a deed acknowledged in New York before a justice of the peace conveying lands in Michigan, and the clerk of the court, certifying the official character of such justice of the peace several years after the acknowledgment was taken, also certifies that the deed was acknowledged according to the *existing* laws of the State, the certificate should be regarded as sufficient to enable the deed to be recorded. The word *existing* should be regarded either as immaterial or as meaning the laws existing at the date of the acknowledgment.<sup>1</sup>

A certificate of authentication, made in conformity with a statute providing that where acknowledgments are taken out of the State the clerk certifying the official character of the officer shall also state that the deed is executed and acknowledged according to the laws of such State, precludes any inquiry as to the form of the acknowledgment.<sup>2</sup>

## VII. *Errors and Omissions in Certificates.*

1159. A form of acknowledgment prescribed by statute need not be followed literally, but only substantially. Words of equivalent import may be substituted for the words used in the statute or in the form.<sup>3</sup> Thus, instead of stating that the grantor

<sup>1</sup> Harrington v. Fish, 10 Mich. 415.

<sup>2</sup> Culbertson v. Witbeck Co. 127 U. S. 326, 8 Sup. Ct. Rep. 1136.

<sup>3</sup> Carpenter v. Dexter, 8 Wall. 513; Kelly v. Calhoun, 95 U. S. 710. **Alabama**: Abney v. De Loach, 84 Ala. 393, 4 So. Rep. 757; Bradford v. Dawson, 2 Ala. 203; Homer v. Schonfield, 84 Ala. 313, 4 So. Rep. 105; Hobson v. Kissam, 8 Ala. 357; Carter v. Chaudron, 21 Ala. 72; Sharpe v. Orme, 61 Ala. 263. **Arkansas**: Jacoway v. Gault, 20 Ark. 190, 73 Am. Dec. 494; Tubbs v. Gatewood, 26 Ark. 128. **California**: Henderson v. Grewell, 8 Cal. 581. **Illinois**: Stuart v. Dutton, 39 Ill. 91; Harvey v. Dunn, 89 Ill. 585; Livingston v. Kettelle, 6 Ill. 116, 41 Am. Dec. 166; Calumet, &c. Dock Co. v. Russell, 68 Ill. 426; Delaunay v. Burnett, 9 Ill. 454. **Iowa**: Todd v. Jones, 22 Iowa, 146; Dickerson v. Davis, 12 Iowa, 353; Newman v. Samuels, 17 Iowa, 528; Bell v. Evans, 10 Iowa, 353.

**Kansas**: Munger v. Baldridge, 41 Kans.

236, 21 Pac. Rep. 159. **Kentucky**: Nantz v. Bailey, 3 Dana, 111; Gregory v. Ford, 5 B. Mon. 471. **Maryland**: Warner v. Hardy, 6 Md. 525; Hall v. Gittings, 2 H. & J. 380. **Minnesota**: Bigelow v. Livingston, 28 Minn. 57, 9 N. W. Rep. 31; Wells v. Atkinson, 24 Minn. 161. **Mississippi**: Caruthers v. McLaran, 56 Miss. 371; Russ v. Wingate, 30 Miss. 440; Morse v. Clayton, 21 Miss. 373; Pickett v. Doe, 5 S. & M. 470, 43 Am. Dec. 523. **Missouri**: Chauvin v. Wagner, 18 Mo. 531; Alexander v. Merry, 9 Mo. 510; Robson v. Thomas, 55 Mo. 581; Hughes v. Morris, 110 Mo. 306, 19 S. W. Rep. 481; Owen v. Baker, 101 Mo. 407, 14 S. W. Rep. 175. **Nebraska**: Spitznagle v. Vanhesssch, 13 Neb. 338; Becker v. Anderson, 11 Neb. 493; Gregory v. Kenyon, 34 Neb. 640, 52 N. W. Rep. 685. **Nevada**: Johnson v. Badger M. & M. Co. 13 Nev. 351. **New Jersey**: Sharp v. Hamilton, 12 N. J. L. 109. **New York**: Thurman v. Cameron, 24 Wend. 87; Canadarqua Academy v. McKechnie, 19 Hun,

executed the deed, it may state that he "signed, sealed, and delivered the same."<sup>1</sup> The omission to state, in precise terms, that the grantor acknowledged the deed "as his act and deed" is not material, when it appears that he acknowledged that he *signed* the deed. The deed is an act, and the acknowledgment of execution is an acknowledgment of it as his act and deed.<sup>2</sup> An acknowledgment that the person making the acknowledgment "executed" the deed is a sufficient compliance with a statutory form, which used the word "subscribed," or the words "signed, sealed, and delivered."<sup>3</sup> And, in like manner, an acknowledgment that he "signed" the deed is equivalent to an acknowledgment that he "executed" it.<sup>4</sup> An acknowledgment of an instrument as the "act and deed" of the person acknowledging imports that he "executed" it, or "signed, sealed, and delivered" it.<sup>5</sup>

1160. A statutory form of acknowledgment may not be exclusive of other forms previously used or in customary use, provided such forms contain in substance the statements required to make a good acknowledgment.<sup>6</sup> Thus, where a statutory form for an acknowledgment by a corporation provides that the officer on oath shall state that he is such officer, "and that the seal affixed to said instrument is the corporate seal of said corporation, and that the said instrument was signed and sealed in behalf

62; *Sheldon v. Stryker*, 42 Barb. 284, 27 How. Pr. 387; *Dennis v. Tarpenny*, 20 Barb. 371; *Claffin v. Smith*, 15 Abb. N. C. 241. **Ohio**: *Barton v. Morris*, 15 Ohio, 408; *Brown v. Farran*, 3 Ohio, 140. **Pennsylvania**: *M'Intyre v. Ward*, 5 Binn. 296; *Shaller v. Brand*, 6 Binn. 435. **Texas**: *Muller v. Boone*, 63 Tex. 91; *Dorn v. Best*, 15 Tex. 62; *Monroe v. Arledge*, 23 Tex. 478; *Talbert v. Dull*, 70 Tex. 675, 8 S. W. Rep. 530; *Belbaze v. Ratto*, 69 Tex. 636, 7 S. W. Rep. 501; *Watkins v. Hall*, 57 Tex. 1; *Belcher v. Weaver*, 46 Tex. 293, 26 Am. Rep. 267; *Wilson v. Simpson*, 80 Tex. 279, 16 S. W. Rep. 40. **Virginia**: *McCormack v. James*, 36 Fed. Rep. 14; *Tod v. Baylor*, 4 Leigh, 498; *Siter v. McClanahan*, 2 Gratt. 280, 294; *Hockman v. McClannahan*, 87 Va. 33, 12 S. E. Rep. 230, per Lacy, J. **West Virginia**: *Leftwich v. Neal*, 7 W. Va. 569;

*Watson v. Michael*, 21 W. Va. 568; *Pickens v. Kuisely*, 29 W. Va. 1, 11 S. E. Rep. 932; *Bensimer v. Fell*, 35 W. Va. 15, 12 S. E. Rep. 1078.

<sup>1</sup> *Calumet, &c. Dock Co. v. Russell*, 68 Ill. 426; *Stuart v. Dutton*, 39 Ill. 91; *Tubbs v. Gatewood*, 26 Ark. 128.

<sup>2</sup> *Stuart v. Dutton*, 39 Ill. 91.

<sup>3</sup> *Dorn v. Best*, 15 Tex. 62; *Smith v. Williams*, 38 Miss. 48.

<sup>4</sup> *Bensimer v. Fell*, 35 W. Va. 15, 12 S. E. Rep. 1078, 29 Am. St. Rep. 774; *Stuart v. Dutton*, 39 Ill. 91; *Jacoway v. Gault*, 20 Ark. 190, 73 Am. Dec. 494; *Tubbs v. Gatewood*, 26 Ark. 128.

<sup>5</sup> *Davis v. Bogle*, 11 Heisk. 315; *Brown v. Farran*, 3 Ohio, 140; *Sharp v. Hamilton*, 12 N. J. L. 109.

<sup>6</sup> *Huse v. Ames*, 104 Mo. 91, 15 S. W. Rep. 965.

of said corporation by authority of its board of directors," the omission of the words "by authority of its board of directors" is not material when the certificate as made would have been sufficient under existing laws.<sup>1</sup>

**1161.** A certificate which does not substantially comply with the statutory form is insufficient.<sup>2</sup> An acknowledgment taken out of the State where the land is located must comply with the statute and form prescribed by the laws of the State where the land lies.<sup>3</sup>

Where a statute required the acknowledgment to be made before two justices of the peace, and that they should certify that "the deed was so acknowledged, and also subscribed or signed, in their presence," a certificate that the grantors personally appeared and acknowledged an indenture "by them subscribed" to be their free act and deed is simply a certificate that the grantors acknowledged the deed in their presence, and that they also subscribed or signed it in their presence, as required. The certificate of acknowledgment is therefore valid.<sup>4</sup>

**1162.** A certificate of acknowledgment should be liberally construed. Technical objections should not be sustained, but on the contrary the certificate should be held valid whenever it meets substantially the statutory requirements. In cases of defective certificates the courts aim to find means to sustain them and not to destroy. It follows, therefore, that obvious clerical errors, whether arising from ignorance or inadvertence, misnomers of the instrument certified to, and all purely technical omissions and defects, should be disregarded.<sup>5</sup> The courts have in some

<sup>1</sup> *Huse v. Ames*, 104 Mo. 91, 15 S. W. Rep. 965.

<sup>2</sup> *East Tennessee, &c. Ry. Co. v. Davis*, 91 Ala. 615, 8 So. Rep. 349; *Keller v. Moore*, 51 Ala. 340; *Roney v. Moss*, 76 Ala. 491; *Montag v. Linn*, 19 Ill. 399; *Fryer v. Rockefeller*, 63 N. Y. 268.

<sup>3</sup> *Keller v. Moore*, 51 Ala. 340; *Brannon v. Brannon*, 2 Dis (Ohio) 224.

<sup>4</sup> *Brown v. Swift* (Ky.), 1 S. W. Rep. 474, under Act of 1792. And see *Willard v. Cramer*, 36 Iowa, 22.

<sup>5</sup> *Kelly v. Calhoun*, 95 U. S. 710; *Cleland v. Long*, 34 Fla. 353, 16 So. Rep. 272; *Summer v. Mitchell*, 29 Fla. 179, 10 So. Rep. 562; *Einstein v. Shouse*, 24 Fla. 490;

*Claffin v. Smith*, 15 Abb. N. C. 241; *Wells v. Atkinson*, 24 Minn. 161; *Brunswick, &c. Co. v. Brackett*, 37 Minn. 58; *Homer v. Schonfeld*, 84 Ala. 313, 4 So. Rep. 105; *Henderson v. Grewell*, 8 Cal. 581; *Touchard v. Crow*, 20 Cal. 150, 81 Am. Dec. 108; *Den v. Geiger*, 9 N. J. L. 224; *Tubbs v. Gatewood*, 26 Ark. 128; *Trammell v. Thurmond*, 17 Ark. 203; *Durst v. Daugherty*, 81 Tex. 650, 17 S. W. Rep. 388; *Alexander v. Merry*, 9 Mo. 510; *Walker v. Owens*, 25 Mo. App. 587; *Morse v. Clayton*, 21 Miss. 373. In *Rigler v. Cloud*, 14 Pa. St. 361, 364, *Coulter, J.*, said: "It is against the spirit and genius of our government to extend nice tech-

instances gone very far to disregard obvious errors and omissions, and, in their desire to uphold the validity of deeds, have presumed much in favor of the regularity of official acts in taking acknowledgment.

Thus a certificate that the grantors came before the officer "to acknowledge this indenture to be their act and deed" was held to mean, not merely that the parties came before the officer with the intent to acknowledge the deed, but that they actually did acknowledge it.<sup>1</sup>

That the instrument acknowledged is called a mortgage or a power of attorney, when it is in fact a deed, does not invalidate the certificate.<sup>2</sup>

1163. It is indispensable that the certificate shall show the fact of acknowledgment.<sup>3</sup> The word "acknowledge" is not wholly indispensable, but the omission of the word "acknowledge" is a fatal defect in a certificate if there is no other word that fairly imports that the grantor acknowledged the deed.<sup>4</sup> The word "stated" is not regarded as equivalent to the word "acknowledged."<sup>5</sup> But the words "deposes and says" he executed the deed, for the purposes therein expressed, were held to be of equivalent import.<sup>6</sup> The statement that the person who appears before the officer is known to him as the person who executed

nical objections to the acts of magistrates and other functionaries of the law, who are called periodically from the mass of the people to discharge such duties without legal training or experience, and thereby disturb estates long settled and purchased for full value, and thus re-vest the estate in the hands of the original vendor by a legal quirk."

<sup>1</sup> *Jackson v. Gilchrist*, 15 Johns. 89, 111. *Thompson, C. J.*, said: "The officer could hardly have been guilty of so absurd and nugatory an act as to give a formal certificate that the parties came before him to acknowledge the deed, if they did not actually acknowledge it." One element of the decision, however, was the presumption arising from the long lapse of time since the acknowledgment, this having been made in 1711. As to

such presumption, see, also, *Hoboken Land & Imp. Co. v. Kerrigan*, 31 N. J. L. 13.

<sup>2</sup> *Ives v. Kimball*, 1 Mich. 308; *Hurt v. McCartney*, 18 Ill. 129.

<sup>3</sup> *Bryan v. Ramirez*, 8 Cal. 461, 68 Am. Dec. 340.

<sup>4</sup> *Cabell v. Grubbs*, 48 Mo. 353; *Stanton v. Button*, 2 Conn. 527; *Newman v. Samuels*, 17 Iowa, 528; *Bryan v. Ramirez*, 8 Cal. 461, 68 Am. Dec. 340; *Harrington v. Fish*, 10 Mich. 415; *Short v. Conlee*, 28 Ill. 219; *Bowman v. Wettig*, 39 Ill. 416; *McDaniel v. Needham*, 61 Tex. 269; *Pinckney v. Burrage*, 31 N. J. L. 21. See, however, *Basshor v. Stewart*, 54 Md. 376.

<sup>5</sup> *Dewey v. Campau*, 4 Mich. 565; *Ingraham v. Grigg*, 13 S. & M. 22.

<sup>6</sup> *Chouteau v. Allen*, 70 Mo. 290, 298. See, also, *Ingraham v. Grigg*, 13 Sm. & M. 22.

the deed, for the purpose therein stated, has been held to be insufficient.<sup>1</sup>

A certificate reciting that the grantor appeared "and acknowledged that ——" signed, sealed, and delivered the same is not sufficient, because it does not show that the grantor acknowledged that he executed the deed.<sup>2</sup>

If from the face of the whole writing, including the certificate, there is no doubt that there was in fact an acknowledgment, and the omitted word "acknowledged" is supplied by the context with positive certainty, the omission will not invalidate the certificate.<sup>3</sup>

**1164. Unnecessary words or statements contained in a certificate are rejected as mere surplusage.** If the certificate sets forth substantially all the facts required by law, it is not vitiated by reason that it sets forth other facts not required by law.<sup>4</sup> Thus, if a certificate of acknowledgment by a married woman, attached to a deed by her of her separate property, states that she executed the deed "for the purpose of relinquishing her right of dower," she having no such right, but an estate in fee, the words quoted will be discarded as surplusage, and the acknowledgment will be construed to be an acknowledgment of the deed according to its import.<sup>5</sup>

**1165. In aid of the certificate of acknowledgment reference may be had to the deed or to any part of it; and every reasonable intendment should be made to its support.** If from the face of the deed, including the certificate of acknowledgment, there is no doubt as to what was done, and what was done was in accordance with the requirement of the statute, the acknowledgment should be held valid.<sup>6</sup> Thus, if words omitted in the certificate

<sup>1</sup> *Short v. Conlee*, 28 Ill. 219; *Cabell v. Grubb*, 48 Mo. 353.

<sup>2</sup> *Buell v. Irwin*, 24 Mich. 145; *Huff v. Webb*, 64 Tex. 284.

<sup>3</sup> *Basshor v. Stewart*, 54 Md. 376.

<sup>4</sup> *Chester v. Rumsey*, 26 Ill. 97; *Stuart v. Dutton*, 39 Ill. 91; *Tourville v. Pierson*, 39 Ill. 446; *Nelson v. Graff*, 44 Mich. 433; *Bradford v. Dawson*, 2 Ala. 203; *Crowley v. Wallace*, 12 Mo. 143; *Owen v. Baker*, 101 Mo. 407, 14 S. W. Rep. 175; *Whitney v. Arnold*, 10 Cal. 531.

<sup>5</sup> *Evans v. Summerlin*, 19 Fla. 858;

*Hartley v. Ferrell*, 9 Fla. 374; *Stone v. Montgomery*, 35 Miss. 83.

<sup>6</sup> *Carpenter v. Dexter*, 8 Wall. 513; *Van Ness v. Bank*, 13 Pet. 17; *Kelly v. Calhoun*, 95 U. S. 710. **Alabama**: *Bradford v. Dawson*, 2 Ala. 203; *Sharpe v. Orme*, 61 Ala. 263. **California**: *Middleton v. Findla*, 25 Cal. 76; *Touchard v. Crow*, 20 Cal. 150, 81 Am. Dec. 108. **Florida**: *Cleland v. Long*, 34 Fla. 353, 16 So. Rep. 272; *Summer v. Mitchell*, 29 Fla. 179, 30 Am. St. Rep. 106, 10 So. Rep. 562. **Illinois**: *Logan v. Williams*, 76 Ill.

by mere clerical error may be supplied by the context with certainty, the acknowledgment should be sustained; for "what may be fairly and clearly understood or implied, in reading the acknowledgment in connection with the deed, is of the same effect as if it had been in terms expressed."<sup>1</sup>

1166. Reference will be had to the deed to determine in what capacity the grantor acknowledged the deed. Thus, where a testator had devised land to his wife without naming an executor, and no administrator was appointed, the wife in a conveyance of the land described herself as executrix and devisee under the will, but signed only her name, the certificate of acknowledgment recited that she acknowledged the deed as executrix for the purposes therein mentioned. It was held that, reading the deed and the certificate together, the acknowledgment was sufficient.<sup>2</sup>

In a certificate which certifies the personal appearance of the party described in and who executed "the same," these words, which refer to nothing in the certificate itself, are properly construed to refer to the deed upon which the certificate is written. These words are used instead of "the within instrument," and should be held to mean the same.<sup>3</sup> In like manner, where the

175; *Calumet, &c. Dock Co. v. Russell*, 68 Ill. 426. **Maryland**: *Basshor v. Stewart*, 54 Md. 376; *Kelly v. Rosenstock*, 45 Md. 389; *Frostburg Mutual Build. Asso. v. Brace*, 51 Md. 508. **Michigan**: *Ives v. Kimball*, 1 Mich. 308; *Nelson v. Graff*, 44 Mich. 433, 6 N. W. Rep. 872. **Minnesota**: *Brunswick-Balke-Colender Co. v. Brackett*, 37 Minn. 58, 33 N. W. Rep. 214; *Wells v. Atkinson*, 24 Minn. 161. **Mississippi**: *Morse v. Clayton*, 13 Sm. & M. 373; *Ingraham v. Grigg*, 13 Sm. & M. 22. **Missouri**: *Robidoux v. Cassilegi*, 10 Mo. App. 516; *Owen v. Baker*, 101 Mo. 407, 14 S. W. Rep. 175, 20 Am. St. 618; *McClure v. McClurg*, 53 Mo. 173; *Wilcoxon v. Osborn*, 77 Mo. 621; *Samuels v. Shelton*, 48 Mo. 444; *Hughes v. Morris*, 110 Mo. 306, 19 S. W. Rep. 481. **New York**: *Claffin v. Smith*, 15 Abb. N. C. 241. **Ohio**: *Barton v. Morris*, 15 Ohio, 408. **Pennsylvania**: *Luffborough v. Parker*, 12 S. & R. 48. **Vermont**: *Brooks v.*

*Chaplin*, 3 Vt. 281, 23 Am. Dec. 209; *Chandler v. Spear*, 22 Vt. 388. **Wisconsin**: *Hiles v. La Flesh*, 59 Wis. 465, 18 N. W. Rep. 435; *Chase v. Whiting*, 30 Wis. 544.

<sup>1</sup> *Basshor v. Stewart*, 54 Md. 376; *Talbert v. Dull*, 70 Tex. 675, 8 S. W. Rep. 530; *Blythe v. Houston*, 46 Tex. 65; *Johnson v. Badger M. & M. Co.* 13 Nev. 351; *Dickerson v. Davis*, 12 Iowa, 353; *Hartshorn v. Dawson*, 79 Ill. 108; *Scharfenburg v. Bishop*, 35 Iowa, 60; *Hornbeck v. Mut. Building Asso.* 88 Pa. St. 64.  
<sup>2</sup> *Bauer v. Schmelcher*, 5 N. Y. Supp. 423.

<sup>3</sup> *Claffin v. Smith*, 15 Abb. N. C. 241. "The law will do this, because it preserves and effectuates a manifest intent of the parties to the assignment, and because, also, it preserves a manifest intention of the public officer who made the certificate, and prevents a mere *lapsus* on his part from proving fatal to an otherwise com-



certificate was that the grantor "acknowledged it," the word "it," not relating to any word used in the certificate, was held to refer to the deed itself.<sup>1</sup>

**1167. An omission in the date of the acknowledgment** may be supplied by inference from the date of the deed or from the time of recording it;<sup>2</sup> and an error in the date may be corrected in the same way.<sup>3</sup> Thus, if a deed be dated on the first day of November in a year named, and the acknowledgment bears date the first day of November without naming the year, it will be presumed that the acknowledgment was made on the day of the execution of the deed.<sup>4</sup> At all events, it will be assumed that the acknowledgment took place before the recording of the deed, for it could not have been properly recorded without acknowledgment.

**1168. An error in the date of the acknowledgment** may be corrected by the date of the deed. Thus, where a deed bore date on the sixth day of January, 1842, and the acknowledgment bore date on the same day of the same month in 1840, an inspection of the certificate showed that in the printed form used for the certificate the blank after the word "forty" had not been filled; and, inasmuch as the certificate showed an acknowledgment after the execution of the deed, the date of the acknowledgment should be corrected by the date of the deed.<sup>5</sup>

On the other hand, the date of the acknowledgment may show an error in the date of the deed, the true date of which may always be shown.<sup>6</sup> It is to be presumed that the date of the acknowledgment is subsequent to the date of the deed.<sup>7</sup> Thus it is not necessarily a part of the office of an acknowledgment to fix the date of the delivery, and though the statutory form recites that the grantor "acknowledged that he signed and delivered the foregoing instrument on the day and year therein mentioned,"

plete and entirely valid instrument of the parties who made the acknowledgment."

<sup>1</sup> *Davar v. Cardwell*, 27 Ind. 478.

<sup>2</sup> *Rackleff v. Norton*, 19 Me. 274; *Kelly v. Rosenstock*, 45 Md. 389; *Bradford v. Dawson*, 2 Ala. 203; *Irving v. Brownell*, 11 Ill. 402.

<sup>3</sup> *Wickes v. Caulk*, 5 H. & J. 36; *Webb v. Huff*, 61 Tex. 677.

<sup>4</sup> *Chase v. Whiting*, 30 Wis. 544; *Pierce v. Brown*, 24 Vt. 165.

<sup>5</sup> *Fisher v. Butcher*, 19 Ohio, 406, 53

Am. Dec. 436. See, also, *Yorty v. Paine*, 62 Wis. 154, 22 N. W. Rep. 137. Where the words "January" and "two" in the date and acknowledgment are written over erasures, a notation in the attestation clause that "the date of the deed is the third of January, 1842," is sufficient to make the deed proper evidence. *Bowlby v. Thunder (Pa.)*, 3 Atl. Rep. 588.

<sup>6</sup> *Gest v. Flock*, 2 N. J. Eq. 108.

<sup>7</sup> *Eaton v. Trowbridge*, 38 Mich. 454; *Gorman v. Stanton*, 5 Mo. App. 585.

the omission of the words "on the day and year therein mentioned" is not a material defect.<sup>1</sup>

1169. If the things essential to a certificate of acknowledgment appear, namely, the fact of acknowledgment and the identity of the person who makes it with the person who executed the deed, omissions as to the remainder of the certificate will not be held to render the certificate insufficient.<sup>2</sup> This is of course a very general statement, and, as a rule of construction, does not apply when a statute positively makes the statement of any other fact essential. But a statute or form of acknowledgment may prescribe things that are not essential, but merely formal. Thus it often becomes a question whether a requirement is a formal or an essential one.

1170. Certificate of execution for the "consideration and purposes" therein. — Under a statute which provides that the acknowledgment of a deed must state that the grantor executed the deed "for the consideration and purposes therein mentioned and set forth," the words "consideration" and "purposes" are both material, and the omission of either without the use of a word of similar import invalidates the acknowledgment.<sup>3</sup> The word "uses" is not of the same or of similar import as the word "consideration."<sup>4</sup>

Words of similar import may be sufficient, and clerical errors in the certificate in recitals of this requirement will not invalidate it.<sup>5</sup>

A recital in the certificate that the grantor "assigned" the deed instead of "signed" does not invalidate it.<sup>6</sup>

Again, although it is provided that the grantor shall state that he executed the deed for the *consideration* and purposes therein

<sup>1</sup> Caruthers v. McLaren, 56 Miss. 371; Morse v. Clayton, 13 Sm. & M. 373; Carter v. Chaudron, 21 Ala. 72; Hobson v. Kissam, 8 Ala. 357.

<sup>2</sup> Henderson v. Grewell, 8 Cal. 581; Einstein v. Shouse, 24 Fla. 490, 5 So. Rep. 380.

<sup>3</sup> Conner v. Abbott, 35 Ark. 365; Johnson v. Godden, 33 Ark. 600; Ford v. Burks, 37 Ark. 91; Wright v. Graham, 42 Ark. 140.

<sup>4</sup> Martin v. O'Bannon, 35 Ark. 62.

<sup>5</sup> Gray v. Kauffman, 82 Tex. 65, 17

S. W. Rep. 513. In this case the certificate of acknowledgment of a deed to J. C. Caskey recited that the grantor "acknowledged that he had executed the same J. C. for Caskey all the uses, purposes, and considerations therein set forth," . . . it was held that the certificate was substantially sufficient, as the name "J. C. Caskey" may be treated as surplusage, and the writing of the word "for" in the connection shown is due to clerical error.

<sup>6</sup> Broussard v. Dull, 3 Tex. Civ. App. 59, 21 S. W. Rep. 937.

mentioned, a certificate of acknowledgment which omits the word "consideration" is not for that reason invalid.<sup>1</sup> In like manner the failure of the officer to certify that the grantor executed the deed for the *purposes* expressed therein, as prescribed by the statutory form, does not affect the legality of the certificate.<sup>2</sup>

1171. The omission of the name of the grantor is not material when the certificate shows that the person who appeared and made the acknowledgment was the grantor.<sup>3</sup> The omission of the surname does not vitiate a certificate which recites the given name of the grantor.<sup>4</sup> But if the person who acknowledged is not in any way identified as the person who executed the deed, the omission of the name is a fatal defect.<sup>5</sup> There is no conclusive or sufficient inference that the grantor acknowledged the instrument when the certificate is merely "subscribed and acknowledged before me."<sup>6</sup> A certificate that a person named, to the officer well known, party to the instrument, acknowledged that — had signed, sealed, and delivered the same, for the purposes and consideration therein stated, is insufficient, because it does not appear that the acknowledgment was by the grantor.<sup>7</sup>

<sup>1</sup> *Monroe v. Arledge*, 23 Tex. 478, 480. "Nor would an acknowledgment by him for record, in strict compliance with the statute, preclude him from showing that the consideration and purposes of the deed were other and different from those therein stated. . . . This, then, is a formal part of the certificate, which, for the sake of regularity, should be inserted, but its omission does not invalidate the certificate." Per Roberts, J.

<sup>2</sup> *Butler v. Brown*, 77 Tex. 342, 14 S. W. Rep. 136. "The statement of the purposes is not more conclusive, and is as much the subject of proof upon the same issues as is the consideration." Otherwise in *Arkansas*, where it is held that if the words "for the consideration and purposes therein set forth," used in the statutory form, be wholly omitted, without the substitution of words of similar import, the certificate is defective, for it must be supposed that these words were inserted

for some useful purpose. *Jacoway v. Gault*, 20 Ark. 190, 73 Am. Dec. 494; *Little v. Dodge*, 32 Ark. 453; *Shryock v. Cannon*, 39 Ark. 434; *Currie v. Kerr*, 11 Lea, 138. Such a deed, however, is admitted in evidence if its execution be otherwise proved at the trial. *Wright v. Graham*, 42 Ark. 140; *Griesler v. McKennon*, 44 Ark. 517.

\* *Wilcoxon v. Osborn*, 77 Mo. 621; *Magness v. Arnold*, 31 Ark. 103; *Wise v. Postlewait*, 3 W. Va. 452.

<sup>4</sup> *Chandler v. Spear*, 22 Vt. 388.

<sup>5</sup> *Hiss v. McCabe*, 45 Md. 77; *Smith v. Hunt*, 13 Ohio, 260, 42 Am. Dec. 201; *Hayden v. Wescott*, 11 Conn. 129; *Trustees v. Davison*, 65 Ill. 124; *Merritt v. Yates*, 71 Ill. 636, 23 Am. Rep. 128; *Huff v. Webb*, 64 Tex. 284; *Buell v. Irwin*, 24 Mich. 152.

<sup>6</sup> *Myers v. Boyd*, 96 Pa. St. 427.

<sup>7</sup> *Huff v. Webb*, 64 Tex. 284. In *Threadgill v. Bickerstaff* (Tex. Civ. App.),

The omission in the certificate of the name of the grantor is immaterial if it shows that the "signer and sealer of the foregoing instrument acknowledged the same."<sup>1</sup> But if the name of the grantor be omitted, it cannot be fairly inferred, from the words by him "sealed and subscribed," that he appeared and acknowledged the deed.<sup>2</sup> It is not necessary that the certificate should formally recite the name of the person making the acknowledgment, if it appears from the certificate that it was the grantor who appeared and made acknowledgment.<sup>3</sup>

A deed which shows upon its face that there were two grantors, composing a partnership, and the acknowledgment purports to be made by the firm, without identifying the person or persons who appeared before the officer, is not entitled to record, and is invalid as to attaching creditors.<sup>4</sup>

**1172. A mistake in the certificate in reciting the name of the grantor may render the acknowledgment invalid if the name recited is unlike the name of the grantor in spelling and pronunciation.<sup>5</sup>** Where a sheriff executed a deed which recited that the execution had been delivered to his predecessor in office, naming him, and that he had taken certain proceedings under the execution, and the certificate of acknowledgment named the predecessor as having executed the deed as sheriff, it was held that, in the absence of evidence showing that it was really the sheriff who executed the deed who acknowledged it, it could not be held that the appearance of the name of the former sheriff in the certificate

26 S. W. Rep. 739, it was held that a certificate stating that more than one person appeared before the officer to acknowledge the instrument, and that "he" acknowledged that he executed it, does not entitle the instrument to record.

<sup>1</sup> *Sanford v. Bulkley*, 30 Conn. 344.

<sup>2</sup> *Sanford v. Bulkley*, 30 Conn. 344; *Hayden v. Wescott*, 11 Conn. 129.

<sup>3</sup> *Wilcoxon v. Osborn*, 77 Mo. 621; *Magness v. Arnold*, 31 Ark. 103.

<sup>4</sup> *Hughes v. Morris*, 110 Mo. 306, 19 S. W. Rep. 481.

<sup>5</sup> *McKinzie v. Stafford* (Tex. Civ. App.), 27 S. W. Rep. 790, where an acknowledgment by "F. M. McKezie" of a deed signed by "F. M. McKinzie" is insufficient to authorize the registration of

an instrument. *Heil v. Redden*, 38 Kans. 255, 16 Pac. Rep. 743. In this case the name signed to the deed was Geo. H. Case, and that in the certificate was Geo. H. Crane. *Boothroyd v. Engles*, 23 Mich. 19, where the deed was by Harmon Sherman and the acknowledgment purported to be by Hiram Sherman. *Stephens v. Motl*, 81 Tex. 115, 16 S. W. Rep. 731, where the deed was by Jonas B., and the name in the certificate was James B. So if the grantee's name be used for that of the grantor. *Wood v. Cochrane*, 39 Vt. 544. Where a deed was signed F. W. Chandler, an acknowledgment certifying its execution by T. W. Chandler is invalid. *Carleton v. Lombardi*, 81 Tex. 355, 16 S. W. Rep. 1081.

was a clerical error.<sup>1</sup> Whether the court could have heard such evidence, if it had been offered, was not decided.

If the error in the name is merely clerical, and the correct name is not very unlike the name used in the certificate, this is not invalidated.<sup>2</sup>

A mistake in the name of the officer taking the acknowledgment, made in the *in testimonium* clause, does not invalidate the certificate in case the officer's true name is signed to the certificate.<sup>3</sup>

**1173. The word "voluntary,"** or its equivalent, in a certificate of acknowledgment, is an essential one when it is prescribed by statute. There is a clear distinction between a man's *act and deed* and his *voluntary act and deed*.<sup>4</sup>

A certificate that the grantor acknowledged the instrument to be his "voluntary act," omitting the words "and deed," substantially complies with the statute.<sup>5</sup> The omission of the word "his" before the words "free and voluntary act" is immaterial, for it was clear that the grantor acknowledged the deed, and, moreover, that he acknowledged it to be his act and not that of another.<sup>6</sup>

**1174. The omission of the word "appeared,"** used in connection with the name of the person acknowledging the instrument, is not a material omission when the certificate shows that he acknowledged it. The omission is merely a clerical error.<sup>7</sup>

<sup>1</sup> *Lincoln v. Thompson*, 75 Mo. 613.

<sup>2</sup> As where the grantor signed as J. M. Williamson, and the certificate recited the name as James M., his correct name being Jasper M., the deed was admitted. *Cheek v. Herndon*, 82 Tex. 146, 17 S. W. Rep. 763. And see *Heil v. Redden*, 45 Kans. 562, 26 Pac. Rep. 2; *Rogers v. Manley*, 46 Minn. 403, 49 N. W. Rep. 194; *Rodes v. St. Anthony, &c. Elevator Co.* 49 Minn. 370, 52 N. W. Rep. 27.

<sup>3</sup> *Agan v. Shannon*, 103 Mo. 661, 15 S. W. Rep. 757.

<sup>4</sup> *Keeling v. Hoyt*, 31 Neb. 453, 48 N. W. Rep. 66; *Spitznagle v. Vanhessch*, 13 Neb. 338, 14 N. W. Rep. 417; *Becker v. Anderson*, 11 Neb. 493, 9 N. W. Rep. 640; *Kreuger v. Walker*, 80 Iowa, 733, 45 N. W. Rep. 871; *Newman v. Samu-*

*els*, 17 Iowa, 528; *Dickerson v. Davis*, 12 Iowa, 353; *Wickersham v. Reeves*, 1 Iowa, 413. But see *Henderson v. Grewell*, 8 Cal. 581.

<sup>5</sup> *Spitznagle v. Vanhessch*, 13 Neb. 338; *Belcher v. Weaver*, 46 Tex. 293, 26 Am. Rep. 267, per Roberts, C. J. And see *Salzer v. Romant*, 52 Tex. 562; *Stuart v. Dutton*, 39 Ill. 91.

<sup>6</sup> *Dickerson v. Davis*, 12 Iowa, 353; *Gray v. Kauffman*, 82 Tex. 65, 17 S. W. Rep. 513.

<sup>7</sup> *Scharfenburg v. Bishop*, 35 Iowa, 60. However, in *Myers v. Boyd*, 96 Pa. St. 427, it was held that the fact that the grantor *appeared* before the officer was not affirmatively shown by a certificate in the following words: "Subscribed and acknowledged before me."

The omission of the words "before me" after *appeared* or *acknowledged*, is not a material one, because it would be presumed that the acknowledgment was made before the officer who signed the certificate.<sup>1</sup> The use of the pronoun "I" at the beginning of the certificate, instead of the words "before me," is immaterial when the certificate shows that the grantor appeared and acknowledged the deed before the officer.<sup>2</sup> The use of the word "the," where it should appear that "he" executed the deed, is a mere clerical error which does not invalidate the certificate.<sup>3</sup>

1175. A defective acknowledgment does not constitute a defective title in the case of an ancient deed, as where a deed has been recorded for forty years, during which time transactions of great importance have been based on it, and no title hostile to that derived through such deed has been asserted.<sup>4</sup>

### VIII. *Identity of the Grantor with the Person acknowledging.*

1176. In general. — The statutes of nearly all the States provide that the officer taking an acknowledgment shall certify that the person making it was personally known or proved to him to be the person who executed the deed acknowledged. It is unfortunate that there are any States in which acknowledgments can be taken without the officer's certifying his knowledge of the identity of the person making the acknowledgment. The early statutes in New England and New York simply required a certificate of the fact of acknowledgment, and in New England this simple form of acknowledgment has been retained to the present time. It has been deemed sufficient to rely upon the ordinary presumption that the magistrate had acted rightly.<sup>5</sup> Formerly this reliance may have been justified, but it is too loose a form for use at the present day.

Under statutes requiring a certificate of the identity of the person making the acknowledgment, four essential facts must substantially appear in the certificate of acknowledgment, namely, (1) That the person making the acknowledgment personally appeared before the officer who makes the certificate; (2) that

<sup>1</sup> Woods v. James, 87 Ky. 511, 9 S. W. Rep. 573; Gordon v. Leech, 81 Ky. 229.

<sup>2</sup> Belbaze v. Ratto, 69 Tex. 636, 7 S. W. Rep. 501.

<sup>3</sup> Durst v. Daugherty, 81 Tex. 650, 17 S. W. Rep. 388.

<sup>4</sup> Bucklen v. Hasterlik, 155 Ill. 423, 40 N. E. Rep. 561; Cable v. Cable, 146 Pa. St. 451, 23 Atl. Rep. 223; McReynolds v. Longenberger, 57 Pa. St. 13, 31.

<sup>5</sup> Sanford v. Bulkley, 30 Conn. 344.

there was an acknowledgment; (3) that the person who makes the acknowledgment is identified as the one who executed the instrument; and (4) that such identity was either personally known or proved to the officer taking the acknowledgment.<sup>1</sup>

1177. It is immaterial how the officer acquired his knowledge of the identity of the person making the acknowledgment with the person described in and who executed the instrument; and it is immaterial whether he has had such knowledge for any definite period of time. The officer's knowledge of persons and their identity is most frequently acquired by introduction; and if this knowledge satisfies the officer as to the identity of the party, it is sufficient to authorize him to take the acknowledgment.<sup>2</sup> There are statutory provisions in some States requiring the officer to base his evidence of the identity of the person acknowledging, when this identity is not within his own knowledge, "on the oath or affirmation of a credible witness," and in such case this evidence should be recited in the certificate.<sup>3</sup>

Under a statute requiring the officer to certify that the person making the acknowledgment is personally known or proved to him by competent evidence to be the identical person who executed the deed, it is not sufficient for the officer to state simply that the deed was acknowledged by the grantor named in the deed, without declaring the officer's knowledge of the identity.<sup>4</sup> It is not sufficient for the officer to say that he is "satisfied" of such identity; he must show how he was satisfied, whether from personal knowledge or by competent testimony.<sup>5</sup> The officer's knowledge of the identity of the person making the acknowledg-

<sup>1</sup> *Cannon v. Deming*, 3 S. D. 421, 53 N. W. Rep. 863, per Bennett, P. J.

<sup>2</sup> *Nippel v. Hammond*, 4 Colo. 211; *Rexford v. Rexford*, 7 Lans. 6; *Wood v. Bach*, 54 Barb. 134, reversing *Jones v. Bach*, 48 Barb. 568, where it was held that a mere introduction at the time of the acknowledgment was not sufficient. As to effect of false statement by the officer, that he knows the person who executed the instrument, see *Watson v. Campbell*, 28 Barb. 421.

<sup>3</sup> *Cannon v. Deming*, 3 S. D. 421, 53 N. W. Rep. 863.

<sup>4</sup> *Schley v. Car Co.* 120 U. S. 575, 7

Sup. Ct. Rep. 730, per Harlan, J.; *Fryer v. Rockefeller*, 63 N. Y. 268; *Miller v. Link*, 2 Thomp. & C. 86; *Fogarty v. Finlay*, 10 Cal. 239, 70 Am. Dec. 714; *Brinton v. SeEVERS*, 12 Iowa, 389; *Smith v. Garden*, 28 Wis. 685; *Becker v. Quiggs*, 54 Ill. 390; *Fell v. Young*, 63 Ill. 106; *Murphy v. Williamson*, 85 Ill. 149; *Coburn v. Herrington*, 114 Ill. 104, 29 N. E. Rep. 478; *East Tenn., V. & G. Ry. Co. v. Davis*, 91 Ala. 615, 8 So. Rep. 349.

<sup>5</sup> *Kimball v. Semple*, 25 Cal. 440; *Shepherd v. Carriel*, 19 Ill. 313; *Fryer v. Rockefeller*, 63 N. Y. 268.

ment cannot be presumed; it must be evidenced by his certificate in order to entitle the instrument to be recorded.<sup>1</sup>

A certificate of acknowledgment of an administrator's deed which states that the administrator, whose name appears in the foregoing instrument of writing as a party, personally appeared and acknowledged the same, sufficiently shows that the person who executed the deed and made the acknowledgment was known to the officer.<sup>2</sup>

1178. There must be a substantial compliance with the requirement that the person making the acknowledgment must be "personally known" to the officer taking it, and that his certificate must show his knowledge, to entitle the deed to be recorded,<sup>3</sup> or to authorize it to be given in evidence without other proof.<sup>4</sup> Failing in this, the record does not impart notice to subsequent purchasers,<sup>5</sup> though it is not necessary that the officer's certificate should use the exact words of the statute or of the prescribed form of acknowledgment.<sup>6</sup> Thus, if the form prescribed uses

<sup>1</sup> *Salmon v. Huff*, 80 Tex. 133, 15 S. W. Rep. 1047; *Callaway v. Fash*, 50 Mo. 420.

<sup>2</sup> *Hughes v. McDivitt*, 102 Mo. 77, 14 S. W. Rep. 660; dissenting opinion, 15 S. W. Rep. 756.

<sup>3</sup> *Alabama*: *Rogers v. Adams*, 66 Ala. 600; *Merritt v. Phenix*, 48 Ala. 87. *California*: *Kimball v. Semple*, 25 Cal. 440; *Fogarty v. Finlay*, 10 Cal. 239, 70 Am. Dec. 714; *Wolf v. Fogarty*, 6 Cal. 224, 65 Am. Dec. 509; *Henderson v. Grewell*, 8 Cal. 581. *Illinois*: *Lindley v. Smith*, 46 Ill. 523; *Becker v. Quigg*, 54 Ill. 390; *Gove v. Cather*, 23 Ill. 634, 76 Am. Dec. 711; *Coburn v. Herrington*, 114 Ill. 104, 29 N. E. Rep. 478; *Shepherd v. Carriel*, 19 Ill. 313; *Hart v. Randolph*, 142 Ill. 521, 32 N. E. Rep. 517; *Heinrich v. Simpson*, 66 Ill. 57. *Iowa*: *Reynolds v. Kingsbury*, 15 Iowa, 238; *Brinton v. Seever*, 12 Iowa, 389. *Missouri*: *Callaway v. Fash*, 50 Mo. 420; *Garnier v. Barry*, 28 Mo. 438; *Hughes v. Morris*, 110 Mo. 306, 19 S. W. Rep. 481. *New Jersey*: *Pinckney v. Burrage*, 31 N. J. L. 21. *New York*: *Fryer v. Rockefeller*, 63 N. Y. 268; *Miller v. Link*, 2 T. & C. 86; *Irving v. Campbell*, 121 N. Y. 353, 24 N. E. Rep. 821,

reversing 24 Jones & S. 224, 4 N. Y. Supp. 103. *South Dakota*: *Cannon v. Deming*, 3 S. D. 421, 53 N. W. Rep. 863. *Tennessee*: *Fall v. Roper*, 3 Head, 485; *Johnson v. Walton*, 1 Sneed, 258; *Peacock v. Tompkins*, 1 Humph. 135; *Garnett v. Stockton*, 7 Humph. 84. *Texas*: *Watkins v. Hall*, 57 Tex. 1; *Salmon v. Huff*, 80 Tex. 133, 15 S. W. Rep. 1047; *Moses v. Dibrell*, 2 Tex. Civ. App. 457, 21 S. W. Rep. 414; *Farrell v. Palestine Loan Asso. (Tex. Civ. App.)* 30 S. W. Rep. 814. *Wisconsin*: *Smith v. Garden*, 28 Wis. 685; *Hiles v. La Flesh*, 59 Wis. 465, 18 N. W. Rep. 435.

<sup>4</sup> *Pinckney v. Burrage*, 31 N. J. L. 21; *East Tennessee Ry. Co. v. Davis*, 91 Ala. 615, 8 So. Rep. 349.

<sup>5</sup> *Fogarty v. Finlay*, 10 Cal. 239, 70 Am. Dec. 714; *Brinton v. Seever*, 12 Iowa, 389; *Cannon v. Deming*, 3 S. D. 421, 53 N. W. Rep. 863.

<sup>6</sup> *Warner v. Hardy*, 6 Md. 525; *Irving v. Campbell*, 24 Jones & S. 224, 4 N. Y. Supp. 103; *Hunt v. Johnson*, 19 N. Y. 279; *Jackson v. Gumaer*, 2 Cow. 552; *Bell v. Evans*, 10 Iowa, 353; *Moses v. Dibrell*, 2 Tex. Civ. App. 457, 21 S. W. Rep. 414.



the words "personally acquainted," it is sufficient that the officer certifies that the grantor was "personally known" to him, for the phrases are equivalent in meaning;<sup>1</sup> or, if the statute uses the words "personally known," it is sufficient that the officer certifies that he was personally acquainted with the person making the acknowledgment.<sup>2</sup>

Where a deed is proved for acknowledgment by an attesting witness, and he is required by statute to state in his certificate the names of the witnesses and their place of residence, his failure to comply with this requirement invalidates the acknowledgment, which does not authorize the deed to be recorded or a certified copy of the record to be read in evidence.<sup>3</sup>

1179. If the officer taking the acknowledgment was himself an attesting witness, it is presumed that the person acknowledging was personally known to him. In such case his omission to certify that the person making acknowledgment was personally known to him to be the person who executed the deed may be supplied by reference to the attestation clause, which declares that the instrument was "signed, sealed, and delivered" in presence of the subscribing witnesses, of whom the officer taking the acknowledgment was one.<sup>4</sup> This decision derives emphasis from the fact that the law of the State where the land was situated provided not only that the party making the acknowledgment should be personally known to the officer to be the real person who executed the deed, or should be proved to be such by a credible witness, but that such personal knowledge or proof should be stated in the certificate. Where the same name appears as a witness to the execution of the deed, and to the certificate of acknowledgment as the officer taking it, it may be presumed, in support of the certificate, that these names represent the same person.<sup>5</sup>

<sup>1</sup> *Kelly v. Calhoun*, 95 U. S. 710; *Schley v. Pullman's Palace Car Co.* 120 U. S. 575, 7 Sup. Ct. Rep. 730, affirming 25 Fed. Rep. 890.

<sup>2</sup> *Doe v. Reed*, 3 Ill. 371.

<sup>3</sup> *Irving v. Campbell*, 121 N. Y. 353, 24 N. E. Rep. 821, reversing 24 Jones & S. 224.

<sup>4</sup> *Carpenter v. Dexter*, 8 Wall. 513; *Hiles v. La Flesh*, 59 Wis. 465, 18 N. W. Rep. 435; *Summer v. Mitchell*, 29 Fla.

179, 10 So. Rep. 562; *Einstein v. Shouse*, 24 Fla. 490, 5 So. Rep. 380; *Brunswick & c. Collender Co. v. Brackett*, 37 Minn. 58, 33 N. W. Rep. 214; *Owen v. Baker*, 101 Mo. 407, 14 S. W. Rep. 175; *Wells v. Atkinson*, 24 Minn. 161; *Samuels v. Shelton*, 48 Mo. 444; *Sharpe v. Orme*, 61 Ala. 263; *Luffborough v. Parker*, 12 Serg. & R. 48.

<sup>5</sup> *Summer v. Mitchell*, 29 Fla. 179, 10 So. Rep. 562.

A certificate that the officer knew the person making the acknowledgment to be the person who *executed* the deed is equivalent to a certificate that he knew him to be the grantor *described* in the deed,<sup>1</sup> or the person who executed and is described in the instrument.<sup>2</sup>

**1180. Unimportant omissions in the certificate as to identity.** — In the statement that the person making the acknowledgment was “personally known” to the officer, the omission of the word “personally” does not invalidate the certificate.<sup>3</sup> Personal knowledge is implied. In a certificate the words “well known to me” or “well acquainted” are equivalent to the words “personally known to me.”<sup>4</sup>

The omission, in the statement that the grantors “are personally known,” of the word “are” is not a material omission, because the word is readily supplied by the context.<sup>5</sup> The omission of the words “described in and who executed” is immaterial when it is stated that the person making the acknowledgment is known to be the identical person whose name is subscribed to the deed.<sup>6</sup> But the omission of the word “known,” or the words “personally known,” is a fatal omission, because that or an equivalent word is an essential one, and is not necessarily supplied by the context.<sup>7</sup>

<sup>1</sup> Schley v. Pullman Car Co. 120 U. S. 575, 7 Sup. Ct. Rep. 730; Thurman v. Cameron, 24 Wend. 87.

<sup>2</sup> Schramm v. Gentry, 63 Tex. 583; Little v. Weatherford, 63 Tex. 638.

<sup>3</sup> Schley v. Pullman Car Co. 120 U. S. 575, 7 Sup. Ct. Rep. 730; Rosenthal v. Griffin, 23 Iowa, 263; Todd v. Jones, 22 Iowa, 146; Robson v. Thomas, 55 Mo. 581; Alexander v. Merry, 9 Mo. 510; Hopkins v. Delaney, 8 Cal. 85; Welch v. Sullivan, 8 Cal. 511; Tully v. Davis, 30 Ill. 103, 83 Am. Dec. 179; Warner v. Hardy, 6 Md. 525; West Point Iron Co. v. Reymert, 45 N. Y. 703; Sheldon v. Stryker, 42 Barb. 284, 29 How. Pr. 387; Davis v. Bogle, 11 Heisk. 315.

<sup>4</sup> Bell v. Evans, 10 Iowa, 353; Delaunay v. Burnett, 9 Ill. 454; Schleicher v. Gatlin, 85 Tex. 270, 20 S. W. Rep.

120; Schramm v. Gentry, 63 Tex. 583; Salmon v. Huff, 80 Tex. 133, 15 S. W. Rep. 257, 1047.

<sup>5</sup> Hartshorn v. Dawson, 79 Ill. 108.

<sup>6</sup> Thurman v. Cameron, 24 Wend. 87; Henderson v. Grewell, 8 Cal. 581.

<sup>7</sup> McKie v. Anderson, 78 Tex. 207, 14 S. W. Rep. 576; Tully v. Davis, 30 Ill. 103, 83 Am. Dec. 179; Wolf v. Fogarty, 6 Cal. 224, 65 Am. Dec. 509. But in *Missouri* it is held that a certificate which states that the person named therein as acknowledging “personally appeared” before the officer substantially complies with the statute. Warder v. Henry, 117 Mo. 530, 23 S. W. Rep. 776; Alexander v. Merry, 9 Mo. 510; Hughes v. McDivitt, 102 Mo. 77, 14 S. W. Rep. 660, 15 S. W. Rep. 756; Wilson v. Quigley, 107 Mo. 98, 17 S. W. Rep. 891.

The omission of the word "be" in the phrase "known to me to be" is immaterial, and is an obvious clerical error.<sup>1</sup>

### IX. *By Married Women.*

**1181.** Statutes requiring acknowledgments of married women to be taken upon a separate examination and explanation of the deed have been enacted for their protection against the undue influence of their husbands.<sup>2</sup> When the certificate shows that a married woman was examined apart from her husband, and that the officer explained to her the import and effect of the deed, and she declared that she freely and voluntarily executed it and acknowledged it as her act and deed, the purpose of the law is attained, and it is immaterial that the particular words of the statute or of the statutory form of acknowledgment are not used. It is the substance of the statute, and not the letter of it, that is required.<sup>3</sup>

A mortgage is a conveyance to which such statutes apply.<sup>4</sup> But the statutes do not apply to a conveyance by husband and wife of land to which the wife has no separate title. If such conveyance be properly acknowledged by the husband his title passes.<sup>5</sup>

**1182.** In a conveyance of land by a married woman her acknowledgment, under such statutes, is an essential part of the execution. Unless her deed is acknowledged substantially

<sup>1</sup> *Johnson v. Badger M. & M. Co.* 13 Nev. 351.

<sup>2</sup> *There are such statutes in Alabama:* Code 1886, § 2508. *Arizona:* R. S. 1887, §§ 226, 2076. *Arkansas:* Dig. of Stats. 1894, § 716. *Delaware:* R. Code 1893, ch. 83, § 4. *District of Columbia:* R. S. 1874, p. 53. *Idaho:* R. S. 1887, § 2498. *Kentucky:* G. S. 1894, § 507. *Nevada:* G. S. 1885, §§ 2591, 2592. *New Jersey:* R. S. 1877, p. 154. *North Carolina:* Code 1883, § 2107. *Pennsylvania:* 1 Brightly's Purdon's Dig. 1894, p. 632. *Rhode Island:* P. S. 1882, ch. 166. *South Carolina:* G. S. 1882, §§ 1796-1798. *Tennessee:* Code 1884, § 2076. *Texas:* R. S. 1879, arts. 559, 560. *West Virginia:* Code 1891, ch. 73, § 4.

Such statutes formerly existed, but have been repealed, in *California, Florida, Illi-*

*nois, Indiana, Maryland, Michigan, Minnesota, Mississippi, Missouri, Montana, New York, New Mexico, Ohio, Oregon, Vermont, Virginia, Washington, Wisconsin.*

The fact that so many States have discarded the statutes requiring acknowledgments of married women to be taken in this manner is not a favorable commentary upon the policy of such statutes. *Belo v. Mayes*, 79 Mo. 67, 72, per Martin, C. And it is not probable that the States still retaining this requirement will continue to do so for many years.

<sup>3</sup> *Mullins v. Weaver*, 57 Tex. 5.

<sup>4</sup> *Tolman v. Smith*, 74 Cal. 345, 16 Pac. Rep. 189.

<sup>5</sup> *Jacks v. Dillon*, 6 Tex. Civ. App. 192, 25 S. W. Rep. 645.

in the mode prescribed by statute, it is absolutely void.<sup>1</sup> In this respect her acknowledgment is a very different thing from the acknowledgment of a person not under disability; for, as has already been noticed, a deed executed and delivered without acknowledgment is valid and passes the title, and acknowledgment is required only to entitle the deed to be recorded, and to be received in evidence without further proof of execution.<sup>2</sup> The reason for this distinction is to be sought in the common-law rule that a *feme covert* could not, either with or without the consent of her husband, execute a valid conveyance of her real estate, or bar her right of dower in her husband's real estate.<sup>3</sup> The only way

<sup>1</sup> **Arkansas**: Shryock v. Cannon, 39 Ark. 434; Little v. Dodge, 32 Ark. 453. **California**: Muir v. Galloway, 61 Cal. 498; Leonis v. Lazzarovich, 55 Cal. 52; Goode v. Smith, 13 Cal. 81; Ewald v. Corbett, 32 Cal. 493. **Illinois**: Coleman v. Billings, 89 Ill. 183; Schroder v. Keller, 84 Ill. 46; Hughes v. Lane, 11 Ill. 123, 50 Am. Dec. 436; Mason v. Brock, 12 Ill. 273, 52 Am. Dec. 490. **Iowa**: Reynolds v. Kingsbury, 15 Iowa, 238. **Kentucky**: Barnett v. Shackelford, 6 J. J. Marsh. 532, 22 Am. Dec. 100; Martin v. Davidson, 3 Bush, 572; Pribble v. Hall, 13 Bush, 61. **Maryland**: Grove v. Todd, 41 Md. 633, 20 Am. Rep. 76; Johns v. Reardon, 11 Md. 465; Steffey v. Steffey, 19 Md. 5. **Mississippi**: Allen v. Lenoir, 53 Miss. 321; Bernard v. Elder, 50 Miss. 336. **Missouri**: Wannell v. Kem, 57 Mo. 478; Chauvin v. Wagner, 18 Mo. 531; Burnett v. McCluey, 78 Mo. 676; Krieger v. Crocker, 118 Mo. 531, 24 S. W. Rep. 170. **New Jersey**: Thayer v. Torrey, 37 N. J. L. 339; Den v. Geiger, 9 N. J. L. 225. **New York**: Doe v. Howland, 8 Cow. 277, 18 Am. Dec. 445; Martin v. Dwelly, 6 Wend. 9, 21 Am. Dec. 245; Van Nostrend v. Wright, Hill & Den. 260; Meriam v. Harsen, 2 Barb. Ch. 232. **North Carolina**: Den v. Lewis, 8 Ired. 30, 47 Am. Dec. 338. **North Dakota and South Dakota**: Wambole v. Foote, 2 Dak. 1, 2 N. W. Rep. 1. **Ohio**: Purcell v. Goshorn, 17 Ohio, 105, 49 Am. Dec. 448; Chesnut v. Shane, 16 Ohio, 599, 47 Am. Dec. 387; Dengenhart v. Cracraft, 36 Ohio St. 549. **Pennsylvania**:

Spencer v. Reese, 165 Pa. St. 158, 30 Atl. Rep. 722; Jourdan v. Jourdan, 9 Serg. & R. 268, 11 Am. Dec. 724; Watson v. Bailey, 1 Binn. 470, 2 Am. Dec. 462; Evans v. Commonwealth, 4 Serg. & R. 272; Thompson v. Morrow, 5 Serg. & R. 289; Watson v. Mercer, 6 Serg. & R. 49; Barnet v. Barnet, 15 Serg. & R. 72; Trimmer v. Heagy, 16 Pa. St. 484; Glidden v. Strupler, 52 Pa. St. 400; Graham v. Long, 65 Pa. St. 383. **Tennessee**: Laird v. Scott, 5 Heisk. 314; Henderson v. Rice, 1 Coldw. 223; Currie v. Kerr, 11 Lea, 138. **Texas**: Looney v. Adamson, 48 Tex. 619; Johnson v. Taylor, 60 Tex. 360. **Virginia**: Grove v. Zumbro, 14 Gratt. 501; Hairston v. Randolphs, 12 Leigh, 445. **West Virginia**: Pickens v. Knisely, 29 W. Va. 1, 6 Am. St. Rep. 622.

But of course, under statutes which do not require a separate examination of a married woman, and under which she may convey her separate property in the same manner as if she were unmarried, the certificate of acknowledgment is not an essential part of her conveyance. Hawes v. Mann, 8 Biss. 21; Wedel v. Herman, 59 Cal. 507; Terry v. Eureka College, 70 Ill. 236; Hogan v. Hogan, 89 Ill. 427.

<sup>2</sup> § 1109.

<sup>3</sup> Martin v. Dwelly, 6 Wend. 9, 21 Am. Dec. 245. "This disability is supposed to be founded in the principle that the separate legal existence of the wife is suspended during the marriage, and is strengthened by the consideration that,

in which she could convey was by uniting with her husband in levying a fine. The provision of law, that a married woman in making a conveyance of her land should acknowledge the deed upon a private examination apart from her husband, was designed as a substitute for the proceeding at common law by fine and recovery, whereby the rights of the wife, on the one hand, should be guarded, and on the other a sure, indefeasible, and unquestionable transfer of her right secured.<sup>1</sup> The act of taking and certifying the acknowledgment of a married woman under these statutes is in the nature of a judicial act.<sup>2</sup>

**1183. The examination must be personal.** The married woman cannot be represented by another; she cannot make the acknowledgment through an attorney,<sup>3</sup> but it may be made through an interpreter when necessary.<sup>4</sup>

The certificate must declare the identity of the married woman making the acknowledgment in the same manner as if she were sole.<sup>5</sup>

from the nature of the connection, there is danger that the influence of the husband may be improperly exerted for the purpose of forcing the wife to part with her rights in his favor. The law, therefore, considers any such deed or conveyance as the act of the husband only, although the wife may have united in it, and restrains its operation to the husband's interest in the premises, and gives to it the same effect as though he alone had executed the conveyance." Per Sutherland, J.

<sup>1</sup> *Kerr v. Russell*, 69 Ill. 666, 670, 18 Am. Rep. 634, per Breese, C. J. In *Henderson v. Smith*, 26 W. Va. 829, 833, 53 Am. Rep. 139, Snyder, J., says: "By the common law a married woman could not, by joining her husband in a deed, divest herself or those claiming under her of her own estate. In process of time, however, fines and recoveries were introduced for this purpose, and by them the rights of the wife might be successfully transferred. But, to prevent imposition upon her, it was subsequently provided by statute that when a *feme covert* was one of the parties to a fine she should be privily examined, and, if she refused her assent, the fine

could not be levied; that, while the privy examination was positively enjoined by the statute, yet, if the wife was allowed to acknowledge the fine without such examination, she was nevertheless bound by it, for it was held to be a judicial proceeding, the record of which could not be contradicted except for a fraud in the conusee, whom equity in such case considered a trustee for her. Such was the law in England when this country was first settled, and for a long time thereafter. Early in the history of Virginia a deed, accompanied by a privy examination of the wife, was made a substitute for the fine, and was given by statute the same effect."

<sup>2</sup> *Henderson v. Smith*, 26 W. Va. 829, 833, 53 Am. Rep. 139; *Pickens v. Knisely*, 29 W. Va. 1, 11 S. E. Rep. 932, per Green, J.

<sup>3</sup> *Wambole v. Foote*, 2 Dak. 1; *Dawson v. Shirley*, 6 Blackf. 531.

<sup>4</sup> *Norton v. Meader*, 4 Sawyer, 603; *Waltee v. Weaver*, 57 Tex. 569; *De Arnaz v. Escandon*, 59 Cal. 486.

<sup>5</sup> *Lindley v. Smith*, 46 Ill. 523; *Gove v. Cather*, 23 Ill. 634, 76 Am. Dec. 711.

1184. Though a statute makes it indispensable that the deed should be acknowledged by both husband and wife,<sup>1</sup> it is not indispensable that they both acknowledge at the same time and place or before the same officer, or that their acknowledgment should be certified by a single certificate.<sup>2</sup> If the wife acknowledged the deed before the husband acknowledges, he can render her every needed protection by himself refusing to sign and acknowledge the deed. If he acknowledged it first, he acknowledged it as a deed to be executed by both. Of course the deed is not binding upon the wife until it is executed by the husband.<sup>3</sup>

In North Carolina the wife's acknowledgment, taken upon a private examination, must follow, in the order of time, the husband's acknowledgment.<sup>4</sup>

1185. It must clearly appear from the certificate that the married woman was examined separately and apart from her husband.<sup>5</sup> It cannot be concluded that she was so examined

*Garnier v. Barry*, 28 Mo. 438; *Reynolds v. Kingsbury*, 15 Iowa, 238.

<sup>1</sup> *L'Engle v. Reed*, 27 Fla. 345, 9 So. Rep. 213.

<sup>2</sup> *Lineberger v. Tidwell*, 104 N. C. 506, 10 S. E. Rep. 758; *Wynne v. Small*, 102 N. C. 133, 8 S. E. Rep. 412.

<sup>3</sup> *Ludlow v. O'Neil*, 29 Ohio St. 181; *Cahall v. Citizens' Mut. Building Asso.* 61 Ala. 232.

<sup>4</sup> *Lineberger v. Tidwell*, 104 N. C. 506, 10 S. E. Rep. 758; *McGlennery v. Miller*, 90 N. C. 215; *Southerland v. Hunter*, 93 N. C. 310; *Ferguson v. Kinsland*, 93 N. C. 337.

<sup>5</sup> **Arkansas**: *Shryock v. Cannon*, 39 Ark. 434; *Stillwell v. Adams*, 29 Ark. 346. Not required in conveyance of wife's separate property since Const. of 1874. *Stone v. Stone*, 43 Ark. 160. **California**: *Muir v. Galloway*, 61 Cal. 498; *Kendall v. Miller*, 9 Cal. 591. **Colorado**: *Nippel v. Hammond*, 4 Colo. 211. **Florida**: *Hartley v. Ferrell*, 9 Fla. 374. **Illinois**: *Lyon v. Kain*, 36 Ill. 362; *Garrett v. Moss*, 22 Ill. 363; *Trustees v. Davidson*, 65 Ill. 124. Since act of 1869 a separate examination not required. *Spurgin v. Traub*, 65 Ill. 170. **Indiana**: *Jordan v. Corey*, 2 Ind.

385, 52 Am. Dec. 516; *Pardun v. Dobesberger*, 3 Ind. 389. Not now required.

**Kentucky**: *Philips v. Green*, 3 A. K. Marsh. 7, 13 Am. Dec. 124. **Michigan**:

*Dewey v. Campau*, 4 Mich. 565. A separate examination not now required.

**Minnesota**: *Edgerton v. Jones*, 10 Minn. 427. Not now required. **Mississippi**:

*Kenneday v. Price*, 57 Miss. 771; *Willis v. Gattman*, 53 Miss. 721; *Warren v. Brown*, 25 Miss. 66, 57 Am. Dec. 191.

Not now required. **Missouri**: *Bagby v. Emberson*, 79 Mo. 139; *Krieger v. Crocker*,

118 Mo. 531, 24 S. W. Rep. 170. Not now required. R. S. 1889, § 2408; *Webb v. Webb*, 87 Mo. 540. **New Jersey**:

*Thayer v. Torrey*, 37 N. J. L. 339; *Armstrong v. Ross*, 20 N. J. Eq. 109;

*Marsh v. Mitchell*, 26 N. J. Eq. 497. **New York**: *Albany Ins. Co. v. Bay*, 4

N. Y. 9, 19; *Dennis v. Tarpenny*, 20 Barb. 371; *Elwood v. Klock*, 13 Barb. 50.

But a separate examination not required since 1849. *Allen v. Reynolds*, 4 Jones

& S. 297. **North Carolina**: *Den v. Ashbee*, 9 Ired. 353; *Askew v. Daniel*, 5 Ired.

Eq. 321; *Clayton v. Rose*, 87 N. C. 106. **North Dakota**, **South Dakota**: *Wambole v. Foote*, 2 Dak. 1, 2 N. W. Rep. 239

from a statement that she voluntarily consented, for it might be that she consented in the presence of her husband, and such a consent does not satisfy the law.<sup>1</sup> But if it is stated that she was examined "separate and apart," it is not material that other words of the prescribed form are omitted, such, for instance, as "out of the presence,"<sup>2</sup> "without the hearing,"<sup>3</sup> or "privily."<sup>4</sup>

1186. An examination "separate and apart" from the husband means an examination out of his presence, so that he cannot communicate with the wife by word or look or motion,<sup>5</sup> and cannot see or hear any indication of unwillingness on her part to execute or acknowledge the instrument.<sup>6</sup> But if the examination is "apart" it is "separate." The words mean substantially the same thing, and therefore a certificate is not rendered invalid by the omission of one of these words.<sup>7</sup>

1187. Compliance with this requirement must be substan-

**Ohio:** *Kilbourn v. Fury*, 26 Ohio St. 153; *Barton v. Morris*, 15 Ohio, 408. Not now required. **Oregon:** *Harty v. Ladd*, 3 Oregon, 353. **Pennsylvania:** *Jourdan v. Jourdan*, 9 S. & R. 268, 11 Am. Dec. 724; *Graham v. Long*, 65 Pa. St. 383; *McCandless v. Engle*, 51 Pa. St. 309. **Tennessee:** *Ellett v. Richardson*, 9 Bax. 293; *McCallum v. Petigrew*, 10 Heisk. 394. **Texas:** *Rice v. Peacock*, 37 Tex. 392. **Vermont:** *Pratt v. Battels*, 28 Vt. 685. Not now required. **Virginia:** *First Nat. Bank v. Paul*, 75 Va. 594, 40 Am. Rep. 740; *Bryan v. Stump*, 8 Gratt. 241, 56 Am. Dec. 139. A separate examination is not now required. **West Virginia:** *Laughlin v. Fream*, 14 W. Va. 322; *Linn v. Patton*, 10 W. Va. 187. **Wisconsin:** Not required since act of 1850. *Hayes v. Frey*, 54 Wis. 503, 11 N. W. Rep. 695.

In a few cases, however, it has been held that, although a statute required a separate examination, if it did not expressly require a certification of this fact, the certificate is good although it does not show this fact, it being presumed that the officer did his duty. *Ruffner v. McLenan*, 16 Ohio, 639; *Coleman v. Billings*, 89 Ill. 183; *Stevens v. Doe*, 6 Blackf. 475. And see *Kavanagh v. Day*, 10 R. I. 393, 14 Am. Rep. 690.

<sup>1</sup> "And it is difficult for the law to protect her further than by giving her an

opportunity of disclosing her mind to the magistrate out of the presence of her husband. The act, therefore, directs this examination of the wife to be separate and apart from the husband; and in this the magistrate has no discretion. He has no right to say that the consent was voluntary unless the husband and wife were separate, and that they were separate must appear on the face of the certificate, and not otherwise." *Jourdan v. Jourdan*, 9 S. & R. 268, 11 Am. Dec. 724, 726, per *Tilghman, C. J.*

<sup>2</sup> *Deery v. Cray*, 5 Wall. 795; *Nippel v. Hammond*, 4 Colo. 211.

<sup>3</sup> *Muir v. Galloway*, 61 Cal. 498; *Pardun v. Dobesberger*, 3 Ind. 389. See, however, *Butterfield v. Beale*, 3 Ind. 302.

<sup>4</sup> *Coombs v. Thomas*, 57 Tex. 321; *Dennis v. Tarpenny*, 20 Barb. 371; *Thayer v. Torrey*, 37 N. J. L. 339; *Love v. Taylor*, 26 Miss. 567; *Kenneday v. Price*, 57 Miss. 771; *Skinner v. Fletcher*, 1 Ired. 313. *Contra*, however, *Warren v. Brown*, 25 Miss. 66, 57 Am. Dec. 191; *Sibley v. Johnson*, 1 Mich. 380.

<sup>5</sup> *Belo v. Mayes*, 79 Mo. 67.

<sup>6</sup> *McCandless v. Engle*, 51 Pa. St. 309.

<sup>7</sup> *Belo v. Mayes*, 79 Mo. 67. See, *contra*, *Dewey v. Campau*, 4 Mich. 565; *Rice v. Peacock*, 37 Tex. 392.

tially shown by the certificate. It cannot be proved by parol when the certificate fails to show it,<sup>1</sup> nor can it be implied from doubtful expressions in the certificate.<sup>2</sup> On the other hand, when the certificate is in due form, it cannot be shown by parol evidence, in the absence of fraud participated in by the grantee, that the wife was not examined separate and apart from her husband.<sup>3</sup>

But a substantial, as distinguished from a literal, compliance with the statute is all that is required.<sup>4</sup>

The certificate must show that the privy examination preceded the acknowledgment. Therefore a certificate which states that the husband and wife acknowledged the deed, and then that the wife, being privily examined, and having the writing explained to her, "declared that she had willingly executed the same, and does not wish to retract it," is not sufficient.<sup>5</sup>

**1188. Deed "fully explained" or "contents made known."** — A certificate of separate examination which fails to show that the deed was "fully explained" or "contents made known," as provided by statute, is fatally defective.<sup>6</sup> A statement that the deed was *read* to the married woman is not in substance the same as the statement that it was *fully explained* to her.<sup>7</sup> A cer-

<sup>1</sup> *Elliott v. Peirsol*, 1 Pet. 328; *Jourdan v. Jourdan*, 9 S. & R. 268, 11 Am. Dec. 724; *First Nat. Bank v. Paul*, 75 Va. 594, 40 Am. Rep. 740; *Harty v. Ladd*, 3 Oreg. 353.

<sup>2</sup> *Hockman v. McClanahan*, 87 Va. 33, 12 S. E. Rep. 230.

<sup>3</sup> See §§ 1196-1216.

<sup>4</sup> *Kenneday v. Price*, 57 Miss. 771; *Johnston v. Wallace*, 53 Miss. 331, 24 Am. Rep. 699.

<sup>5</sup> *Hockman v. McClanahan*, 87 Va. 33, 12 S. E. Rep. 230; *Blair v. Sayre*, 29 W. Va. 604, 615, 2 S. E. Rep. 97; *Laidley v. Land Co.* 30 W. Va. 505, 511, 4 S. E. Rep. 705.

<sup>6</sup> *Alabama*: *Roney v. Moss*, 76 Ala. 491. *California*: *Hutchinson v. Ainsworth*, 63 Cal. 286; *Pease v. Barbiers*, 10 Cal. 436. *Iowa*: *O'Ferrall v. Simplot*, 4 Greene, 162, 4 Iowa, 381. *Kentucky*: *Moorman v. Board*, 11 Bush, 135. The use of the word "understandingly," or its equivalent, when required by statute, is

essential. *Anderson v. Bailey*, 11 Heisk. 29; *Wright v. Dufield*, 2 Bax. 218. *Missouri*: *Burnett v. McCluskey*, 78 Mo. 676; *Bagby v. Emberson*, 79 Mo. 139. *North Dakota and South Dakota*: *Wambole v. Foote*, 2 Dak. 1, 2 N. W. Rep. 239. *Pennsylvania*: *Barnet v. Barnet*, 15 S. & R. 72, 16 Am. Dec. 516; *Miller v. Wentworth*, 82 Pa. St. 280; *Hornbeck v. Mt. &c. Asso.* 88 Pa. St. 64; *Spencer v. Reese*, 165 Pa. St. 158, 30 Atl. Rep. 722. *Texas*: *Ruleman v. Pritchett*, 56 Tex. 482; *Burkett v. Scarborough*, 59 Tex. 495; *Hayden v. Moffat*, 74 Tex. 647, 12 S. W. Rep. 820; *Norton v. Davis*, 83 Tex. 32, 18 S. W. Rep. 430; *Johnson v. Taylor*, 60 Tex. 360. *Virginia*: *Bolling v. Teel*, 76 Va. 487; *Hairston v. Randolphs*, 12 Leigh, 445. *West Virginia*: *Tavener v. Barrett*, 21 W. Va. 656.

<sup>7</sup> *Watson v. Michael*, 21 W. Va. 568. A certificate by the officer that "she was examined and interrogated by me touching the same" is not sufficient under a



tificate which shows that the explanation was made *before* the privy examination is fatally defective. The explanation must be during such examination and as a part of it.<sup>1</sup>

The acknowledgment must be after the privy examination and explanation, and a certificate which shows that the husband and wife acknowledged the deed, and then that the wife, being privily examined, and having the writing explained to her, declared that she had willingly executed the same, is insufficient.<sup>2</sup> No presumption of knowledge of the contents of a deed, on the part of a married woman, arises from the fact of her executing it.<sup>3</sup>

statute requiring the certificate to state that a "full explanation" of the deed was made to her. *Runge v. Sabin* (Tex. Civ. App.), 30 S. W. Rep. 568.

<sup>1</sup> *Watson v. Michael*, 21 W. Va. 568; *McMullen v. Eagan*, 21 W. Va. 233; *Laidley v. Knight*, 23 W. Va. 735. In **Kentucky**, however, although the law directs the officer to explain the deed to the wife separate and apart from her husband, it is not indispensably necessary that it should be so explained in order to make it valid. It is the information as to the contents and legal effect of the instrument, and not the time, place, and mode in which it is imparted, nor the person who imparts it, that constitutes the essence of the requirement. *Moorman v. Board*, 11 Bush, 135; *Gregory v. Ford*, 5 B. Mon. 471.

<sup>2</sup> In **Missouri** the statute does not require a private explanation of the contents of the deed. *Belo v. Mayes*, 79 Mo. 67; *Webb v. Webb*, 87 Mo. 540. Nor is it requisite that the information as to the contents of the deed be imparted by the officer. *Drew v. Arnold*, 85 Mo. 128. In **Ohio**, under the statute of 1818, although the officer was required to read or otherwise make known to the wife the contents of the deed, it was not essential that he should certify that he had done so. *Card v. Patterson*, 5 Ohio St. 319; *Chesnut v. Shane*, 16 Ohio, 599, 47 Am. Dec. 387. So in **Indiana**: *Stevens v. Doe*, 6 Blackf. 475.

In *Hockman v. McClanahan*, 87 Va. 33, 12 S. E. Rep. 230, it is said to like effect: "The examination must be privy; the

writing must be explained to her: these are

prerequisite. And after this the wife must

(1) acknowledge the deed to be her act; (2)

declare that she did willingly execute it;

and (3) that she does not now wish to re-

tract it. If she does not, under these cir-

cumstances, acknowledge it to be her act,

and declare that she willingly executed it,

then the law will regard the execution as

involuntary and as under compulsion, and

she is not bound. . . . In this case there

has been no acknowledgment by the wife

of the act, after privy examination and

explanation out of the presence of her

husband, unless we can hold that a decla-

ration that she did execute willingly can

be held to be such acknowledgment. But

the statute requires that there shall be

both, not either; and both are distinctly

repeated in the statute which requires

recordation of the deed of a married

woman. This question, upon the surface

and in the abstract, appears to be one

containing but little substance; but when

considered in connection with the statute,

it is a question whether the statute has

been complied with. The statute direct-

ing an acknowledgment after privy ex-

amination, and the acknowledgment being

in this case before such privy examina-

tion, to hold this certificate good would

be to disregard this requirement of the

law, which we are not authorized to do."

See, also, *Blair v. Sayre*, 29 W. Va. 604,

2 S. E. Rep. 97; and *Laidley v. Land Co.*

30 W. Va. 505, 511, 4 S. E. Rep. 705.

<sup>3</sup> *Pease v. Barbiers*, 10 Cal. 436; *Nantz*

*v. Bailey*, 3 Dana, 111.

**1189. Immaterial omissions and errors.** — In a certificate of acknowledgment by a married woman, the omission of the word "known," in the phrase "the contents of said indenture being first made fully known to her," is not a material omission, because the certificate as written clearly implies that the contents were communicated to her.<sup>1</sup> The omission of the word "fully" in the phrase "fully known" is not a material one.<sup>2</sup>

The statement that the married woman making the acknowledgment "fully understands the contents of said deed" is not equivalent to the requirement that the contents shall be "fully explained to her."<sup>3</sup>

A certificate of acknowledgment by a married woman which is formal in every respect except that instead of stating that the contents and meaning of the deed were explained to her, it recited that the contents and meaning of her *husband* were explained to her, is sufficient, for it is clear from the whole certificate what was meant, and that the use of the wrong word was a mere clerical error.<sup>4</sup>

**1190. Willingly executed the same.** — These words, or words of equivalent import, are essential to the validity of a certificate when required by statute.<sup>5</sup> The fact that the certificate shows

<sup>1</sup> *Hombeck v. Mutual Build. & L. Asso.* 88 Pa. St. 64.

<sup>2</sup> *Hartshorn v. Dawson*, 79 Ill. 108.

<sup>3</sup> *Langton v. Marshall*, 59 Tex. 296. But see *Thomas v. Meier*, 18 Mo. 573; *Bateman, Petitioner*, 11 R. I. 585.

<sup>4</sup> *Calumet, &c. Dock Co. v. Russell*, 68 Ill. 426.

<sup>5</sup> *Laughlin v. Fream*, 14 W. Va. 322; *Leftwich v. Neal*, 7 W. Va. 569; *Pickens v. Knisely*, 29 W. Va. 1, 6 Am. St. Rep. 622; *Bartlett v. Fleming*, 3 W. Va. 163; *Bolling v. Teel*, 76 Va. 487; *Dennis v. Tarpenny*, 20 Barb. 371; *Loudon v. Blythe*, 27 Pa. St. 22; *Bagby v. Emberson*, 79 Mo. 139; *Little v. Dodge*, 32 Ark. 453; *Tubbs v. Gatewood*, 26 Ark. 128; *Stillwell v. Adams*, 29 Ark. 346; *Chaffe v. Oliver*, 39 Ark. 531; *Jones v. Lewis*, 8 Ired. 70, 47 Am. Dec. 338; *Wambole v. Foote*, 2 Dak. 1, 2 N. W. Rep. 239; *Garrett v. Moss*, 22 Ill. 363; *Hayden v. Moffat*, 74 Tex. 647, 12 S. W. Rep. 820;

*Smith v. Elliott*, 39 Tex. 201; *Belcher v. Weaver*, 46 Tex. 293, 26 Am. Rep. 267; *Blackburn v. Pennington*, 8 B. Mon. 217.

Under a statute of **Kentucky**, in somewhat different terms, it was held that the declaration that she did not wish to retract was equivalent to a declaration that she wished the deed to stand, and that she freely acknowledged the execution of it. *Gill v. Fauntleroy*, 8 B. Mon. 177. In **Alabama** a statutory form of acknowledgment by a wife to a conveyance of homestead was "that she signed the same of her own free will and accord, and without fear, constraint, or threats on the part of the husband;" and it was held that the omission of the word "threats" rendered the certificate insufficient and invalid. *Motes v. Carter*, 73 Ala. 553. Under this statute the word "persuasion" is not a substantial substitute for the word

that the married woman acknowledged a deed to be her act does not imply that she willingly executed it; nor does the statement that she does not wish to retract what she has done necessarily imply that she willingly executed the deed. "Here is the express provision of the statute requiring her declaration that she willingly executed the deed and does not wish to retract it. . . . The legislature does not seem to have regarded these phrases as being of the same import, and the rules of interpretation require that the courts shall give effect to every part of the act."<sup>1</sup>

1191. Under a statute requiring that the "execution" of the deed shall be acknowledged, an acknowledgment that the deed was "signed" has been held insufficient.<sup>2</sup>

But there is stronger authority that the word "signed" is in such case equivalent to "executed," and that its use in place of the latter word does not vitiate the certificate.<sup>3</sup>

1192. The omission of the words "freely" and "voluntarily" is immaterial when the certificate shows that she acknowledged that she executed the deed "without any fear, threats, or compulsion" on the part of her husband, and upon an examination separate and apart from him.<sup>4</sup> It was the purpose of the statute relating to acknowledgments by married women to protect them against the undue influence of the husband. If the

"threats." *Daniels v. Lowery*, 92 Ala. 519, 8 So. Rep. 352.

*Words of equivalent import.* *Dundas v. Hitchcock*, 12 How. 256; *Battin v. Bigelow*, 1 Pet. C. C. 452; *Allen v. Lenoir*, 53 Miss. 321; *Bernard v. Elder*, 50 Miss. 336; *Little v. Dodge*, 32 Ark. 453; *Tubbs v. Gatewood*, 26 Ark. 128; *Chaffe v. Oliver*, 39 Ark. 531; *Dennis v. Tarpenny*, 20 Barb. 371; *Meriam v. Harsen*, 2 Barb. Ch. 232; *Goode v. Smith*, 13 Cal. 81; *Belcher v. Weaver*, 46 Tex. 293, 26 Am. Rep. 267; *Edmondson v. Harris*, 2 Tenn. Ch. 427; *Den v. Ferebee*, 9 Ired. L. 312; *Bensimer v. Fell*, 35 W. Va. 15, 12 S. E. Rep. 1078. See, however, for instances of fatal omissions or substitutions, *Henderson v. Rice*, 1 Coldw. 223; *Hawkins v. Burress*, 1 Harr. & J. 513; *Alabama L. Ins. Co. v. Boykin*, 38 Ala. 510; *Boykin v. Rain*, 28 Ala. 332, 65 Am. Dec. 349.

<sup>1</sup> *Leftwich v. Neal*, 7 W. Va. 569.

<sup>2</sup> *Edwards v. Thom*, 25 Fla. 222, 5 So. Rep. 707; *Kendrick v. Latham*, 25 Fla. 820, 6 So. Rep. 871; *L'Engle v. Reed*, 27 Fla. 345, 9 So. Rep. 213.

<sup>3</sup> *Bensimer v. Fell*, 35 W. Va. 15, 12 S. E. Rep. 1078; *Pickens v. Knisely*, 29 W. Va. 1, 11 S. E. Rep. 932; *Stuart v. Dutton*, 39 Ill. 91; *Jacoway v. Gault*, 20 Ark. 190, 73 Am. Dec. 494.

<sup>4</sup> *Allen v. Lenoir*, 53 Miss. 321; *Love v. Taylor*, 26 Miss. 567; *Belcher v. Weaver*, 46 Tex. 293, 26 Am. Rep. 267. Where a certificate stated that the wife "freely and voluntarily," with "fear or compulsion on the part of her said husband, signed same," but it appeared from the general sense and meaning of the certificate that the word "without" was intended, instead of "with," the certificate was held to be sufficient. *Durst v. Daugherty*, 81 Tex. 650, 17 S. W. Rep. 388.

words used, by fair intendment, imply that her execution of the deed was "voluntary" and "free," the requirements of the statutes are satisfied. The words "without any fear, threats, or compulsion" import that the conveyance has been made unbiassed by him.<sup>1</sup>

The entire omission of the words "without fear" has been held to invalidate the acknowledgment.<sup>2</sup>

The omission of the word "threats" is not supplied by the word "persuasion," and such certificate is fatally defective.<sup>3</sup>

**1193.** A statute which directs that a married woman shall upon a private examination acknowledge the deed "to be her act" is substantially met by a certificate that the husband and wife severally acknowledged the deed, and that the wife upon private examination "declared that she had willingly signed, sealed, and delivered the same, and that she wished not to retract it."<sup>4</sup> The omission of the words "her act and deed" is immaterial where there is an acknowledgment by a married woman that she willingly executed the deed.<sup>5</sup> But a statement that a married woman "acknowledged the same freely and willingly" is not a substantial compliance with a statute requiring a certificate that "she acknowledged such instrument to be her act and deed, and declared that she had willingly signed the same."<sup>6</sup>

**1194.** For the purposes therein expressed. — These words are material when prescribed by statute for the certificate of acknowledgment of a married woman.<sup>7</sup> The requirement may, however, be satisfied by the use of equivalent words.<sup>8</sup>

In case it is provided that in order to relinquish dower it shall be stated in the certificate of acknowledgment that she relinquishes dower, the omission to state this is fatally defective, and insufficient to release her dower rights.<sup>9</sup>

<sup>1</sup> *Bernard v. Elder*, 50 Miss. 336; *Shaller v. Brand*, 6 Binn. 435.

<sup>2</sup> *Boykin v. Rain*, 28 Ala. 332.

<sup>3</sup> *Daniels v. Lowery*, 92 Ala. 519, 8 So. Rep. 352.

<sup>4</sup> *Solyer v. Romanet*, 52 Tex. 562.

<sup>5</sup> *Solyer v. Romanet*, 52 Tex. 562; *Stuart v. Dutton*, 39 Ill. 91.

<sup>6</sup> *Hayden v. Moffatt*, 74 Tex. 647, 12 S. W. Rep. 820, 15 Am. St. Rep. 866. See *Rorer v. Roanoke Nat. Bank*, 83 Va. 589, 4 S. E. Rep. 820; *Clinch Riv.*

*Veneer Co. v. Kurth*, 90 Va. 137, 19 S. E. Rep. 878.

<sup>7</sup> *Shryock v. Cannon*, 39 Ark. 434;

*Currie v. Kerr*, 11 Lea, 138.

<sup>8</sup> *Davis v. Bogle*, 11 Heisk. 315.

<sup>9</sup> *Thomas v. Meier*, 18 Mo. 573; *Lindley v. Smith*, 46 Ill. 523; *Becker v. Quigg*, 54 Ill. 390. If such relinquishment is contained in a married woman's deed of her own land, it is rejected as surplusage, and the acknowledgment is not vitiated. *Stuart v. Dutton*, 39 Ill. 91; *Stuart v.*

1195. Does not wish to retract. — Under a statute providing, as a part of the certificate of acknowledgment by a married woman, that she “does not wish to retract” her execution of the conveyance, the omission of this statement makes the certificate fatally defective, unless words of equivalent import are used;<sup>1</sup> but it has been held that the omission is supplied by the use of equivalent words, such as that “she still voluntarily assents thereto.”<sup>2</sup>

The same rule applies to the phrase “is still satisfied therewith.”<sup>3</sup>

### X. *Conclusiveness of Certificates.*

1196. There is a presumption, generally conclusive, in favor of the truth of the certificate, when this substantially conforms with the statutory requirements. It is an official act, done under the obligation of an official oath, and protected by the presumptions the law necessarily indulges in favor of the acts of its own officers. The burden of proof is on those who assail the verity of the certificate, and it can be successfully impeached only by clear and convincing evidence that fraud or imposition was practiced, or that the deed was not executed by the grantor, when the issue is limited to the fact of execution.<sup>4</sup> There are some

Rumsey, 26 Ill. 97; *Tourville v. Pierson*, 39 Ill. 446; *Hartley v. Ferrell*, 9 Fla. 374; *Stone v. Montgomery*, 35 Miss. 83; *Chauvin v. Wagner*, 18 Mo. 531, 546; *Perkins v. Carter*, 20 Mo. 465. *Contra*, *Lane v. Dolick*, 6 McLean, 200. In case the land conveyed is in part owned by the husband and in part by the wife, and she makes a single acknowledgment relinquishing her dower, this clause will be held applicable to all lands in which she has dower; and, as to the lands she owned in fee, the clause will be held to be surplusage. *Barker v. Circle*, 60 Mo. 258.

<sup>1</sup> *Bateman*, Petitioner, 11 R. I. 585; *Grove v. Zumbro*, 14 Gratt. 501; *McMullen v. Eagan*, 21 W. Va. 233; *Leftwich v. Neal*, 7 W. Va. 569; *Linn v. Patton*, 10 W. Va. 187; *Bolling v. Teel*, 76 Va. 487; *La Bourgeoise v. McNamara*, 5 Mo. App. 576; *Chauvin v. Wagner*, 18 Mo. 531; *Ruleman v. Pritchett*, 56 Tex. 482;

*Davis v. Agnew*, 67 Tex. 206, 2 S. W. Rep. 43, 376; *Belcher v. Weaver*, 46 Tex. 293, 26 Am. Rep. 267; *Murphy v. Reynaud*, 2 Tex. Civ. App. 470, 21 S. W. Rep. 991; *Norton v. Davis*, 83 Tex. 32, 18 S. W. Rep. 430; *Freeman v. Preston* (Tex. Civ. App.), 29 S. W. Rep. 495; *Landers v. Bolton*, 26 Cal. 548. In *Hughes v. Lane*, 11 Ill. 123, it was held that it was not necessary to recite this in the certificate.

<sup>2</sup> *Norton v. Davis*, 83 Tex. 32, 18 S. W. Rep. 430.

<sup>3</sup> *Ward v. McIntosh*, 12 Ohio St. 231.

<sup>4</sup> *Shelton v. Aultman & T. Co.* 82 Ala. 315, 8 So. Rep. 232; *Downing v. Blair*, 75 Ala. 216; *Barnett v. Proskauer*, 62 Ala. 486, 487, per Brickell, C. J.; *Calumet, & Co. Dock Co. v. Russell*, 68 Ill. 426; *Lickmon v. Harding*, 65 Ill. 505; *Warrick v. Hull*, 102 Ill. 280; *Dikeman v. Arnold*, 78 Mich. 455, 44 N. W. Rep. 407; *Hourtienne v. Schnoor*, 33 Mich. 274;

decisions which hold that, while the certificate is not conclusive but only *prima facie* evidence, it is very strong evidence that the deed was executed as certified in the acknowledgment;<sup>1</sup> but the great weight of authority is that the certificate is conclusive of the facts recited, in the absence of an allegation and proof of fraud, imposition, or duress.<sup>2</sup>

*Johnson v. Van Velsor*, 43 Mich. 209, 5 N. W. Rep. 265; *Borland v. Walrath*, 33 Iowa, 130; *Bailey v. Landingham*, 53 Iowa, 722, 6 N. W. Rep. 76; *Holt v. Moore*, 37 Ark. 145; *Banning v. Banning*, 80 Cal. 271, 22 Pac. Rep. 210; *Grant v. White*, 57 Cal. 141; *Addis v. Graham*, 88 Mo. 197; *Riecke v. Westenhoff*, 10 Mo. App. 358; *Carr v. Frick Coke Co.* 170 Pa. St. 62, 32 Atl. Rep. 656.

<sup>1</sup> **Connecticut**: *Linsley v. Brown*, 13 Conn. 192; *Smith v. Ward*, 2 Root, 378, 1 Am. Dec. 80. **Illinois**: *Blackman v. Hawks*, 89 Ill. 512; *McPherson v. Sanborn*, 88 Ill. 150; *Crane v. Crane*, 81 Ill. 165. **Iowa**: *Bailey v. Landingham*, 53 Iowa, 722, 6 N. W. Rep. 76; *Van Orman v. McGregor*, 23 Iowa, 300; *Morris v. Sargent*, 18 Iowa, 90; *Herrick v. Musgrove*, 67 Iowa, 63, 24 N. W. Rep. 594. **Kansas**: *Gabbey v. Forgeus*, 38 Kans. 62, 15 Pac. Rep. 866. **Kentucky**: *Ford v. Teal*, 7 Bush, 156; *Woodhead v. Foulds*, 7 Bush, 222. Some of these cases will be found on examination to involve questions of fraud, imposition, or duress, or the certificates fail to meet the statutory requirements. **Michigan**: *Dewey v. Campan*, 4 Mich. 565; *Hourtienne v. Schnoor*, 33 Mich. 274; *Camp v. Carpenter*, 52 Mich. 375, 18 N. W. Rep. 113; *Johnson v. Van Velsor*, 43 Mich. 208, 5 N. W. Rep. 265. **Minnesota**: *Dodge v. Hollinshead*, 6 Minn. 25, 80 Am. Dec. 433; *Edgerton v. Jones*, 10 Minn. 427. **Nebraska**: *Phillips v. Bishop*, 35 Neb. 487, 53 N. W. Rep. 375; *Barker v. Avery*, 36 Neb. 599, 54 N. W. Rep. 989. **New Jersey**: *Marsh v. Mitchell*, 26 N. J. Eq. 497. **New York**: *Thurman v. Cameron*, 24 Wend. 87; *Gillett v. Stanley*, 1 Hill, 121; *People v. Galloway*, 17 Wend. 540; *Jackson v. Cairns*, 20 Johns. 301; *Jackson v. Hayner*, 12

*Johns.* 469; *Jackson v. Schoonmaker*, 4 Johns. 161; *Knowles v. McCamley*, 10 Paige, 342. **Pennsylvania**: *Heeter v. Glasgow*, 79 Pa. St. 79. **Virginia**: *Hutchinson v. Rust*, 2 Gratt. 394. **Wisconsin**: *Smith v. Allis*, 52 Wis. 337, 9 N. W. Rep. 155.

<sup>2</sup> *Insurance Co. v. Nelson*, 103 U. S. 544; *Young v. Duval*, 109 U. S. 573, 3 Sup. Ct. Rep. 414; *Paxton v. Marshall*, 18 Fed. Rep. 361. **Alabama**: *Scott v. Simons*, 70 Ala. 356; *Shelton v. Aultman & Taylor Co.* 82 Ala. 315, 8 So. Rep. 232; *Barnett v. Proskauer*, 62 Ala. 486; *Miller v. Marx*, 55 Ala. 322; *Smith v. McGuire*, 67 Ala. 34; *Downing v. Blair*, 75 Ala. 216. The cases of *Grider v. American Mortg. Co.* 99 Ala. 281, 12 So. Rep. 775, and *Giddens v. Bolling*, 99 Ala. 319, 13 So. Rep. 511, are modified in *American Freehold Land Mortgage Co. v. James (Ala.)*, 16 So. Rep. 887, which fully supports the text. **Arkansas**: *Meyer v. Gossett*, 38 Ark. 377; *Holt v. Moore*, 37 Ark. 145. **California**: *De Arnaz v. Escandon*, 59 Cal. 486; *Banning v. Banning*, 80 Cal. 271, 22 Pac. Rep. 210; *Grant v. White*, 57 Cal. 141. **Connecticut**: *Hayden v. Wescott*, 11 Conn. 129. **Florida**: *First Nat. Bank v. Ashmead*, 33 Fla. 416, 14 So. Rep. 886. **Illinois**: *Griffin v. Griffin*, 125 Ill. 430, 17 N. E. Rep. 782; *Fitzgerald v. Fitzgerald*, 100 Ill. 385; *Tunison v. Chamblin*, 88 Ill. 378; *Russell v. Baptist Theo. Union*, 73 Ill. 337; *Kerr v. Russell*, 69 Ill. 666, 18 Am. Rep. 634; *Lickmon v. Harding*, 65 Ill. 505; *Monroe v. Poorman*, 62 Ill. 523; *Hill v. Bacon*, 43 Ill. 477; *Calumet, &c. Dock Co. v. Russell*, 68 Ill. 426; *Post v. First Nat. Bank*, 138 Ill. 559, 28 N. E. Rep. 978. **Indiana**: *Wright v. Bundy*, 11 Ind. 398; *M'Neely v. Rucker*, 6 Blackf. 391. **Kentucky**: *Harpending v. Wylie*, 14 Bush,

The fact that the officer who took the acknowledgment was the grantor's attorney does not alter the presumption in favor of the certificate.<sup>1</sup>

But an acknowledgment may be impeached by showing that the officer who purported to take it had no authority to do so, or was acting beyond his jurisdiction.<sup>2</sup>

1197. As between the immediate parties to the deed, an acknowledgment may be impeached for forgery, fraud, collusion, duress, or imposition;<sup>3</sup> but the evidence to warrant the set-

380; *Cox v. Gill*, 83 Ky. 669; *Keith v. Silberberg* (Ky.), 29 S. W. Rep. 316. **Maine**: *Greene v. Godfrey*, 44 Me. 25. **Maryland**: *Bissett v. Bissett*, 1 H. & McH. 211; *Ridgely v. Howard*, 3 H. & McH. 321. **Michigan**: *Dikeman v. Arnold*, 78 Mich. 455, 44 N. W. Rep. 407; *Hourtienne v. Schnoor*, 33 Mich. 274; *Johnson v. Van Velsor*, 43 Mich. 208, 219, 5 N. W. Rep. 265. **Mississippi**: *Johnston v. Wallace*, 53 Miss. 331, 24 Am. Rep. 699; *Shivers v. Simmons*, 54 Miss. 520, 28 Am. Rep. 372; *Allen v. Lenoir*, 53 Miss. 321; *Stone v. Montgomery*, 35 Miss. 83. **Missouri**: *Addis v. Graham*, 88 Mo. 197; *Riecke v. Westenoff*, 10 Mo. App. 358. **New Jersey**: *Tooker v. Sloan*, 30 N. J. Eq. 394; *Marsh v. Mitchell*, 26 N. J. L. 497. **New York**: *Priest v. Cummings*, 16 Wend. 617; *Elwood v. Klock*, 13 Barb. 50. The Code of Civ. Proc. § 936, declares that the certificate of acknowledgment of a conveyance is not conclusive, but may be rebutted. But this statute cannot be invoked to prevent an estoppel by deed. *Mut. L. Ins. Co. v. Corey*, 135 N. Y. 326, 31 N. E. Rep. 1095. **Ohio**: *Ford v. Osborne*, 45 Ohio St. 1, 12 N. E. Rep. 526; *Baldwin v. Snowden*, 11 Ohio St. 203, 78 Am. Dec. 303. **Oregon**: *Moore v. Fuller*, 6 Oreg. 272. **Pennsylvania**: *Carr v. Frick Coke Co.* 170 Pa. St. 62, 32 Atl. Rep. 656, 662; *Cover v. Manaway*, 115 Pa. St. 338, 8 Atl. Rep. 393; *Singer Manuf. Co. v. Rook*, 84 Pa. St. 442, 24 Am. Rep. 204; *Miller v. Wentworth*, 82 Pa. St. 280; *Hall v. Patterson*, 51 Pa. St. 289; *Michener v. Cavender*, 38 Pa. St. 334; *Heeter v. Glasgow*, 79 Pa. St. 79,

21 Am. Rep. 46; *Shrader v. Decker*, 9 Pa. St. 14; *Williams v. Baker*, 71 Pa. St. 476; *Louden v. Blythe*, 16 Pa. St. 532, 27 Pa. St. 22; *Heilman v. Kroh*, 155 Pa. St. 1, 25 Atl. Rep. 751. **Tennessee**: *Shields v. Netherland*, 5 Lea, 193; *Grotenkemper v. Carver*, 9 Lea, 280. **Texas**: *Hartley v. Frosh*, 6 Tex. 208, 55 Am. Dec. 772; *Pool v. Chase*, 46 Tex. 207; *Shelby v. Burtis*, 18 Tex. 644; *Williams v. Pouns*, 48 Tex. 141; *Davis v. Kennedy*, 58 Tex. 516; *Kocourek v. Marak*, 54 Tex. 201, 33 Am. Rep. 623; *Wiley v. Prince*, 21 Tex. 637; *Waltee v. Weaver*, 57 Tex. 571; *Herring v. White*, 6 Tex. Civ. App. 249, 25 S. W. Rep. 1016. **Virginia**: *Harkins v. Forsyth*, 11 Leigh, 294; *Murrell v. Diggs*, 84 Va. 900, 6 S. E. Rep. 461; *Burson v. Andes*, 83 Va. 445, 8 S. E. Rep. 249. **West Virginia**: *Pickens v. Knisely*, 29 W. Va. 1, 11 S. E. Rep. 932; *Rollins v. Menager*, 22 W. Va. 461; *Henderson v. Smith*, 26 W. Va. 829.

<sup>1</sup> *Dikeman v. Arnold*, 78 Mich. 455, 44 N. W. Rep. 407.

<sup>2</sup> *Ferebee v. Hinton*, 102 N. C. 99, 8 S. E. Rep. 922.

<sup>3</sup> *Schrader v. Decker*, 9 Pa. St. 14; *Barnet v. Barnet*, 15 S. & R. 72; *Michener v. Cavender*, 38 Pa. St. 334; *Louden v. Blythe*, 16 Pa. St. 532, 55 Am. Dec. 527; *Jamison v. Jamison*, 3 Whart. 457, 31 Am. Dec. 536; *Heeter v. Glasgow*, 79 Pa. St. 79, 21 Am. Rep. 46; *Cressona Sav. & Co. v. Sowers*, 134 Pa. St. 354, 19 Atl. Rep. 686; *Williams v. Baker*, 71 Pa. St. 476; *Miller v. Wentworth*, 82 Pa. St. 280; *Rollins v. Menager*, 22 W. Va. 461; *Westbrooks v. Jeffers*, 33 Tex. 86.

ting aside of the deed upon such ground must fully and clearly satisfy the court that the certificate is untrue and fraudulent.<sup>1</sup> The officer's certificate in proper form must prevail over the unsupported testimony of the grantor that the same was false and forged.<sup>2</sup> A mere suspicion that a certificate is false and forged, or even a preponderance of evidence not sufficient to establish a moral certainty to that effect, is insufficient to impeach the certificate.<sup>3</sup> The certificate of acknowledgment imports verity, and can be overcome only by clear and satisfactory evidence. The testimony of the grantor and the opinions of experts that the signature to the deed is not that of the grantor are not sufficient.<sup>4</sup>

<sup>1</sup> *Insurance Co. v. Nelson*, 103 U. S. 544; *Griffin v. Griffin*, 125 Ill. 430, 17 N. E. Rep. 782; *Fitzgerald v. Fitzgerald*, 100 Ill. 385; *Marston v. Brittenham*, 76 Ill. 614; *Monroe v. Poorman*, 62 Ill. 523; *Watson v. Watson*, 118 Ill. 56, 7 N. E. Rep. 95; *Calumet, &c. Dock Co. v. Russell*, 68 Ill. 426; *Graham v. Anderson*, 42 Ill. 514, 92 Am. Dec. 89; *Riecke v. Westenhoff*, 10 Mo. App. 358; *Smith v. McGuire*, 67 Ala. 34; *Worrell v. McDonald*, 66 Ala. 572.

<sup>2</sup> *Lickmon v. Harding*, 65 Ill. 505; *Monroe v. Poorman*, 62 Ill. 523; *Graham v. Anderson*, 42 Ill. 514, 92 Am. Dec. 89; *Watson v. Watson*, 118 Ill. 56, 7 N. E. Rep. 95; *McPherson v. Sanborn*, 88 Ill. 150; *Crane v. Crane*, 81 Ill. 165; *Russell v. Theological Union*, 73 Ill. 337; *Blackman v. Hawks*, 89 Ill. 512; *Marston v. Brittenham*, 76 Ill. 611; *Kerr v. Russell*, 69 Ill. 666, 18 Am. Rep. 634; *Calumet, &c. Dock Co. v. Russell*, 68 Ill. 426, 430; *Heacock v. Lubuke*, 107 Ill. 396; *McPherson v. Sanborn*, 88 Ill. 150; *Foster v. Latham*, 21 Ill. App. 165; *Hourtienne v. Schnoor*, 33 Mich. 274; *Bailey v. Landingham*, 53 Iowa, 722, 6 N. W. Rep. 76; *Grottenkemper v. Carver*, 9 Lea, 280; *Shields v. Netherland*, 5 Lea, 193. In *Watson v. Watson*, 118 Ill. 56, 60, 7 N. E. Rep. 95, Mr. Justice Craig said: "We are aware of no well-considered case holding that a deed may be impeached and set aside on such evidence, and we think it would be

establishing a dangerous precedent for any court to lay down a rule of that character. As was said in the case first cited, public policy requires such an act should prevail over the unsupported testimony of an interested party; otherwise there would be but slight security in titles to land."

<sup>3</sup> *Griffin v. Griffin*, 125 Ill. 430, 17 N. E. Rep. 782.

<sup>4</sup> *Insurance Co. v. Nelson*, 103 U. S. 544; *Watson v. Watson*, 118 Ill. 56, 7 N. E. Rep. 95; *Tunison v. Chamblin*, 88 Ill. 378; *Kerr v. Russell*, 69 Ill. 666, 18 Am. Rep. 634; *Warrick v. Hull*, 102 Ill. 280; *Russell v. Baptist Theological Union*, 73 Ill. 337; *Johnson v. Van Velsor*, 43 Mich. 208, 5 N. W. Rep. 265; *Hourtienne v. Schnoor*, 33 Mich. 274; *Van Orman v. McGregor*, 23 Iowa, 300; *Worrell v. McDonald*, 66 Ala. 572; *Smith v. McGuire*, 67 Ala. 34; *Grottenkemper v. Carver*, 9 Lea, 240; *Biggers v. St. Louis Mut. House Building Co.* 9 Mo. App. 210; *Reicke v. Westenhoff*, 10 Mo. App. 358; *Smith v. Allis*, 52 Wis. 337, 9 N. W. Rep. 155; *Allen v. Lenoir*, 53 Miss. 321; *Hughes v. Colman*, 10 Bush, 246; *Jett v. Rogers*, 12 Bush, 564; *Kavanaugh v. Day*, 10 R. I. 393. In *Borland v. Walrath*, 33 Iowa, 130, 133, Beck, J., said: "The evidence as to the genuineness of the signature, based upon the comparison of handwriting and of the opinion of experts, is entitled to proper consideration



1198. As to subsequent purchasers for a valuable consideration without notice the certificate is conclusive, even in cases of fraud or duress.<sup>1</sup> This rule applies equally to ordinary acknowledgments and to acknowledgments by a married woman upon separate examination. She cannot avoid the deed on account of the deception and fraud practiced on her by her husband in procuring her signature, or on account of the failure of the officer to acquaint her with the contents of the instrument, in the absence of evidence tending to charge those claiming under the deed with notice.<sup>2</sup> "A deed having been signed by husband and wife, and she having appeared before an officer competent to take her acknowledgment, and having acknowledged in some manner,

and weight. It must be confessed, however, that it is of the lowest order of evidence, or of the most unsatisfactory character. It cannot be claimed that it ought to overthrow positive and direct evidence of credible witnesses who testify from their personal knowledge. It is most used and is most useful in cases of conflict between witnesses as corroborating testimony."

<sup>1</sup> Paxton v. Marshall, 18 Fed. Rep. 361. Alabama: Shelton v. Aultman & T. Co. 82 Ala. 315, 8 So. Rep. 232; Moog v. Strang, 69 Ala. 98. Arkansas: Holt v. Moore, 37 Ark. 145; Meyer v. Gossett, 38 Ark. 377. Illinois: Ennor v. Thompson, 46 Ill. 214; Lickmon v. Harding, 65 Ill. 505; Kerr v. Russell, 69 Ill. 666, 18 Am. Rep. 634. Massachusetts: White v. Graves, 107 Mass. 325. Mississippi: Johnston v. Wallace, 53 Miss. 331; Stone v. Montgomery, 35 Miss. 83. Ohio: Baldwin v. Snowden, 11 Ohio St. 203, 78 Am. Dec. 303. Oregon: Moore v. Fuller, 6 Oreg. 272. Pennsylvania: Heilman v. Kroh, 155 Pa. St. 1, 25 Atl. Rep. 751; Singer Manuf. Co. v. Rook, 84 Pa. St. 442, 24 Am. Rep. 204; Schrader v. Decker, 9 Pa. St. 14, 49 Am. Dec. 538; Cressona Asso. v. Sowers, 134 Pa. St. 354, 19 Atl. Rep. 686; Williams v. Baker, 71 Pa. St. 476; Heeter v. Glasgow, 79 Pa. St. 79, 21 Am. Rep. 46; Loudon v. Blythe, 27 Pa. St. 22, 67 Am. Dec. 442. Texas: Texas L. & L. Co. v. Blalock, 76 Tex. 85, 13

S. W. Rep. 12; Coker v. Roberts, 71 Tex. 597, 9 S. W. Rep. 665; Davis v. Kennedy, 58 Tex. 516; Kocourek v. Marak, 54 Tex. 201, 38 Am. Rep. 623; Williams v. Pouns, 48 Tex. 141, 146; Pool v. Chase, 46 Tex. 207, 210; Wiley v. Prince, 21 Tex. 637; Shelby v. Burtis, 18 Tex. 644; Hartley v. Frosh, 6 Tex. 208, 55 Am. Dec. 772; Waltee v. Weaver, 57 Tex. 569. West Virginia: Rollins v. Menager, 22 W. Va. 461; Henderson v. Smith, 26 W. Va. 829; Pickens v. Knisely, 29 W. Va. 1, 11 S. E. Rep. 932. In Miller v. Wentworth, 82 Pa. St. 280, Agnew, J., said: "The defendant is a *bona fide* purchaser, for a full consideration, without notice of any irregularity; relying on the certificate of the magistrate, there being nothing on its face to put him upon inquiry. In such case the certificate is conclusive of the facts stated in it, and parol evidence will not be received to impugn it." *Contra*, see Central Bank v. Copeland, 18 Md. 305, a case which is questioned.

In Iowa it is held that a grantee by quitclaim deed is not entitled to protection. Fogg v. Holcomb, 64 Iowa, 621, 21 N. W. Rep. 111.

<sup>2</sup> Young v. Duval, 109 U. S. 573, 3 S. Ct. Rep. 414; Davis v. Kennedy, 58 Tex. 516; Pool v. Chase, 46 Tex. 207; Williams v. Pouns, 48 Tex. 141; Waltee v. Weaver, 57 Tex. 569. California: De Arnaz v. Escandon, 59 Cal. 486.

and he having certified on the deed that she had acknowledged on a private examination separate from her husband, and that she had executed the deed freely and voluntarily, without any fears, threats, or compulsion on the part of her husband, the truth of the certificate as to its statements cannot be questioned as against a *bona fide* purchaser.”<sup>1</sup>

But if the officer was not competent to take the acknowledgment, as, for instance, if he was acting out of his own county, to which his jurisdiction was limited, this fact may be shown, and the validity of the acknowledgment contested, though it appears on the face of the instrument that such acknowledgment was taken before him in his own county.<sup>2</sup>

1199. If the grantee has knowledge of facts showing that undue means were used in obtaining the acknowledgment, he is put upon inquiry, and he takes the conveyance at his peril. Thus, if the acknowledgment of a married woman was not given with her free will and consent, and she was in fact forced to give it, and the grantee had knowledge of facts which should have led him to inquire whether she had not been constrained to sign the deed against her will, the certificate may be impeached.<sup>3</sup>

If the certificate be false in fact, and the grantee knew it was false, or knew the circumstances which would put an honest and prudent man upon inquiry, it may then be contradicted by parol evidence.<sup>4</sup> In such case the acknowledgment is overthrown, not because the magistrate taking it knew that the statements contained in it were false, or that the deed was obtained under duress, but because the grantee knew of the imposition or duress, or knew of circumstances to put him upon inquiry.<sup>5</sup> If fraud or duress has been practiced, and the knowledge of it, or of such circumstances as would lead to inquiry, has been brought home to the grantee, the acknowledgment may be avoided. Less than actual duress, such as threats, persecution, or harshness on the part of the husband, will avoid an acknowledgment by a married woman, pro-

<sup>1</sup> Meyer v. Gossett, 38 Ark. 377, 383. See, also, Donahue v. Mills, 41 Ark. 421; Holt v. Moore, 37 Ark. 145; Johnston v. Wallace, 53 Miss. 331.

<sup>2</sup> New Eng. Mortg. Security Co. v. Payne (Ala.), 18 So. Rep. 164.

<sup>3</sup> Loudon v. Blythe, 16 Pa. St. 532, 55 Am. Dec. 527.

<sup>4</sup> Loudon v. Blythe, 16 Pa. St. 532, 55 Am. Dec. 527.

<sup>5</sup> Loudon v. Blythe, 27 Pa. St. 22, 67 Am. Dec. 442.

vided the grantee knew of the improper means used to obtain her execution or acknowledgment of the conveyance, or provided the grantee had such knowledge that he ought to have inquired in regard to the facts.<sup>1</sup>

A deed and the acknowledgment being regular on their face, it does not impair the effect of the record that the acknowledgment was in fact taken before the deed was complete, as where the name of the grantee or the description of the premises had not been inserted. The grantor is estopped in favor of *bona fide* purchasers to allege that either the deed or the acknowledgment, by reason of its having been prematurely taken, was invalid.<sup>2</sup>

1200. But the certificate is conclusive only of such facts as the officer is bound to certify under the provisions of the statute in force, and is not even evidence of facts which he is not required to certify. As to matters he is not bound to certify, his certificate, being extra official, is merely a statement made in his private capacity, and will therefore be rejected. Thus a wife is not concluded by a statement in a certificate of acknowledgment that she was of age, when the officer was not required to certify as to her age.<sup>3</sup> Moreover, the certificate is conclusive only of the facts therein stated, and does not tend to establish the existence of other facts not stated.<sup>4</sup> It is not conclusive that a wife making the acknowledgment had sufficient mental capacity to make the conveyance.<sup>5</sup>

1201. The officer who took the acknowledgment is not allowed to impeach his certificate. He is a public officer performing duties required by law, and considerations of public policy demand that he should not be a competent witness to contradict his own official certificate.<sup>6</sup> But the officer is a competent

<sup>1</sup> McCandless v. Engle, 51 Pa. St. 309; Kerr v. Russell, 69 Ill. 666.

<sup>2</sup> Pence v. Arbuckle, 22 Minn. 417; Roussain v. Norton, 53 Minn. 560, 55 N. W. Rep. 747.

<sup>3</sup> Williams v. Baker, 71 Pa. St. 476; Draper v. Bryson, 17 Mo. 71, 57 Am. Dec. 257.

<sup>4</sup> Hand v. Weidner, 151 Pa. St. 362, 25 Atl. Rep. 38.

<sup>5</sup> Thompson v. New Eng. Mortg. Security Co. (Ala.) 18 So. Rep. 315; Williams v. Baker, 71 Pa. St. 476.

<sup>6</sup> Stone v. Montgomery, 35 Miss. 83; Allen v. Lenoir, 53 Miss. 321; Harkins v. Forsyth, 11 Leigh, 294; Hockman v. McClanahan, 87 Va. 33, 12 S. E. Rep. 230; Central Bank v. Copeland, 18 Md. 305, 31 Am. Dec. 597; Wright v. Bundy, 11 Ind. 398; Riecke v. Westenhoff, 10 Mo. App. 358; Garth v. Fort, 15 Lea, 683; Michener v. Cavender, 38 Pa. St. 334, 80 Am. Dec. 486; Camp v. Carpenter, 52 Mich. 375, 18 N. W. Rep. 113; Hays v. Hays, 5 Rich. 31; Wilson v. South Park Com'rs, 70 Ill. 46.

witness to establish the due execution of a conveyance, against the denial of the person who appears by the certificate to have acknowledged it.<sup>1</sup>

That the officer who took the acknowledgment of a married woman cannot recollect that he examined her separate and apart from her husband, and that the woman herself cannot remember whether she was so examined or not, does not invalidate or affect the certificate.<sup>2</sup> A certificate of the acknowledgment of a married woman is not successfully impeached by testimony of the husband and wife that the husband remained in the clerk's office while the privy examination was taken, the husband also stating that he does not remember whether he was out of hearing or not, and the wife saying nothing on this point.<sup>3</sup>

1202. A person acknowledging a deed adopts the signature of his name upon it though it is a forgery, and makes it his own.<sup>4</sup> Proof that the signature to the deed is not in the handwriting of the supposed grantor falls far short of proving it to be a forgery. A grantor may sign a deed by the hand of another if this be done by the direction or in the presence of the grantor. Even if it had been signed without authority, by acknowledging the deed the grantor effectually makes the signature his.<sup>5</sup> But a person by acknowledging a deed does not adopt a signature of which he did not know the existence, as when a forged discharge of a mortgage was fraudulently substituted for the extension of another mortgage which the person making the acknowledgment had actually signed, and supposed he was acknowledging.<sup>6</sup> When the issue is limited to the fact of the execution of the deed, the certificate of acknowledgment may be contradicted.<sup>7</sup>

1203. A certificate of acknowledgment is not conclusive that the person named as grantor executed the deed. The only use of the acknowledgment is to entitle the deed to be recorded, and the registry of it is not conclusive proof of its execution. A mortgagor, having forged the signature of the mort-

<sup>1</sup> Jansen v. McCahill, 22 Cal. 563, 83 Am. Dec. 84; Rollins v. Menager, 22 W. Va. 461; Pickens v. Knisely, 29 W. Va. 1, 11 S. E. Rep. 932.

<sup>2</sup> Tooker v. Sloan, 30 N. J. Eq. 394.

<sup>3</sup> Grotenkemper v. Carver, 9 Lea, 280.

<sup>4</sup> Baldwin v. Snowden, 11 Ohio St. 203, 78 Am. Dec. 303.

<sup>5</sup> Tunison v. Chamblin, 88 Ill. 378.

<sup>6</sup> O'Neil v. Webster, 150 Mass. 572, 23 N. E. Rep. 235.

<sup>7</sup> Barnett v. Proskauer, 62 Ala. 486; Shelton v. Aultman & T. Co. 82 Ala. 315, 8 So. Rep. 232.

gagee, a woman, to a discharge of the mortgage, deceived a justice of the peace into believing that her acquiescence in the extension of another mortgage was an acknowledgment that this discharge was her deed, and fraudulently induced the justice to attest her signature, and to certify her acknowledgment of the forged discharge. The discharge was then duly recorded. It was held that the certificate of the justice of the peace, to the acknowledgment was not conclusive that she executed the discharge, and that she was not estopped from denying that she executed it.<sup>1</sup> The burden of proof is, of course, on those who assail the verity of the certificate, and it can be successfully impeached only by clear and convincing evidence that the deed was not executed by the grantor.<sup>2</sup>

**1204.** The certificate is to be judged solely by what appears on its face, if there was any appearance and acknowledgment at all; and parol evidence of what passed at the time of the acknowledgment is not admissible for the purpose of contradicting the certificate or of supplying substantial defects, except in cases of fraud or imposition.<sup>3</sup> The acknowledgment must all be certified in writing; it cannot rest partly in parol and partly in writing. Before parol evidence is admitted, the fact of fraud or imposition must be established by convincing evidence and knowledge, or notice of the fraud or imposition must be brought home to the grantee.<sup>4</sup>

<sup>1</sup> *O'Neil v. Webster*, 150 Mass. 572, 23 N. E. Rep. 235. And see *Grider v. American Mortg. Co.* 99 Ala. 281, 12 So. Rep. 775.

<sup>2</sup> *Barnett v. Proskauer*, 62 Ala. 486; *Shelton v. Aultman & T. Co.* 82 Ala. 315, 8 So. Rep. 232.

<sup>3</sup> **Alabama**: *Shelton v. Aultman & T. Co.* 82 Ala. 315, 8 So. Rep. 232; *Downing v. Blair*, 75 Ala. 216; *Grider v. American Mortg. Co.* 99 Ala. 281, 12 So. Rep. 775. **Connecticut**: *Smith v. Ward*, 2 Root, 378, 1 Am. Dec. 80. **Illinois**: *Ennor v. Thompson*, 46 Ill. 214; *Marston v. Brittenham*, 76 Ill. 611; *Warrick v. Hull*, 102 Ill. 280. **Iowa**: *O'Ferrall v. Simplot*, 4 Iowa, 381. **Kentucky**: *Pribble v. Hall*, 13 Bush, 161. **Maryland**: *Central Bank v. Copeland*, 18 Md. 305, 81 Am. Dec. 597. **Michigan**: *Johnson v. Van Velsor*,

43 Mich. 208, 5 N. W. Rep. 265. **Missouri**: *McClure v. McClurg*, 53 Mo. 173; *Samuels v. Shelton*, 48 Mo. 444. **New York**: *Elwood v. Klock*, 13 Barb. 50. **Oregon**: *Harty v. Ladd*, 3 Oreg. 353. **Pennsylvania**: *Barnet v. Barnet*, 15 S. & R. 72, 16 Am. Dec. 516; *Jourdan v. Jourdan*, 9 S. & R. 268, 11 Am. Dec. 724. **Tennessee**: *Coal Creek Co. v. Heck*, 15 Lea, 497. **Texas**: *Hartley v. Frosh*, 6 Tex. 208, 55 Am. Dec. 772; *Pool v. Chase*, 46 Tex. 207. **Virginia**: *First Nat. Bank v. Paul*, 75 Va. 594, 40 Am. Rep. 740; *Hairston v. Randolphs*, 12 Leigh, 445; *Harkins v. Forsyth*, 11 Leigh, 294. **West Virginia**: *Rollins v. Menager*, 22 W. Va. 461; *Leftwich v. Neal*, 7 W. Va. 569. **Wisconsin**: *Smith v. Allis*, 52 Wis. 337, 9 N. W. Rep. 155.

<sup>4</sup> *Rollins v. Menager*, 22 W. Va. 461;

1205. A false or forged certificate of acknowledgment, where none was made, is wholly void;<sup>1</sup> but its falsity can only be shown upon allegation or proof of fraud or imposition practiced towards the grantor by some fraudulent combination between the parties interested and the officer taking the acknowledgment. This statement applies equally to ordinary acknowledgments and to acknowledgments by married women separate and apart from their husbands.<sup>2</sup> If the grantor made no appearance before the officer, and did not acknowledge the deed at all, this fact may be shown in contradiction of the officer's certificate, even against *bona fide* mortgagees and purchasers.<sup>3</sup> "There is no rule which could lawfully make any officer's certificate of acknowledgment conclusive evidence of the identity of persons, or of the execution of a conveyance which would not have the effect of depriving a person of his property without his own act or fault. . . . It is not a very satisfactory state of things when a forgery can gain even presumptive credit from the action of an officer who has certified without foundation for his action."<sup>4</sup> The person who appears by the certificate to have acknowledged the deed may show as against all the world that he never made any acknowledgment at all of the execution of the deed, and that the certificate is a forgery or fabrication by the officer.<sup>5</sup> A married

Lickmon v. Harding, 65 Ill. 505; Insurance Co. v. Nelson, 103 U. S. 544; Davis v. Kennedy, 58 Tex. 516; Shields v. Netherland, 5 Lea, 193; Worrell v. McDonald, 66 Ala. 572; Shelton v. Aultman & T. Co. 82 Ala. 315, 8 So. Rep. 232.

<sup>1</sup> Alabama: Shelton v. Aultman & T. Co. 82 Ala. 315, 8 So. Rep. 232; Barnett v. Proskauer, 62 Ala. 486. Arkansas: Meyer v. Gossett, 38 Ark. 377; Holt v. Moore, 37 Ark. 145; Donahue v. Mills, 41 Ark. 421. California: Le Mesnager v. Hamilton, 101 Cal. 532, 35 Pac. Rep. 1054, 40 Am. St. Rep. 81. Connecticut: Smith v. Ward, 2 Root, 378, 1 Am. Dec. 80. Illinois: Lowell v. Wren, 80 Ill. 238; Strauch v. Hathaway, 101 Ill. 11, 40 Am. Rep. 193. Indiana: Mays v. Hedges, 79 Ind. 288. Iowa: Borland v. Walrath, 33 Iowa, 130. Mississippi: Allen v. Lenoir, 53 Miss. 321; Johnston v. Wallace, 53 Miss. 331, 24 Am. Rep. 699; Harmon v.

Magee, 57 Miss. 410. Ohio: Baldwin v. Snowden, 11 Ohio St. 203, 78 Am. Dec. 303; Williamson v. Carskadden, 36 Ohio St. 664. Pennsylvania: Michener v. Cavender, 38 Pa. St. 334, 80 Am. Dec. 486; Cover v. Manaway, 115 Pa. St. 338, 2 Am. St. Rep. 552. West Virginia: Pickens v. Knisely, 29 W. Va. 1, 11 S. E. Rep. 932. Wisconsin: Smith v. Allis, 52 Wis. 337, 9 N. W. Rep. 155.

<sup>2</sup> Shelton v. Aultman & T. Co. 82 Ala. 315, 8 So. Rep. 232.

<sup>3</sup> Barnett v. Proskauer, 62 Ala. 486; Grider v. American Mortg. Co. 99 Ala. 281, 12 So. Rep. 775. See this case for a careful examination of the question.

<sup>4</sup> Camp v. Carpenter, 52 Mich. 375, 379, 18 N. W. Rep. 113.

<sup>5</sup> Donahue v. Mills, 41 Ark. 421, per Eakin, J.; Allen v. Lenoir, 53 Miss. 321; Johnston v. Wallace, 53 Miss. 331, 24 Am. Rep. 699.

woman testified that she never executed a deed of trust which purported to be executed by her and her husband, and acknowledged before a notary public. She further testified that her husband brought her a paper to sign, and when she asked him what it was, she not being able to read, he replied that it was a mere matter of form, and she then made her mark, and her husband handed the paper to the creditor, who was present, and that no one asked her whether she acknowledged her signature or whether she executed the paper. She was fully corroborated in her statements by the testimony of her husband and of three disinterested witnesses who were present. It was held that this evidence was sufficient to overcome the certificate of acknowledgment, and authorize a decree, at the suit of the woman, enjoining a sale under the deed of trust, on the ground of fraud in procuring her signature.<sup>1</sup> The proof to sustain the impeachment of the certificate should be of the clearest, strongest, and most convincing character.<sup>2</sup> The certificate must stand as against a mere conflict of evidence. There should be more than a mere preponderance of evidence against the integrity of the certificate.

**1206.** A certificate of acknowledgment by a married woman in regular form is conclusive, unless fraud or conspiracy be alleged and proved. It is conclusive though the acknowledgment was taken through an interpreter, and it is shown that he did not correctly interpret the contents of the instrument, but told the woman that the instrument was a mortgage, when in fact it was an absolute conveyance, it not being alleged or found that

<sup>1</sup> *Lowell v. Wren*, 80 Ill. 238.

<sup>2</sup> *Insurance Co. v. Nelson*, 103 U. S. 544. **Alabama**: *Barnett v. Proskauer*, 62 Ala. 486. **Illinois**: *Russell v. Baptist Union*, 73 Ill. 337; *Kerr v. Russell*, 69 Ill. 666; *Marston v. Brittenham*, 76 Ill. 611; *Crane v. Crane*, 81 Ill. 165; *McPherson v. Sanborn*, 88 Ill. 150; *Blackman v. Hawks*, 89 Ill. 512. **Iowa**: *Herrick v. Musgrove*, 67 Iowa, 63, 24 N. W. Rep. 594; *Bailey v. Landingham*, 53 Iowa, 722, 6 N. W. Rep. 76. **Michigan**: *Hourtienne v. Schnoor*, 33 Mich. 274. **Nebraska**: *Phillips v. Bishop*, 35 Neb. 487, 53 N. W. Rep. 375; *Pereau v. Frederick*, 17 Neb. 117, 22 N. W. Rep. 235.

**New York**: *Willis v. Albertson*, 20 Abb. N. C. 263. **Ohio**: *Ford v. Osborne*, 45 Ohio St. 1, 12 N. E. Rep. 526. **West Virginia**: *Pickens v. Knisely*, 29 W. Va. 1, 11 S. E. Rep. 932; *Jarrell v. Jarrell*, 27 W. Va. 743. **Wisconsin**: *Smith v. Allis*, 52 Wis. 337, 9 N. W. Rep. 155. In *Marston v. Brittenham*, 76 Ill. 611, the court say: "To impeach such a certificate, the evidence should do more than produce a mere preponderance against its integrity in the balancing of probabilities; it should, by its completeness and reliable character, fully and clearly satisfy the court that the certificate is untrue and fraudulent."

the grantee had any notification of this fact.<sup>1</sup> If a married woman actually appeared before the acknowledging officer, his certificate is conclusive as to the manner of her acknowledging and the facts recited therein.<sup>2</sup>

There are decisions which hold that an innocent purchaser without notice has a right to rely absolutely upon the certificate in due form of the acknowledgment of a married woman upon a privy examination; for such an acknowledgment is a substitute for the proceeding at common law by fine and recovery, whereby the rights of the wife, on the one hand, may be guarded, and on the other the rights of the grantee may be assured; and the wife will not be allowed to avoid the same as to purchasers without notice by showing her signature to be a forgery, and that she never in fact acknowledged the same.<sup>3</sup>

A certificate of the wife's acknowledgment is not conclusive as to her mental capacity to join in the conveyance.<sup>4</sup>

1207. Parol evidence is not admissible to contradict, except for fraud or forgery, a certificate of acknowledgment by a married woman upon a separate examination; or to supply a defect in the certificate, though such defect was occasioned by the inadvertence or mistake of the officer taking the same.<sup>5</sup> If the

<sup>1</sup> *De Arnaz v. Escandon*, 59 Cal. 486; *Herring v. White*, 6 Tex. Civ. App. 249, 25 S. W. Rep. 1016.

<sup>2</sup> *Cover v. Manaway*, 115 Pa. St. 338, 8 Atl. Rep. 393, 2 Am. St. Rep. 552; *Singer Manuf. Co. v. Rook*, 84 Pa. St. 442, 24 Am. Rep. 204; *Heeter v. Glasgow*, 79 Pa. St. 79; *Miller v. Marx*, 55 Ala. 322; *Moses v. Dade*, 58 Ala. 211; *Rogers v. Adams*, 66 Ala. 600; *Moog v. Strang*, 69 Ala. 98; *Vancleave v. Wilson*, 73 Ala. 387; *Downing v. Blair*, 75 Ala. 216; *Dent v. Long*, 90 Ala. 172, 7 So. Rep. 640; *Shelton v. Aultman & Taylor Co.* 82 Ala. 315, 8 So. Rep. 232; *Edinburgh American Land Mortg. Co. v. Peoples*, 102 Ala. 241, 14 So. Rep. 655; *Baldwin v. Snowden*, 11 Ohio St. 203, 78 Am. Dec. 303; *Le Mesnager v. Hamilton*, 101 Cal. 532, 536, 35 Pac. Rep. 1054, 40 Am. St. Rep. 81.

<sup>3</sup> *Kerr v. Russell*, 69 Ill. 666; *Graham v. Anderson*, 42 Ill. 514; *Lickmon v. Harding*, 65 Ill. 505; *Calumet, &c. Dock*

*Co. v. Russell*, 68 Ill. 426. And see dissenting opinion of Green, J., in *Pickens v. Knisely*, 29 W. Va. 1, 11 S. E. Rep. 932.

<sup>4</sup> *Thompson v. New Eng. Mortg. Security Co. (Ala.)* 18 So. Rep. 315; *Williams v. Baker*, 71 Pa. St. 476.

<sup>5</sup> *Elliott v. Peirsol*, 1 Pet. 328, 1 McLean, 11; *First Nat. Bank v. Paul*, 75 Va. 594, 40 Am. Rep. 740; *Jourdan v. Jourdan*, 9 S. & R. 268, 11 Am. Dec. 724; *Jamison v. Jamison*, 3 Whart. 457, 31 Am. Dec. 536; *Watson v. Bailey*, 1 Binn. 470, 2 Am. Dec. 462; *Griffith v. Ventress*, 91 Ala. 366, 8 So. Rep. 312; *Shelton v. Aultman & T. Co.* 82 Ala. 315, 8 So. Rep. 232; *Downing v. Blair*, 75 Ala. 216; *Miller v. Marx*, 55 Ala. 322; *Barnett v. Proskauer*, 62 Ala. 486; *Jinwright v. Nelson (Ala.)*, 17 So. Rep. 91; *Bours v. Zachariah*, 11 Cal. 281; *Barnett v. Shackelford*, 6 J. J. Marsh. 532, 22 Am. Dec. 100; *Harty v. Ladd*, 3



deed relates to the husband's property, and the certificate of acknowledgment does not conform with the requirements of the statute, upon the death of the husband the widow is entitled to recover her dower in the real estate covered by the deed.<sup>1</sup> Nei-

Oreg. 353; *Leftwich v. Neal*, 7 W. Va. 569; *Rollins v. Menager*, 22 W. Va. 461; *Robinson v. Noel*, 49 Miss. 253; *Willis v. Gattman*, 53 Miss. 721; *Harmon v. Magee*, 57 Miss. 410; *Martin v. Hargardine*, 46 Ill. 322; *Graham v. Anderson*, 42 Ill. 514, 92 Am. Dec. 89; *Merritt v. Yates*, 71 Ill. 636; *Gray v. Ulrich*, 8 Kans. 112; *Smith v. Hunt*, 13 Ohio, 260, 42 Am. Dec. 201; *O'Ferrall v. Simplot*, 4 Iowa, 381; *Hartley v. Frosh*, 6 Tex. 208; *Freiberg v. De Lamar* (Tex. Civ. App.), 27 S. W. Rep. 151. In *Kentucky*, G. St. ch. 81, § 17, which provides that the certificate of an officer may be called in question for a mistake on his part, does not apply to a certificate of acknowledgment of a deed by a married woman. It cannot be shown that the officer failed to do what his certificate imports. The law intended to give to it, to the extent indicated, absolute verity. Otherwise, no confidence can be placed in the record of conveyances. *Tichenor v. Yankey*, 89 Ky. 508, 12 S. W. Rep. 947; *Cox v. Gill*, 83 Ky. 669. *Contra*, in *Missouri*: *Belo v. Mayes*, 79 Mo. 67; *Clark v. Edwards*, 75 Mo. 87; *Steffen v. Bauer*, 70 Mo. 399; *Wannall v. Kem*, 57 Mo. 478; *Webb v. Webb*, 87 Mo. 541; *Mays v. Pryce*, 95 Mo. 603, 8 S. W. Rep. 731; *Barrett v. Davis*, 104 Mo. 549, 16 S. W. Rep. 377. In *Pierce v. Georger*, 103 Mo. 450, 15 S. W. Rep. 848, *Macfarlane, J.*, said: "These decisions do not seem to be in harmony with the rulings of other States on the subject. It is generally held that, in case the married woman appears before the officer and makes an acknowledgment of the deed, the certificate of the officer will be conclusive against her, in the absence of fraud, in any contest between her and a purchaser in good faith and without notice. For a review of the authorities, see *Pickens v. Knisely*, 29 W. Va. 1, 11 S. E.

Rep. 932; and *Paxton v. Marshall*, 18 Fed. Rep. 364 and note. Such ruling seems better calculated to insure the security of titles and the protection of purchasers. Titles in this State that have passed through the hands of married women are always open to suspicion, in view of the right of the woman at any time to attack them, regardless of the innocence and good faith of the purchaser, and in view of the frequency with which such right has been exercised. The provision of our statute that 'neither the certificate of acknowledgment, nor the proof of any such instrument, nor the record, nor the transcript of the record of such instrument, shall be conclusive, but the same may be rebutted' (§ 698 Rev. St. 1879), probably controlled the decisions of our courts. This statute has been in existence since 1845, and possibly longer. The rule adopted has stood, through several revisions of the statute, without statutory change, and it must be regarded as in accord with the policy of the State. In the case at bar, plaintiff testifies positively and unequivocally that she neither signed or acknowledged the deed, nor appeared before the officer for any purpose; if this be true, then the deed, as to her, would be a forgery, and she had the right to show the fact. The certificate of the notary was only *prima facie* evidence of the truth of its recitals, and it should have been left to the jury to determine the preponderance of the evidence." The Missouri decisions are properly declared absurd and mischievous in *Pickens v. Knisely*, 29 W. Va. 1, 11 S. E. Rep. 932, 940.

<sup>1</sup> *First Nat. Bank v. Paul*, 75 Va. 594, 40 Am. Rep. 740. In *Kerr v. Russell*, 69 Ill. 666, 670, 18 Am. Rep. 634, Mr. Chief Justice Breese said: "This court has often said that the provision of the

ther can the certificate of acknowledgment by a married woman in due form be impeached or contradicted by parol evidence, unless upon clear proof of fraud or imposition practiced upon her with the knowledge or connivance of the grantee. Thus it cannot be shown, in contradiction of the certificate, that the wife was not examined separate and apart from her husband as required by statute,<sup>1</sup> but that her husband was present.<sup>2</sup>

1208. An officer cannot amend his certificate after it has passed out of his hands, except by taking the acknowledgment anew. He can make such new certificate only upon a re-acknow-

law authorizing a justice of the peace, or other designated officer, to take the private examination of the wife, was designed as a substitute for the proceeding at common law by fine and recovery, whereby the rights of the wife on the one hand might be guarded, and a sure, indefeasible, and unquestionable transfer of her right secured on the other. It cannot be supposed, whilst the legislature were protecting the wife, they had no regard to the importance of inspiring confidence in the title. . . . The proceeding by fine and recovery never could be contradicted; why, then, should its substitute be subjected to that test? No man could be content with a title in all respects perfect upon its face, when, upon the death of his vendor, his widow, with the assistance of the magistrate, or without it, as in this case, may undo what they have solemnly done, and without the possibility of contradiction, since the magistrate and the wife are alone privies and parties to her examination. . . . Of what value would privy examinations be, where the wife has been quiet during the lifetime of her husband, and conjures up, at a remote day, objections which are allowed to prevail? Who would take a deed, to which a married woman is a party, with these probable direful results staring him in the face? Everything in relation to titles would be thrown into utter confusion, and irretrievable mischief would be the certain consequence."

<sup>1</sup> See citations above, and *Downing v. Blair*, 75 Ala. 216; *Shelton v. Aultman*

& T. Co. 82 Ala. 315, 8 So. Rep. 332; *Pickens v. Knisely*, 29 W. Va. 1, 36, 11 S. E. Rep. 932, 940, dissenting opinion of Green, J., who says: "I have found but a single case out of Missouri where a married woman has ever, as against an innocent purchaser, been permitted by parol evidence to contradict the facts stated in such certificate that she personally appeared before the officer, or any other fact stated in such a certificate; and that is *Allen v. Lenoir*, 53 Miss. 321." In *Mississippi* a married woman cannot contradict the facts set out in the certificate, with the single exception of the statement that the married woman personally appeared before the notary or other officer. "While every other statement made in such certificate must be regarded as absolutely true so far as an innocent purchaser is concerned, and not to be contradicted by any parol testimony, the statement that she personally appeared before such officer is not to be regarded as conclusively true, but can be proven by parol testimony to be false, and the title of an innocent purchaser be rendered utterly worthless." *Allen v. Lenoir*, 53 Miss. 321; *Johnston v. Wallace*, 53 Miss. 331. Green, J., in *Pickens v. Knisely*, 29 W. Va. 1, 25, 11 S. E. Rep. 932, 940, says: "No case is cited in which any such distinction was ever held by any court to exist; and, so far as I know, no decision in any other State can be found which holds that there is any such distinction."

<sup>2</sup> *Keith v. Silberberg* (Ky.), 29 S. W. Rep. 316.

ledgment of the deed.<sup>1</sup> But in a case in Missouri the court intimated that the officer might correct his certificate of a married woman's acknowledgment by setting out that she was examined apart from her husband, and was made acquainted with the contents of the deed.<sup>2</sup> Accordingly, long after the acknowledgment, the officer made a new certificate, conforming exactly to the requirements of the statute in regard to acknowledgments by married women. The jury, however, found that the latter certificate was false, and the court remarked that, if the facts occurred as certified in that certificate, it was sufficient to account for the omission in the certificate made at the time.<sup>3</sup>

1209. There are some decisions to the contrary, directly affirming the power of an officer who has made a mistake in his certificate of acknowledgment to correct it at any time afterwards

<sup>1</sup> *Elliott v. Piersol*, 1 Pet. 328; *Elwood v. Klock*, 13 Barb. 50; *Bours v. Zachariah*, 11 Cal. 281, 70 Am. Dec. 779; *Wedel v. Herman*, 59 Cal. 507; *Durfee v. Garvey*, 65 Cal. 406, 4 Pac. Rep. 377; *Enterprise Transit Co. v. Sheedy*, 103 Pa. St. 492, 49 Am. Rep. 130; *Merritt v. Yates*, 71 Ill. 636, 22 Am. Rep. 128; *Gilbraith v. Gallivan*, 78 Mo. 452; *Harmon v. Magee*, 57 Miss. 410; *Newman v. Samuels*, 17 Iowa, 528; *First Nat. Bank v. Paul*, 75 Va. 594, 40 Am. Rep. 740; *McMullen v. Eagan*, 21 W. Va. 233; *Stone v. Sledge*, 87 Tex. 49, 24 S. W. Rep. 697. In *Griffith v. Ventress*, 91 Ala. 366, 8 So. Rep. 312, *Coleman, J.*, delivering the judgment of the court, said: "These conclusions may work a hardship in some cases, but they afford a much safer protection to titles than to leave such important interests to the voluntary action and uncertain memory of the officer authorized by statute to take acknowledgments and make the certificates. If he can add to a certificate, why not subtract from it? If he can make a new certificate four years after the deed has been delivered and recorded, why not twenty years after, and, perhaps, after parties and witnesses have died? If courts of law and equity are powerless to inquire into and determine the correctness of those certificates, and change them in accordance with the real

facts, it is difficult to perceive why such power should rest with the officer who made them."

<sup>2</sup> *Wannall v. Kem*, 51 Mo. 150.

<sup>3</sup> *Wannall v. Kem*, 57 Mo. 478. In *Gilbraith v. Gilbraith*, 78 Mo. 452, it was held that after the deed has been delivered, and the officer who took the acknowledgment has gone out of office, he has no power to correct a defect in his certificate. *Winslow, C.*, delivering the opinion, said: "We have carefully examined the question, and are all decidedly of the opinion that to extend the doctrine intimated in the *Kem* cases beyond the official term of the officer performing the original act, so as to sustain the certificate before us, would result in the utter subversion of our entire system for the execution of deeds." A similar decision was made in *Griffiths v. Ventress*, 91 Ala. 366, 8 So. Rep. 312, in which the case of *Wannall v. Kem* is examined and criticised at length by *Coleman, J.*, who declares that the doctrine that an officer, even while yet in office, may amend his certificate after he has delivered it to the grantee, rests upon a slim foundation so far as direct adjudication is concerned; and he decides that at any rate the officer cannot correct his certificate after the expiration of his term, although he still holds the office by virtue of a reëlection.

during his term of office, so that it will correctly state the facts as they occurred in the acknowledgment.<sup>1</sup> But these decisions are contrary to the great weight of authority, which is to the effect that the officer cannot, after the deed has passed from his custody and he has no further jurisdiction in the premises, without a reëxamination, or consent of the parties, indorse another certificate on the deed, or amend the one already made.<sup>2</sup>

1210. An acknowledgment by a married woman after her husband's death does not validate a deed of her separate property executed during coverture. The deed might have been perfected by her at any time during coverture, and the effect of her acknowledgment would have related back to the time of the original delivery of the deed, in case no adverse rights had intervened. "But after the death of the husband the acknowledgment necessary to give the deed effect at the time it was made could not be made, and to make any other acknowledgment have that effect would be extending the doctrine unreasonably, and without due regard to the statute." An acknowledgment to the deed, such as is required of an unmarried woman, was not the acknowledgment that was essential to make perfect the deed, and therefore it did not have the effect of relating back and making that deed operate to convey her title to the property as of the time when the deed was delivered.<sup>3</sup>

1211. When a wife's acknowledgment of her signature to her husband's conveyance is defective, a new acknowledgment made by her with the intent to cure the defect will relate back to the original delivery of the conveyance by the husband, in case there are no intervening rights of third persons.<sup>4</sup> A defective acknowledgment by the wife is of no consequence in case she had no interest in the property, the husband, who was

<sup>1</sup> *Jordan v. Corey*, 2 Ind. 385, 52 Am. Dec. 516; *Stott v. Harrison*, 73 Ind. 17; *Harmon v. Magee*, 57 Miss. 410; *Wannall v. Kem*, 51 Mo. 150; *Miller v. Powell*, 53 Mo. 252.

<sup>2</sup> In *Bours v. Zachariah*, 11 Cal. 281, 70 Am. Dec. 779, Mr. Justice Baldwin, who delivered the opinion, said: "We do not deem it necessary to criticise the case of *Jordan v. Corey*, 2 Ind. 385. That case we think wholly unsupported by

authority." See, also, *Merritt v. Yates*, 71 Ill. 638, 23 Am. Rep. 128; *Griffith v. Ventress*, 91 Ala. 366, 8 So. Rep. 312, where the cases are reviewed; *Shubert v. Winston* (Ala.), 11 So. Rep. 200.

<sup>3</sup> *Chester v. Breitling* (Tex. Civ. App.), 30 S. W. Rep. 464, per James, C. J., Ely, J., dissenting; *Halbert v. Hendrix* (Tex. Civ. App.), 26 S. W. Rep. 911.

<sup>4</sup> *Cahall v. Citizens' Mut. Build. Asso.* 61 Ala. 232.

the sole owner, having duly acknowledged the deed.<sup>1</sup> No acknowledgment by her in such case is essential.<sup>2</sup>

1212. Neither a court of law nor a court of equity has power to amend a certificate of acknowledgment.<sup>3</sup>

An omission of a statutory requirement essential to the validity of a married woman's deed cannot be corrected in equity.<sup>4</sup> "A court of equity has no more jurisdiction than a court of law to recognize and give effect to instruments inoperative for want of compliance with a condition made by statute prerequisite to their validity."<sup>5</sup> Neither can her deed, invalid on account of a defective acknowledgment, or other omission of a statutory requirement, be enforced in equity as an agreement to convey.<sup>6</sup>

1213. In some States there are statutes authorizing the reformation of certificates of acknowledgment by the court.<sup>7</sup> They

<sup>1</sup> *Bassett v. Martin*, 83 Tex. 339, 18 S. W. Rep. 587.

<sup>2</sup> *Jacks v. Dillon*, 6 Tex. Civ. App. 192, 25 S. W. Rep. 645.

<sup>3</sup> *In re Millard*, 5 Man., G. & S. 753; *Drury v. Foster*, 2 Wall. 24; *Elliott v. Piersol*, 1 Pet. 328. **Alabama**: *Griffiths v. Ventress*, 91 Ala. 366, 8 So. Rep. 312; *Cox v. Holcomb*, 87 Ala. 592, 6 So. Rep. 309. **California**: *Bours v. Zachariah*, 11 Cal. 281, 70 Am. Dec. 779; *Barrett v. Tewksbury*, 9 Cal. 13; *Selover v. American R. C. Co.* 7 Cal. 266. Otherwise such amendment provided for under the Code. *Wedel v. Herman*, 59 Cal. 507. **Illinois**: *Martin v. Hargardine*, 46 Ill. 322. **Indiana**: *Hamar v. Medsker*, 60 Ind. 413. **Iowa**: *Grapengather v. Fejervary*, 9 Iowa, 163, 74 Am. Dec. 336. **Kentucky**: *Barnett v. Shackelford*, 6 J. J. Marsh. 532, 22 Am. Dec. 100. **Maryland**: *Gebb v. Rose*, 40 Md. 387; *Grove v. Todd*, 41 Md. 633, 20 Am. Rep. 76. **Missouri**: *Shroyer v. Nickell*, 55 Mo. 264; *Wannall v. Kem*, 51 Mo. 150. **New York**: *Knowles v. McCamly*, 10 Paige, 342. **Ohio**: *Koltenbrock v. Cracraft*, 36 Ohio St. 584; *Silliman v. Cummins*, 13 Ohio, 116. **Tennessee**: *Shields v. Netherland*, 5 Lea, 193; *Campbell v. Taul*, 3 Yerg. 548.

<sup>4</sup> *Drury v. Foster*, 2 Wall. 24; *Dickinson v. Glenney*, 27 Conn. 104; *Gebb v.*

*Rose*, 40 Md. 387, 393; *Grove v. Todd*, 41 Md. 633, 20 Am. Rep. 76; *Purcell v. Goshorn*, 17 Ohio, 105, 49 Am. Dec. 448; *Barrett v. Tewksbury*, 9 Cal. 13; *Malloy v. Bruden*, 88 N. C. 305; *McMullen v. Eagan*, 21 W. Va. 233; *Leftwich v. Neal*, 7 W. Va. 569; *Ruleman v. Pritchett*, 56 Tex. 482; *Johnson v. Bryan*, 62 Tex. 623; *Williams v. Ellingsworth*, 75 Tex. 480; *Grapengether v. Fejervary*, 9 Iowa, 163, 74 Am. Dec. 336; *Gill v. Fauntleroy*, 8 B. Mon. 177.

<sup>5</sup> *Trustees v. Davison*, 65 Ill. 124; *Townsley v. Chapin*, 12 Allen, 476, 480, per Foster, J.; *Jewett v. Davis*, 10 Allen, 68.

<sup>6</sup> *Martin v. Dwelly*, 6 Wend. 9, 21 Am. Dec. 245.

<sup>7</sup> **California**: Civ. Code, § 1202; *Wedel v. Harman*, 59 Cal. 507; *Hutchinson v. Ainsworth*, 63 Cal. 286. **Ohio**: R. S. 1890; *Kilbourn v. Fury*, 26 Ohio St. 153; *Dengenhart v. Cracraft*, 36 Ohio St. 549. **Pennsylvania**: Act of May 25, 1878; 1 Brightly's Purdon's Dig. 1894, p. 635, §§ 34, 35. **Tennessee**: Code, §§ 2080-2082. See *Brankley v. Tomeny*, 9 Bax. 275, holding that the officer may make oath and correct certificate in a foreign state where the acknowledgment was taken; and *Grotenkemper v. Carver*, 4 Lea, 375, holding that the officer may

have been passed for the purpose of curing defects arising from the ignorance or carelessness of persons intrusted with the power of taking acknowledgments. The general policy of the law requires that the presumption of absolute accuracy shall attach to such official certificates; and to aid this presumption, rather than to interfere with it, the statutes seek to remedy such defects in a due and orderly manner. The remedy is an equitable one, and must be pursued in the manner of other equitable remedies. All parties interested in the subject-matter must be before the court. Otherwise a certificate might be established as valid for one party, and the same certificate when contested by another party might be held to be invalid.<sup>1</sup> The evidence that the deed was in fact properly acknowledged, and that the defect is one of form, should be clear to authorize the court to reform a certificate.<sup>2</sup>

A statute authorizing a suit and judgment to correct errors in acknowledgments may operate in cases of certificates of acknowledgments made before the act was passed, without being open to the objection that the statute is applied retrospectively; for the statute does not create a right where none existed before, but simply permits the judgment of a court to be substituted for the defective certificate.<sup>3</sup>

**1214. Statutes providing for reforming certificates of acknowledgment should be liberally construed to carry out the**

make oath to the correction after he goes out of office. See, also, *Vaughn v. Carlisle*, 2 Lea, 525; *Garth v. Fort*, 15 Lea, 683; *Stroud v. McDaniel*, 12 Lea, 617. The amended certificate as between the parties and volunteers under them relates back to the date of the original acknowledgment. *Grottenkemper v. Carver*, 9 Lea, 280. Texas: R. S. art. 4353. This statute does not validate an acknowledgment not properly taken, but provides for correcting the certificate to show that the acknowledgment was in fact correctly made. *Johnson v. Taylor*, 60 Tex. 360. An action for this purpose is barred by the statute of limitations in four years. *Norton v. Davis*, 83 Tex. 32, 18 S. W. Rep. 430; *Stone v. Sledge*, 87 Tex. 49, 24 S. W. Rep. 697.

In Michigan there is a statute which

provides that a deed made in good faith for a valuable consideration shall not be wholly void by reason of any defect in any statutory requisite in signing, sealing, attestation, acknowledgment, or certificate of acknowledgment, but may be allowed to operate as an agreement to convey. 2 Comp. Laws, 1351. This has been held to extend to defective acknowledgments. *Healey v. Worth*, 35 Mich. 166. But a certificate of acknowledgment without the seal of a commissioner is void, and cannot be amended under this act. *Buell v. Irwin*, 24 Mich. 145.

<sup>1</sup> *Manufacturers' N. Gas Co. v. Douglass*, 130 Pa. St. 283, 18 Atl. Rep. 630.

<sup>2</sup> *Spencer v. Reese*, 165 Pa. St. 158, 30 Atl. Rep. 722.

<sup>3</sup> *Johnson v. Taylor*, 60 Tex. 360. *Contra*, *Judson v. Porter*, 53 Cal. 482.

purpose for which they were enacted; and therefore a proviso in such statute that it shall not apply where suit has already been commenced to recover the land conveyed by the deed, to which is appended such defective acknowledgment, is held to exclude from the operation of the act only cases in which such suit to recover the land had been commenced before the date of the passage of the act.<sup>1</sup>

The reformation provided for by the statute contemplates those cases where the actual facts are in accordance with the law, but the certificate fails to set them out in due form.<sup>2</sup> It has no application when the certificate is in due form, but it is claimed that it is not true in fact;<sup>3</sup> nor where the certificate is not in due form, and there is a failure to establish the facts necessary to sustain a formal certificate;<sup>4</sup> nor where the deed is not defective in acknowledgment, but in the form of the deed itself, as where it is so worded as to purport to convey only a dower interest when it was intended to pass an estate in fee.<sup>5</sup>

**1215. Retroactive legislation to cure a defective acknowledgment is sustained upon the ground that it does not change the deed, but that it operates only upon the mode of proof.**<sup>6</sup> An act curing defective acknowledgments applies to deeds upon which suits have been commenced before the passing of the act; and if the act was passed pending an appeal in such suit, the appellate court must determine the case under the law in force at the time of the decision.<sup>7</sup> But if a judgment had been rendered prior to the passage of the validating statute, though the case is still pending in an appellate court, the judgment cannot be affected by such statute.<sup>8</sup>

<sup>1</sup> *Manufacturers' N. Gas Co. v. Douglass*, 130 Pa. St. 283, 18 Atl. Rep. 630.

<sup>2</sup> *Bowden v. Bland*, 53 Ark. 53, 13 S. W. Rep. 420.

<sup>3</sup> *Cressona Asso. v. Sowers*, 134 Pa. St. 354, 19 Atl. Rep. 686.

<sup>4</sup> *Hand v. Weidner*, 151 Pa. St. 362, 25 Atl. Rep. 38.

<sup>5</sup> *Bowden v. Bland*, 53 Ark. 53, 13 S. W. Rep. 420.

<sup>6</sup> *Barnet v. Barnet*, 15 S. & R. 72, 16 Am. Dec. 516; *Shonk v. Brown*, 61 Pa. St. 321; *Journeay v. Gibson*, 56 Pa. St. 57; *Tate v. Stooltzfoos*, 16 S. & R. 35;

*Shrawder v. Snyder*, 142 Pa. St. 1, 21 Atl. Rep. 796, 28 W. N. C. 84, 21 Atl. Rep. 796, 28 W. N. C. 84; *Grove v. Todd*, 41 Md. 633, 20 Am. Rep. 76; *Dulany v. Tilghman*, 6 G. & J. 461; *Dengenhart v. Cra-craft*, 36 Ohio St. 549; *Chesnut v. Shane*, 16 Ohio 599, 47 Am. Dec. 387; *Johnson v. Taylor*, 60 Tex. 360; *Logan v. Williams*, 76 Ill. 175; *Maxey v. Wise*, 25 Ind. 1; *Newman v. Samuels*, 17 Iowa, 528; *Stroud v. McDaniel*, 12 Lea, 617.

<sup>7</sup> *Cooley's Const. Lim.* 476; *Green v. Abraham*, 43 Ark. 420.

<sup>8</sup> *Barnet v. Barnet*, 15 S. & R. 72, 16

1216. A curative statute is constitutional and valid if rights of third parties have not accrued, but does not divest the title of a party who has acquired title by a subsequent deed from the same grantor, which is registered prior to the enactment of the curative statute.<sup>1</sup>

Under a statute validating recorded deeds which have been acknowledged according to the laws of other States where they were executed, such deeds are to be considered, upon a question of priority, as having been properly acknowledged and recorded originally.<sup>2</sup> If the statute makes valid only such conveyances as have been acknowledged according to the laws and usages of the State in which such conveyances were acknowledged, it must be shown that an acknowledgment claimed to have been validated thereby was not merely legal under the laws of that State, but that the certificate of acknowledgment was in accordance with the usages of such State.<sup>3</sup>

Curative acts in terms relating only to acknowledgments of deeds have been held to cover any defects in their attestation.<sup>4</sup>

Am. Dec. 516; *Wright v. Graham*, 42 Ark. 140.

<sup>1</sup> *Gordon v. Collett*, 107 N. C. 362, 12 S. E. Rep. 332; *Summer v. Mitchell*, 29 Fla. 179, 10 So. Rep. 562; *Barton v. Morris*, 15 Ohio, 408; *Watson v. Mercer*, 8 Pet. 88; *Buckley v. Early*, 72 Iowa, 289, 33 N. W. Rep. 769; *Green v. Abrahams*,

43 Ark. 420; *Johnson v. Richardson*, 44 Ark. 365.

<sup>2</sup> *East v. Pugh*, 71 Iowa, 162, 32 N. W. Rep. 309; *Carson v. Thompson*, 10 Wash. 295, 38 Pac. Rep. 1116.

<sup>3</sup> *Krueger v. Walker* (Iowa), 63 N. W. Rep. 320.

<sup>4</sup> *Carson v. Thompson*, 10 Wash. 295, 38 Pac. Rep. 1116.



## CHAPTER XXVIII.

### DELIVERY.

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| <p>I. A matter of intention, 1217-1229.</p> <p>II. Gives immediate effect to deed, 1230-1239.</p> <p>III. To whom it may be made, 1240-1247.</p> <p>IV. Presumption of delivery from possession of the deed, 1248-1257.</p> <p>V. Destruction, cancellation, or surrender of deed, 1258-1264.</p> | <p>VI. When delivery is complete, 1265-1275.</p> <p>VII. Acceptance by the grantee essential, 1276-1285.</p> <p>VIII. Presumption of delivery from recitals or acknowledgment, 1286-1288.</p> <p>IX. Recording alone does not constitute a delivery, 1289-1301.</p> |
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### *I. A Matter of Intention.*

1217. Delivery is an essential part of the execution of a deed. It does not take effect until there is a delivery to the grantee, either actual or constructive.<sup>1</sup> The usual and simplest

<sup>1</sup> *Younge v. Guilbeau*, 3 Wall. 636. **Alabama**: *Goodlett v. Kelly*, 74 Ala. 213; *Bernheim v. Horton* (Ala.), 15 So. Rep. 822. **Arkansas**: *Miller v. Physick*, 24 Ark. 244. **California**: *Barr v. Schroeder*, 32 Cal. 609; *Fitch v. Bunch*, 30 Cal. 208; *Bank v. Bailhache*, 65 Cal. 327, 4 Pac. Rep. 106. **Colorado**: *Rittmaster v. Brisbane*, 19 Colo. 371, 35 Pac. Rep. 736. **Connecticut**: *Jones v. Jones*, 6 Conn. 111, 16 Am. Dec. 35. **Georgia**: *Black v. Thornton*, 31 Ga. 641; *Oliver v. Stone*, 24 Ga. 63; *Maddox v. Gray*, 75 Ga. 452. **Illinois**: *Weber v. Christen*, 121 Ill. 91, 11 N. E. Rep. 893; *Price v. Hudson*, 125 Ill. 284, 17 N. E. Rep. 817; *Skinner v. Baker*, 79 Ill. 496; *Cline v. Jones*, 111 Ill. 563; *Byars v. Spencer*, 101 Ill. 429, 40 Am. Rep. 212; *McElroy v. Hiner*, 133 Ill. 156, 24 N. E. Rep. 435. **Indiana**: *Jones v. Loveless*, 99 Ind. 317; *Tharp v. Jarrell*, 66 Ind. 52; *Scobey v. Walker*, 114 Ind. 254, 15 N. E. Rep. 674; *Colee v. Colee*, 122 Ind. 109, 23 N. E. Rep. 687. **Maine**: *Jackson v. Sheldon*, 22 Me. 569; *Brown v. Brown*, 66 Me. 316; *Jewett v. Preston*, 27 Me. 400; *Foster v. Perkins*, 42 Me. 168. **Massachusetts**: *Fairbanks v. Metcalf*, 8 Mass. 230; *Maynard v. Maynard*, 10 Mass. 456, 6 Am. Dec. 146; *Fay v. Richardson*, 7 Pick. 91. **Michigan**: *Thatcher v. St. Andrews Church*, 37 Mich. 264; *Ritter v. Ritter*, 42 Mich. 108, 3 N. W. Rep. 284. **Mississippi**: *Armstrong v. Stovall*, 26 Miss. 275; *Davis v. Williams*, 57 Miss. 843. **Missouri**: *Turner v. Carpenter*, 83 Mo. 333; *Sneathen v. Sneathen*, 104 Mo. 201, 16 S. W. Rep. 497; *Allen v. De Groodt*, 105 Mo. 442, 16 S. W. Rep. 494, 1049; *Crowder v. Searcy*, 103 Mo. 97, 15 S. W. Rep. 346. **New Hampshire**: *Cook v. Brown*, 34 N. H. 460. **New Jersey**: *Crawford v. Bertholf*, 1 N. J. Eq. 458; *Cannon v. Cannon*, 26 N. J. Eq. 316. **New York**: *Jackson v. Leek*, 12 Wend. 105; *Jackson v. Richards*, 6 Cow. 617; *Osterhout v. Shoemaker*, 3 Hill, 513; *Stephens v. Buffalo &*

mode of delivery is the actual handing over of the deed by the grantor to the grantee with the expressed intention of passing the title. But such a manual passing over of the deed is not absolutely essential in any case.

1218. Delivery is a question of fact, and a question that is often difficult to determine. If there is any test applicable to all cases, it is to be found in intention. The evidence of intention is to be found in acts and words. But a deed may be delivered by acts without words, or by words without acts, though ordinarily both words and acts go to the making of a delivery.<sup>1</sup> Thus if the grantor, having executed a deed with the intention of

N. Y. City R. Co. 20 Barb. 332; Mitchell v. Bartlett, 51 N. Y. 447; Weed v. Hewlett, 12 N. Y. Supp. 606; Cussack v. Tweedy, 126 N. Y. 81, 26 N. E. Rep. 1033; Fisher v. Hall, 41 N. Y. 416; Bryant v. Bryant, 42 N. Y. 11. Ohio: Hammell v. Hammell, 19 Ohio, 17. Oregon: Fain v. Smith, 14 Ore. 82, 12 Pac. Rep. 365, 58 Am. Rep. 281. Tennessee: Davis v. Cross, 14 Lea, 637, 52 Am. Rep. 177; Brevard v. Neely, 2 Sneed, 164. Texas: McLaughlin v. McManigle, 63 Tex. 553; Dikes v. Miller, 24 Tex. 417; Hubbard v. Cox, 76 Tex. 239, 13 S. W. Rep. 170. Vermont: Dwinell v. Bliss, 58 Vt. 353, 5 Atl. Rep. 317; Stiles v. Brown, 16 Vt. 563; Elmore v. Marks, 39 Vt. 538; Gorham v. Meacham, 63 Vt. 231, 22 Atl. Rep. 572; Paddock v. Potter, 67 Vt. 360, 31 Atl. Rep. 784. Virginia: Harman v. Oberdorfer, 33 Gratt. 497; Skipwith v. Cunningham, 8 Leigh, 271, 281. West Virginia: Lang v. Smith, 37 W. Va. 725, 17 S. E. Rep. 213.

<sup>1</sup> Alabama: McLure v. Colclough, 17 Ala. 89; Elsberry v. Boykin, 65 Ala. 336; Simmons v. Simmons, 78 Ala. 365. Delaware: Porter v. Buckingham, 2 Harr. 197. Illinois: Price v. Hudson, 125 Ill. 284, 17 N. E. Rep. 817; Byars v. Spencer, 101 Ill. 429, 40 Am. Rep. 212; Otis v. Spencer, 102 Ill. 622, 40 Am. Rep. 617; Benneson v. Aiken, 102 Ill. 284, 40 Am. Rep. 592; Walker v. Walker, 42 Ill. 311, 89 Am. Dec. 445; Bryan v. Wash, 7 Ill. 557, 565; Rountree v. Smith, 152 Ill. 493, 38 N. E. Rep. 680; Blake v. Fash, 44 Ill. 302; Whitman v. Heneberry, 73 Ill. 109. Indiana: Vaughan v. Gorman, 94 Ind. 11; Burkholder v. Casad, 47 Ind. 418; Somers v. Pumphrey, 24 Ind. 231. Maine: Brown v. Brown, 66 Me. 316; Hatch v. Bates, 54 Me. 136; Porter v. Cole, 4 Me. 20; Hill v. McNichol, 80 Me. 209, 13 Atl. Rep. 883. Maryland: Byers v. McClanahan, 6 G. & J. 250; Stewart v. Redditt, 3 Md. 67. Michigan: Thatcher v. St. Andrew's Church, 37 Mich. 264. New Jersey: Crawford v. Bertholf, 1 N. J. Eq. 458; Cannon v. Cannon, 26 N. J. Eq. 316. New York: Jackson v. Phipps, 12 Johns. 418, per Spencer, J.: "The delivery must be either actual by doing something and saying nothing, or else verbal by saying something and doing nothing; or it may be by both, but by one or both of these it must be made." Missouri: Sneathen v. Sneathen, 104 Mo. 201, 16 S. W. Rep. 497; Standiford v. Standiford, 97 Mo. 231, 10 S. W. Rep. 836; Burke v. Adams, 80 Mo. 504; Crowder v. Searey, 103 Mo. 97, 15 S. W. Rep. 346. North Carolina: Waddell v. Hewitt, 1 Ired. Eq. 475; Devereux v. McMahon, 108 N. C. 134, 12 S. E. Rep. 902. Oregon: Fain v. Smith, 14 Ore. 82, 12 Pac. Rep. 365, 58 Am. Rep. 281; Flint v. Phipps, 16 Ore. 437, 19 Pac. Rep. 543. Pennsylvania: Dayton v. Newman, 19 Pa. St. 194; Pennsylvania Co. v. Dovey, 64 Pa. St. 260. Vermont: Gorham v. Meacham, 63 Vt. 231, 22 Atl. Rep. 572. Wisconsin: Bogie v. Bogie, 35 Wis. 659; Welch v. Sackett, 12 Wis. 243.

passing the title, hands it to the grantee without saying a word, there is a good delivery. And so with the like intention if the grantor, having executed a deed which is lying in the presence of the parties, directs the grantee to take it, and the latter signifies his assent, the delivery is complete without either of the parties touching the deed.<sup>1</sup> So, if a deed, executed in the presence of the parties, be left with the attorney or justice of the peace who drew it for safe-keeping, the delivery is complete.<sup>2</sup> It is the intention in all cases that gives vitality to the act, whatever it may be, or to the words, whatever they may be.<sup>3</sup>

**1219. Delivery of the deed in modern conveyancing takes the place of livery of seisin under the old law.**<sup>4</sup> In feudal times delivery of possession of the land in a public and notorious manner was the thing essential to the vesting of title to the land. "This became gradually diminished in importance until the manual delivery of a piece of the turf, and many other symbolic acts, became sufficient. When all this passed away, and the creation and transfer of estates in land by a written instrument, called the act or deed of the party, became the usual mode, the instrument was at first delivered on the land in lieu of livery of seisin. Finally, any delivery of the deed, or any act which the party intended to stand for such delivery, became effectual to pass the title."<sup>5</sup>

**1220. Delivery is primarily a matter of intention.** Whether there has been a delivery of the deed is a question of fact rather than of law, depending upon the intent of the grantor to vest an

<sup>1</sup> *Shelton's Case*, 1 Cro. Eliz. 7, in the words of the reporter. The case was: Lessee for years grants his term by deed, and sealeth it in presence of divers and of the grantee himself; and the deed at the same time was read, but not delivered; nor did the grantee take it, but it was left behind them in the same place. The opinion of all the judges was that it was a good grant; for the parties came for that purpose, and performed all that was requisite for the perfecting it, except an actual delivery; but it being left behind them, and not countermanded, it shall be said a delivery in law. See, also, *Souverye v. Arden*, 1 Johns. Ch. 240.

<sup>2</sup> *Orr v. Clark*, 62 Vt. 136, 19 Atl. Rep. 929.

<sup>3</sup> *Xenos v. Wickham*, L. R. 2 H. L. 296, reversing same case in 13 C. B. N. S. 381, 14 C. B. N. S. 435; *Byars v. Spencer*, 101 Ill. 429, 40 Am. Rep. 212; *Weber v. Christen*, 121 Ill. 91, 11 N. E. Rep. 893, per *Mulkey, J.*; *Bryan v. Wash*, 7 Ill. 557; *Dayton v. Newman*, 19 Pa. St. 194; *Black v. Sharkey*, 104 Cal. 279, 37 Pac. Rep. 939; *Hastings v. Vaughn*, 5 Cal. 315; *Hibberd v. Smith*, 67 Cal. 547, 4 Pac. Rep. 473, 8 Pac. Rep. 46.

<sup>4</sup> *Harrington v. Gage*, 6 Vt. 532.

<sup>5</sup> *United States v. Schurz*, 102 U. S. 378, 398.

estate in the grantee.<sup>1</sup> If a deed be so disposed of as to evince clearly the intention of the grantor that it shall take effect as a conveyance, it is a sufficient delivery.<sup>2</sup> This intention may be in-

<sup>1</sup> *Gamons v. Knight*, 5 Barn. & C. 673; *Xenos v. Wickham*, L. R. 2 H. L. 596; *Younge v. Guilbeau*, 3 Wall. 636, 641. **Alabama**: *Alexander v. Alexander*, 71 Ala. 295. **California**: *Hastings v. Vaughn*, 5 Cal. 315; *Deau v. Parker*, 88 Cal. 283, 26 Pac. Rep. 91. **Delaware**: *Jamison v. Craven*, 4 Del. Ch. 311. **Georgia**: *Ross v. Campbell*, 73 Ga. 309. **Illinois**: *Weber v. Christen*, 121 Ill. 91, 11 N. E. Rep. 893; *Douglas v. West*, 140 Ill. 455, 31 N. E. Rep. 403; *Masterson v. Cheek*, 23 Ill. 72; *Otis v. Spencer*, 102 Ill. 622, 40 Am. Rep. 617; *Byars v. Spencer*, 101 Ill. 429, 40 Am. Rep. 212; *Gunnell v. Cockerill*, 79 Ill. 79; *Walker v. Walker*, 42 Ill. 311; *Bryan v. Wash*, 7 Ill. 557; *Roane v. Baker*, 120 Ill. 308, 11 N. E. Rep. 246; *McElroy v. Hiner*, 133 Ill. 156, 24 N. E. Rep. 435; *Hill v. Hill*, 119 Ill. 242, 10 N. E. Rep. 667; *Burnap v. Sharpsteen*, 149 Ill. 225, 36 N. E. Rep. 1008; *Lancaster v. Blaney*, 140 Ill. 203, 29 N. E. Rep. 870; *Shovers v. Warrick*, 152 Ill. 355, 38 N. E. Rep. 792; *McDonald v. Minnick*, 147 Ill. 651, 35 N. E. Rep. 367; *Otis v. Beckwith*, 49 Ill. 121. **Indiana**: *Somers v. Pumphrey*, 24 Ind. 231; *Hotchkiss v. Olmstead*, 37 Ind. 74; *Berry v. Anderson*, 22 Ind. 36; *Stokes v. Anderson*, 118 Ind. 533, 21 N. E. Rep. 331. **Iowa**: *Tallman v. Cooke*, 39 Iowa, 402; *Ware v. Smith*, 62 Iowa, 159, 17 N. W. Rep. 459; *Robinson v. Gould*, 26 Iowa, 89; *Craven v. Winter*, 38 Iowa, 471; *Steel v. Miller*, 40 Iowa, 402; *McKenna v. Kelso*, 52 Iowa, 727, 3 N. W. Rep. 152; *Parker v. Parker*, 56 Iowa, 111, 8 N. W. Rep. 806; *Richardson v. Grays*, 85 Iowa, 149, 52 N. W. Rep. 10; *Farmers' & Traders' Bank v. Haney*, 87 Iowa, 101, 54 N. W. Rep. 61; *Hutton v. Smith*, 88 Iowa, 238, 55 N. W. Rep. 326. **Kentucky**: *Abert v. Lape* (Ky.), 15 S. W. Rep. 134. **Massachusetts**: *Stevens v. Stevens*, 150 Mass. 557, 23 N. E. Rep. 8, 378; *Shurtleff v. Francis*, 118 Mass. 154; *Perry v. Porter*, 121 Mass. 522; *Parrott v. Avery*, 159 Mass. 594, 35 N. E. Rep. 94; *Hawkes v. Pike*, 105 Mass. 560; *Brabrook v. Bank*, 104 Mass. 228, 232; *Chase v. Breed*, 5 Gray, 440. **Michigan**: *Thatcher v. St. Andrew's Church*, 37 Mich. 264. **Mississippi**: *Davis v. Williams*, 57 Miss. 843. **Missouri**: *Gilmore v. Morris*, 13 Mo. App. 114; *Standiford v. Standiford*, 97 Mo. 231, 10 S. W. Rep. 836. *Hammerslough v. Cheatham*, 84 Mo. 13. **Montana**: *Martin v. Flaharty*, 13 Mont. 96, 32 Pac. Rep. 287. **New Hampshire**: *Hurlburt v. Wheeler*, 40 N. H. 73. **New Jersey**: *Ruckman v. Ruckman*, 32 N. J. Eq. 259; *Jones v. Swayze*, 42 N. J. L. 279; *Martling v. Martling*, 47 N. J. Eq. 122, 20 Atl. Rep. 41; *Vreeland v. Vreeland*, 48 N. J. Eq. 56, 21 Atl. Rep. 627. **North Carolina**: *M'Kee v. Hicks*, 2 Dev. 379. **Oregon**: *Fain v. Smith*, 14 Oreg. 82, 58 Am. Rep. 281. **Tennessee**: *Martin v. Ramsey*, 5 Humph. 350; *Corley v. Corley*, 2 Coldw. 524. **Vermont**: *Dwinell v. Bliss*, 58 Vt. 353, 5 Atl. Rep. 317; *Elmore v. Marks*, 39 Vt. 538; *Lindsay v. Lindsay*, 11 Vt. 621; *Orr v. Clark*, 62 Vt. 136, 19 Atl. Rep. 929.

<sup>2</sup> **Delaware**: *Doe v. Beeson*, 2 Houst. 246. **Illinois**: *Benson v. Hall*, 150 Ill. 60, 36 N. E. Rep. 947; *Price v. Hudson*, 125 Ill. 284, 17 N. E. Rep. 817; *Gunnell v. Cockerill*, 79 Ill. 79; *Miller v. Meers*, 155 Ill. 284, 40 N. E. Rep. 577; *Bennesson v. Aiken*, 102 Ill. 284. **Massachusetts**: *Mills v. Gore*, 20 Pick. 28. **Minnesota**: *Stevens v. Hatch*, 6 Minn. 64; *Conlan v. Grace*, 36 Minn. 276, 30 N. W. Rep. 880; *Gaston v. Merriam*, 33 Minn. 271, 22 N. W. Rep. 614; *Schmitt v. Schmitt*, 31 Minn. 106, 16 N. W. Rep. 543; *Thompson v. Easton*, 31 Minn. 99, 16 N. W. Rep. 542. **Missouri**: *Tyler v. Hall*, 106 Mo. 313, 17 S. W. Rep. 319. **Nebraska**: *Brittain v. Work*, 13 Neb. 347. **New Hampshire**: *Warren v. Swett*, 31 N. H. 332. **Texas**: *Hubbard v. Cox*, 76

ferred from a variety of circumstances. It may be inferred from the grantor's acts and declarations at the execution of the deed, or even from his subsequent acts and declarations. It may be inferred also from the attendant circumstances and from subsequent events; but in such case the circumstances must be such as satisfactorily to indicate the grantor's intention to part with the deed and to put it within the control of the grantee.<sup>1</sup> The fact that the grantee enters into possession of the land and makes improvements is a circumstance tending to show the grantor's intention to deliver the deed and complete the sale.<sup>2</sup>

1221. It is essential, however, that the deed should be completed ready for delivery, in order to make the transfer of the possession of it from the grantor to the grantee or his agent effectual as a delivery. That the instrument is lacking in an essential particular affords a presumption that the parties did not intend the transfer of it to be a delivery to take effect pres-

Tex. 239, 13 S. W. Rep. 170. *Tennessee*: *Nichol v. Davidson Co.* 3 Tenn. Ch. 547. *Vermont*: *Orr v. Clark*, 62 Vt. 136, 19 Atl. Rep. 929. *Wisconsin*: *Tisher v. Beckwith*, 30 Wis. 55.

In *Price v. Hudson*, 125 Ill. 284, 17 N. E. Rep. 817, a man about to enlist in the army, at the time of the Civil War, made a deed to his wife, and placed it in a trunk in the dwelling-house, telling his wife that if he was killed she should take the deed and have it recorded. He returned two years afterwards, but never afterwards saw the deed, and the grantee took no manual possession of it until ten years after its execution, when she took it from the trunk, and, on advice that it was ineffectual to convey title, she destroyed it. In an action to subject the premises to a mechanic's lien as her property, it was held that the deed never took effect for want of a delivery.

<sup>1</sup> *Cannon v. Cannon*, 26 N. J. Eq. 316; *Vought v. Vought*, 50 N. J. Eq. 177, 27 Atl. Rep. 489; *Dean v. Parker*, 88 Cal. 283, 26 Pac. Rep. 91; *McLaughlin v. McManigle*, 63 Tex. 553; *Tyler v. Hall*, 106 Mo. 313, 17 S. W. Rep. 319.

*Huse v. Den*, 85 Cal. 390, 24 Pac. Rep. 790. In this case the deed remained in

possession of the grantor. The deed was a deed of trust to two trustees, of whom the grantor was one, and the other trustee was present at the time of its execution, and consented to act as a trustee. It was intended to be a deed of settlement for the benefit of the grantor's children, and was in the nature of a covenant to stand seised for their benefit. These circumstances were held to be sufficient to warrant the finding of a complete execution and delivery.

In *Terhune v. Oldis*, 44 N. J. Eq. 146, 150, 14 Atl. Rep. 638, Chancellor McGill said: "To show delivery, there must be proof of that which evinces an intention on the part of the grantor to part with the instrument, and, of course, to pass the title." And in *Ordinary v. Thatcher*, 41 N. J. L. 403, 409, Chief Justice Beasley said, in substance, that the true theory is that a deed is delivered whenever it is intended that it shall go into effect by force of what is said or done, without any further future declaration or act. And see *Vreeland v. Vreeland*, 48 N. J. Eq. 56, 21 Atl. Rep. 627.

<sup>2</sup> *McFall v. McFall*, 136 Ind. 622, 36 N. E. Rep. 517; *Williams v. Williams*, 148 Ill. 426, 36 N. E. Rep. 104.

ently.<sup>1</sup> Thus one wishing to buy certain land sent to a banker the consideration money and a form of deed, on the execution of which the banker was authorized to pay the money to the vendor and send the deed to the vendee. The vendor executed the deed, but directed the banker not to deliver it until certain changes had been agreed to. Before these changes had been made the banker, while still holding the deed and the money, became insolvent and made an assignment. It was held that the vendor could not recover the consideration money from the assignee, because the deed had never been delivered.<sup>2</sup> And so, where a deed signed by only a portion of the grantors remains in possession of one of the grantors, and is not recorded until fifty years after a subsequent deed, sealed and delivered by all the grantors, is recorded, the conclusion is inevitable that it was never delivered or intended to become operative.<sup>3</sup>

Of course there may be a complete delivery and acceptance of the deed without its complete execution, as where its execution by the grantor's wife is lacking, and it is delivered on the understanding that she is to execute it thereafter; and in that case, on its execution by her, the grantee cannot be heard to say that he never accepted it. But in such case the delivery would be implied under circumstances which would be sufficient to afford a presumption of the delivery of a completed deed. The delivery of the deed before completion must be established by positive evidence.<sup>4</sup>

1222. There must be some evidence of an intent to deliver. Simply proving that a deed was signed and attested and left on the table without a delivery to any person, and in the absence of the grantee, is not sufficient evidence of a delivery.<sup>5</sup> A grantor signed a deed, bill of sale, and promissory note, and left them upon the table. He neither said nor did anything to indicate an intention to deliver them; on the contrary, the circumstances show that he did not want to execute the writing at that time.

<sup>1</sup> *Jordan v. Davis*, 108 Ill. 336; *Goodlett v. Kelly*, 74 Ala. 213; *Cusack v. Tweedy*, 56 Hun, 617, 11 N. Y. Supp. 16.

<sup>2</sup> *Griffith v. Winborne*, 105 N. C. 403, 10 S. E. Rep. 855.

<sup>3</sup> *Cusack v. Tweedy*, 11 N. Y. Supp. 16.

<sup>4</sup> *Dikeman v. Arnold*, 78 Mich. 455, 44 N. W. Rep. 407.

<sup>5</sup> *Terhune v. Oldis*, 44 N. J. Eq. 146, 150, 14 Atl. Rep. 638; *Ordinary v. Thatcher*, 41 N. J. L. 403; *Vreeland v. Vreeland*, 48 N. J. Eq. 56, 21 Atl. Rep. 627; *Ruckman v. Ruckman*, 33 N. J. Eq. 354; *Hughes v. Easten*, 4 J. J. Marsh. 472, 20 Am. Dec. 230; *Flannigan v. Goggins*, 71 Wis. 28, 36 N. W. Rep. 846.

He reserved the right to examine them on the next day, and it was agreed that, if they were found incorrect, corrections should be made. While the papers were lying upon the table, one of the grantors named therein took them up and gave them to his clerk, with instructions to put them in his vault. It was held there was no delivery.<sup>1</sup>

But evidence that a deed, executed by the grantor in the house of the grantee, at his request was left lying upon the table of the grantee, who picked it up and put it away, is sufficient to prove a delivery of the deed, aside from any presumptions arising from the possession of the deed by the grantee.<sup>2</sup>

**1223.** Even the actual passing over of the deed from the grantor to the grantee may not amount to a full and complete delivery of it, in case the parties both agreed or understood at the time that the deed should not become operative until some future event,<sup>3</sup> or the fulfilment of a condition or provision, such as the approval of the deed by a copartner or other person having an interest.<sup>4</sup> Parol evidence is admissible to show that a deed delivered to the grantee named therein was not intended to take effect according to its terms.<sup>5</sup>

**1224.** Primarily the evidence relating to delivery is for the jury, and whether the evidence shows a delivery is a question to be determined by the jury as a question of fact. If the testimony directly shows a delivery, or shows facts from which it is a positive and absolute inference of law that there was a delivery, then the court may instruct the jury to find a delivery; but when there is conflicting testimony, or where there are only facts from which a delivery may be doubtfully inferred, then the finding should be left to the jury under proper instructions, upon the whole evidence in the case.<sup>6</sup> If any circumstances are shown, no

<sup>1</sup> *Stokes v. Anderson*, 118 Ind. 533, 21 N. E. Rep. 331. And see *Major v. Todd*, 84 Mich. 85, 47 N. W. Rep. 841.

<sup>2</sup> *McLennan v. McDonnell*, 78 Cal. 273, 20 Pac. Rep. 566.

<sup>3</sup> *Fraser v. Davie*, 11 S. C. 56; *Arthur v. Anderson*, 9 S. C. 234.

<sup>4</sup> *Lee v. Richmond* (Iowa), 57 N. W. Rep. 613.

<sup>5</sup> *Black v. Sharkey*, 107 Cal. 279, 37 Pac. Rep. 939; *Hastings v. Vaughn*, 5 Cal. 315; *Hibberd v. Smith*, 67 Cal. 547,

4 Pac. Rep. 473, 8 Pac. Rep. 46; *Denis v. Velati*, 96 Cal. 223, 31 Pac. Rep. 1; *Stewart v. Stewart*, 50 Wis. 445, 7 N. W. Rep. 369; *Knolls v. Barnhart*, 71 N. Y. 474.

<sup>6</sup> *Murray v. Stair*, 2 B. & C. 82; *Lindsay v. Lindsay*, 11 Vt. 621; *Hunt v. Swayze*, 55 N. J. L. 33, 25 Atl. Rep. 850; *Roll v. Rea*, 50 N. J. L. 264, 12 Atl. Rep. 905; *Jones v. Swayze*, 42 N. J. L. 279; *Earle v. Earle*, 20 N. J. L. 347; *Vreeland v. Vreeland*, 48 N. J. Eq. 56, 21 Atl. Rep. 627; *Critchfield v. Critchfield*, 24 Pa. St.

matter how slight or inconclusive, from which a delivery may be inferred, it is the right of the party relying upon them to have them submitted to the jury, and it is erroneous for the judge to instruct them that there is no evidence of a delivery.<sup>1</sup>

**1225. When a question of law.**—While ordinarily the question whether a deed has been delivered is one of fact to be determined by the jury upon the whole evidence in the case, the question may arise in such a form as to present only a question of law for the determination of the court; or it may be a mixed question of law and fact, in which case the jury should determine the facts, and the court the law arising upon the facts.<sup>2</sup> When the facts are undisputed, their legal effect is a question of law for the court to pass upon.<sup>3</sup> The court may instruct the jury to find a delivery when the whole testimony shows a state of facts from which delivery is a positive inference of law;<sup>4</sup> and the court may refuse to submit the question of delivery to the jury when the undisputed facts show that there was no delivery in the grantor's lifetime, and that the only delivery intended was one to be made after the testator's death. In such case, as a matter of law, there was no delivery and the deed is void.<sup>5</sup>

Upon the trial of an issue whether there had been a delivery of a deed which was to take effect after the grantor's death, a lease from the grantor for his life to the grantee was introduced in evidence for the purpose of raising an inference that the deed had never been delivered. It was held that it was the exclusive province of the court and not of the jury to determine whether the execution of the lease was inconsistent with the fact of the delivery of the deed.<sup>6</sup>

100; *Hannah v. Swarner*, 8 Watts, 9, 34 Am. Dec. 442; *Lutes v. Reed*, 138 Pa. St. 171, 20 Atl. Rep. 943; *Stoney v. Winterhalter* (Pa.), 11 Atl. Rep. 611; *Cherry v. Herring*, 83 Ala. 458, 3 So. Rep. 667; *Alexander v. Alexander*, 71 Ala. 295; *Nye v. Lowry*, 82 Ind. 316; *Bovee v. Hinde*, 135 Ill. 137, 25 N. E. Rep. 694; *Van Hook v. Walton*, 28 Tex. 59; *Cocks v. Simmons*, 57 Miss. 183; *Denis v. Velati*, 96 Cal. 223, 31 Pac. Rep. 1; *Hibberd v. Smith*, 67 Cal. 547, 56 Am. Rep. 726; *Pitts v. Sheriff*, 108 Mo. 110, 18 S. W. Rep. 1071.

<sup>1</sup> *Floyd v. Taylor*, 12 Ired. 47; *Whitman v. Shingleton*, 108 N. C. 193, 12 S. E. Rep. 1027; *Roll v. Rea*, 50 N. J. L. 264, 12 Atl. Rep. 905; *Sweetser v. Lowell*, 38 Me. 446.

<sup>2</sup> *Somers v. Pumphrey*, 24 Ind. 231, per Elliott, C. J.

<sup>3</sup> *Rogers v. Carey*, 47 Mo. 232, 4 Am. Rep. 322.

<sup>4</sup> *Jones v. Swayze*, 42 N. J. L. 279.

<sup>5</sup> *Taft v. Taft*, 59 Mich. 185, 26 N. W. Rep. 426, 60 Am. Rep. 291.

<sup>6</sup> *Robbins v. Spencer*, 121 Ind. 594, 22 N. E. Rep. 660.



1226. Parol evidence is always competent to show whether a deed has become operative by delivery, though such evidence is not competent to control its construction if it has once taken effect.<sup>1</sup> To this extent declarations made by the parties, or either of them, at the time of the execution of a deed, are admissible in evidence on the issue of delivery as being a part of the *res gestæ*; but subsequent declarations, especially those of the grantor, in disparagement of his deed, are not so admissible.<sup>2</sup> Evidence as to what the parties said and did prior to their final meeting, at which a delivery of the deed is claimed to have been made, is immaterial upon the issue of such delivery, unless it can be shown that one of the parties said or did something before going to the place of meeting indicating an intention to deliver or accept the deed.<sup>3</sup>

Thus subsequent declarations and acts by the grantor for the purpose of sustaining his deed are admissible to show his intention in delivering it.<sup>4</sup> Where a grantor has left a deed for the benefit of the grantee with a third person, his testimony as to any declarations made by the grantor, or conversations had with him in relation to the delivery at that or any subsequent time, is competent to show the grantor's intention; but he cannot properly be asked what he would have done had the grantor afterwards called for the deed.<sup>5</sup>

1227. The grantee's entry into possession of the land is a circumstance tending to show a delivery of the deed, and in connection with other circumstances may be strong evidence of delivery. If the grantor, without actually delivering the deed, permits the grantee to act upon the belief that he has a valid conveyance in the construction of valuable improvements on the

<sup>1</sup> Price v. Hudson, 125 Ill. 284, 17 N. E. Rep. 817, per Shope, J.; Jordan v. Davis, 108 Ill. 336.

<sup>2</sup> Ord v. Ord, 99 Cal. 523, 34 Pac. Rep. 83; Bury v. Young, 98 Cal. 446, 33 Pac. Rep. 338; Thatcher v. St. Andrew's Church, 37 Mich. 264; Stevens v. Castel, 63 Mich. 111, 29 N. W. Rep. 828; Schuffert v. Grote, 88 Mich. 650, 50 N. W. Rep. 657; Chick v. Sisson, 95 Mich. 412, 54 N. W. Rep. 895; Keator v. Dimmick, 46 Barb.

158; Hendy v. Smith, 2 N. Y. Supp. 535; Jackson v. Chapin, 5 Cow. 485; Jackson v. Miller, 6 Cow. 751; Jackson v. Cary, 16 Johns. 302; Steffian v. Bank, 69 Tex. 513, 6 S. W. Rep. 823.

<sup>3</sup> Emery v. Three Rivers, 78 Mich. 438, 455, 44 N. W. Rep. 401.

<sup>4</sup> Miller v. Meers, 155 Ill. 284, 40 N. E. Rep. 577.

<sup>5</sup> Dean v. Parker, 88 Cal. 283, 26 Pac. Rep. 91.

land, he cannot then be allowed to say that the deed was in fact inoperative for want of a final delivery.<sup>1</sup>

The value of the evidence derived from the fact of the grantee's possession of the land must depend in every instance very much upon the circumstances of the case. Thus the mere fact that a father, after making a deed to his son, which was found among the father's papers after his decease, shortly before his decease put the son in possession of the land, does not necessarily tend to show a delivery of the deed, because he may have done this for the sole purpose of permitting the son to enjoy the rents and profits of the land, and not in pursuance of a previous gift, especially if it be shown that the father had said that he wished his son to live upon the land, and that he could do as he pleased about cutting timber thereon.<sup>2</sup>

1228. The burden of proving the delivery of a deed rests upon the party who claims that it was delivered. There must at least be a preponderance of evidence that the deed was delivered. Proof that a deed was executed, and that it remained in the possession of the grantor, is no evidence that it was ever delivered, but on the contrary it is some evidence that it had not been delivered.<sup>3</sup> There must be some affirmative evidence of an intent to deliver and accept the deed, and such evidence may be found either in the acts or words of the parties, or in the circumstances attending the transaction.<sup>4</sup> Evidence that one had a bond for a deed, and that a deed was duly executed to him, and a witness thereto certified that it was signed, sealed, and delivered in his presence, and that the grantor had signed a paper recognizing the deed under which the grantee claimed title, is sufficient to sustain a finding that the deed was delivered.<sup>5</sup>

1229. A grant of land by a state or nation under its seal and the hand of its executive needs no delivery.<sup>6</sup> A patent

<sup>1</sup> *Hayes v. Boylan*, 141 Ill. 400, 30 N. E. Rep. 1041, per Scholfield, J.; *Master-son v. Cheek*, 23 Ill. 72; *Walker v. Walker*, 42 Ill. 311; *Reed v. Douthit*, 62 Ill. 348; *Sturtevant v. Sturtevant*, 116 Ill. 340, 6 N. E. Rep. 428.

<sup>2</sup> *Tyler v. Hall*, 106 Mo. 313, 17 S. W. Rep. 319.

<sup>3</sup> *Burkholder v. Casad*, 47 Ind. 418; *Burton v. Boyd*, 7 Kans. 17; *Newlin v. Beard*, 6 W. Va. 110; *Pillow v. King*, 55

Ark. 633, 18 S. W. Rep. 764; *Tyler v. Hall*, 106 Mo. 313, 17 S. W. Rep. 319; *Pool v. Davis*, 135 Ind. 323, 34 N. E. Rep. 1130.

<sup>4</sup> *Crawford v. Bertholf*, 1 N. J. Eq. 458.

<sup>5</sup> *Lowd v. Brigham*, 154 Mass. 107, 26 N. E. Rep. 1004, 28 N. E. Rep. 7.

<sup>6</sup> Mr. Cruise says: "The king's letters-patent need no delivery, nor his patent under the great seal of the Duchy of Lancaster; for they are sufficiently authenti-

for land under the seal of the United States and the sign-manual of the President, when recorded in the general land office, vests a complete title without delivery.<sup>1</sup> The title then becomes a title by matter of record, without a delivery such as is necessary in a conveyance by a private person. "By these acts, open and public declaration is made that, so far as the general government is concerned, the title of the premises has been transferred to the grantee. The record stands in the place of the offer for delivery in the case of a private deed; the instrument is then in a condition for acceptance, and is thenceforth held for the grantee."<sup>2</sup> Though the patent remains in the land office, it passes the title to the grantee if the latter accepts the grant, or has done any acts from which an acceptance may be presumed, such as demanding the patent, or his making efforts to secure the favorable action of the land department upon it.<sup>3</sup>

## II. *Gives immediate Effect to a Deed.*

1230. Whether an instrument is a deed or a will depends upon the time when it is to take effect, rather than upon its form or manner of execution.<sup>4</sup> A deed takes effect upon its delivery

cated and completed by the annexing of the respective seals to them." Title xxxiv. § 1, part 3.

<sup>1</sup> *United States v. Schurz*, 102 U.S. 378; *Marbury v. Madison*, 1 Cranch, 137; *Green v. Lister*, 8 Cranch, 229; *Leroy v. Jamison*, 3 Sawyer, 369; *Ex parte Kuhlman*, 3 Rich. Ch. 257, 55 Am. Dec. 642; *Donner v. Palmer*, 31 Cal. 500; *Gilmore v. Sapp*, 100 Ill. 297; *Houghton v. Hardenberg*, 53 Cal. 181. As to title by record, see *Blackstone*, book 2, ch. 21.

<sup>2</sup> *Leroy v. Jamison*, 3 Sawyer, 369, per Field, J.

<sup>3</sup> *United States v. Schurz*, 102 U.S. 378; *Leroy v. Jamison*, 3 Sawyer, 369.

<sup>4</sup> *Habergham v. Vincent*, 2 Ves. Jr. 204, 230. In this case this subject was fully considered, by Mr. Justice Buller, who in his opinion said: "A deed must take place upon its execution, or not at all. It is not necessary for a deed to convey an immediate interest in possession, but it must take place, as passing that interest to be conveyed, at the exe-

cution; but a will is quite the reverse. It can only operate after death; and upon this instrument it is clear the testator had no idea that this paper would have any effect till a distant period long after his death and the expiration of the other estates. . . . But the cases have established that an instrument in any form, whether a deed poll or indenture, if the obvious purpose is not to take place till after the death of the person making it, shall operate as a will. The cases for that are both at law and in equity; and in one of them there were express words of immediate grant, and a consideration to support it as a grant; but, as upon the whole the intention was that it should have a future operation after death, it was considered as a will."

To like effect, see *Wellborn v. Weaver*, 17 Ga. 267, 63 Am. Dec. 235; *Hale v. Joslin*, 134 Mass. 310; *Cook v. Brown*, 34 N. H. 460; *Faulk v. Faulk*, 23 Tex. 653; *Hinson v. Bailey*, 73 Iowa, 544, 35 N. W. Rep. 626; *Cline v. Jones*, 111 Ill.

in the grantor's lifetime. A will takes effect from the death of the testator. An instrument which was manifestly intended to convey a title or beneficial interest to the grantee, and to take effect in the grantor's lifetime, must be regarded as a deed, if there is anything amounting to a delivery of it, and not as a will.<sup>1</sup> But if the obvious purpose of the instrument was that it should not take effect to convey any title till after the death of the person making it, it is a will, and may be given effect as such if it has the requisite formalities of a will.<sup>2</sup> An instrument may be a deed as regards a part of the property described, the title to which is to pass to the grantee in the grantor's lifetime, and a will as to other property, the title to which is to pass upon the death of the grantor.<sup>3</sup>

An instrument executed and acknowledged as a deed, but declared therein to be a "last will and testament," will nevertheless be held to be a present conveyance, if such appears from the whole instrument to have been the intention.<sup>4</sup>

**1231.** By reference a deed may become part of a will, or a will may become part of a deed. Where a grantor executed a deed of his farm to his sister, and left it in the custody of a third person without any instruction as to its delivery, and afterwards made a will by which he devised to another a small part of the land so conveyed for life, with a proviso that at the death of the devisee it should "revert back to said farm and become the property of my said sister, together with other lands I have already conveyed by deed to her," it was held that the deed had no operation as a conveyance, because it was not delivered in the grantor's lifetime, but that the deed was by the reference incorporated in

563; *Brown v. Brown*, 66 Me. 316, 321, per Virgin, J.; *Spencer v. Robbins*, 106 Ind. 580, 5 N. E. Rep. 726.

<sup>1</sup> *Allen v. De Groodt*, 105 Mo. 442, 16 S. W. Rep. 494; *Sneathen v. Sneathen*, 104 Mo. 201, 16 S. W. Rep. 497; *Thompson v. Johnson*, 19 Ala. 59; *Gregory v. Walker*, 38 Ala. 26; *Younge v. Moore*, 1 Strob. 48; *Wall v. Wall*, 30 Miss. 91, 64 Am. Dec. 147; *Exum v. Canty*, 34 Miss. 533; *Cumming v. Cumming*, 3 Ga. 460; *Jackson v. Culpepper*, 3 Ga. 569; *Daniel v. Veal*, 32 Ga. 589; *Diefendorf v. Diefendorf*, 132 N. Y. 100, 30 N. E. Rep. 375, 8 N. Y. Supp. 617, 29 N. Y. St.

Rep. 122; *Blackman v. Preston*, 123 Ill. 381, 15 N. E. Rep. 42.

<sup>2</sup> *Habergham v. Vincent*, 2 Ves. Jr. 230; *Cook v. Brown*, 34 N. H. 460; *Bright v. Adams*, 51 Ga. 239; *Wellborn v. Weaver*, 17 Ga. 267, 63 Am. Dec. 235; *Donald v. Nesbitt*, 89 Ga. 290, 5 S. E. Rep. 367; *Jones v. Loveless*, 99 Ind. 317; *Leaver v. Gauss*, 62 Iowa, 314, 17 N. W. Rep. 522; *Wall v. Wall*, 30 Miss. 91.

<sup>3</sup> *Kinnebrew v. Kinnebrew*, 35 Ala. 628; *Robinson v. Schly*, 6 Ga. 515.

<sup>4</sup> *Chavez v. Chavez (Tex.)*, 13 S. W. Rep. 1018.

the will, and that the sister took title under it to the farm, subject to the life interest in a part of it.<sup>1</sup>

A deed may refer to a will for a more specific statement of some of its provisions or of the grantor's intentions, and the will is then to be read as a part of the deed, just as any other paper referred to becomes incorporated in the deed. The fact that the will could not become operative until the death of the testator would not postpone the vesting of the title under the deed.<sup>2</sup>

**1232.** Whether an instrument is a deed or a will is determined by the inquiry whether it is to take effect immediately as a present conveyance, or only upon the death of the maker. If the instrument conveys a present interest it is irrevocable, and operates as a conveyance, although the grantor retains a life interest and the possession of the land.<sup>3</sup> It is even held that a deed containing a provision that the title is to remain in the grantor during his lifetime,<sup>4</sup> or that it is not to go into effect until his death,<sup>5</sup> is a present conveyance with a reservation of a life estate.

If the grantor intended to make a present conveyance, and there was a sufficient delivery of it, the instrument is a deed, though possession of the land conveyed is not to vest in the grantee till the grantor's death.<sup>6</sup> Thus an instrument in the form of a deed, executed by a husband on his death-bed, conveying all his property to his wife, signed, sealed, and acknowledged, and delivered to a physician, with instructions that it should be kept for his wife until his death and then recorded, is a deed, and not an attempted testamentary disposition of the property.<sup>7</sup>

<sup>1</sup> *Thompson v. Lloyd*, 49 Pa. St. 127.

<sup>2</sup> *Allen v. De Groodt*, 105 Mo. 442, 16 S. W. Rep. 494, 1049; *Amos v. Amos*, 117 Ind. 19, 19 N. E. Rep. 539, 543.

<sup>3</sup> *Kyle v. Perdue*, 87 Ala. 423, 6 So. Rep. 296; *Hall v. Burkham*, 59 Ala. 349; *Spencer v. Robbins*, 106 Ind. 580, 5 N. E. Rep. 726; *Decker v. Decker* (Iowa), 61 N. W. Rep. 921; *Kaufman v. Ehrlich*, 94 Ga. 159, 21 S. E. Rep. 377; *Rawlings v. McRoberts*, 95 Ky. 346, 25 S. W. Rep. 601; *In re Diez*, 50 N. Y. 88; *Jenkins v. Adcock*, 5 Tex. Civ. App. 466, 27 S. W. Rep. 21; *Turner v. Scott*, 51 Pa. St. 126; *Wren v. Coffey* (Tex. Civ. App.), 26 S.

W. Rep. 142; *Carlton v. Cameron*, 54 Tex. 72.

<sup>4</sup> *White v. Hopkins*, 80 Ga. 154, 4 S. E. Rep. 863.

<sup>5</sup> *Seals v. Pierce*, 83 Ga. 787, 10 S. E. Rep. 589; *Chavez v. Chavez* (Tex.), 13 S. W. Rep. 1018.

<sup>6</sup> *Youngblood v. Youngblood*, 74 Ga. 614.

<sup>7</sup> *Deifendorf v. Deifendorf*, 132 N. Y. 100, 30 N. E. Rep. 375, 8 N. Y. Supp. 617.

In *Bromley v. Mitchell*, 155 Mass. 509, 511, 30 N. E. Rep. 83, it appeared that two days before the grantor's death he executed an absolute conveyance of all

**1233. A deed must take effect upon its execution if at all.** It must pass a present interest to the grantee, though his right to enter into possession may be deferred to a future time. If the intention is manifest that the deed should not take immediate effect, but shall be operative only upon the grantor's death, it will never take effect at all unless it is executed with such formalities that it may be given effect to as a testamentary disposition.<sup>1</sup> The following case illustrates these propositions:<sup>2</sup> A father, having previously made gifts to all his children except a daughter, went before a justice of the peace and executed a conveyance of a tract of land to her, and acknowledged the deed, stating that it

his property, upon certain trusts previously expressed. The trial court found in favor of the validity of the deed, and upon appeal the finding was not disturbed, though it was remarked by Holmes, J., delivering the opinion, "that the trusts certainly have a very testamentary look." He further said: "But on the face of the deed it is a conveyance operating at once and irrevocably, and there is nothing in the parol trusts which is not reconcilable with the same interpretation. It is perfectly possible to convey all one's property upon a present irrevocable trust to pay one's debts and so forth, as found in this case. If the trusts include gifts which do not pass to the possession of the *cestuis que trust* until the death of the donor, that is not conclusive against the instrument being a deed, and valid as such."

<sup>1</sup> *Habergham v. Vincent*, 2 Ves. Jr. 231, per Buller, J.; *McCalla v. Bane*, 45 Fed. Rep. 828. **Georgia**: *Wellborn v. Weaver*, 17 Ga. 267, 63 Am. Dec. 235, disapproving of *Wheelwright v. Wheelwright*, 2 Mass. 447, 3 Am. Dec. 66. **Illinois**: *Cline v. Jones*, 111 Ill. 563; *Blackman v. Preston*, 123 Ill. 381, 15 N. E. Rep. 42. **Indiana**: *Jones v. Loveless*, 99 Ind. 317; *Squires v. Summers*, 85 Ind. 252. **Iowa**: *Leaver v. Gauss*, 62 Iowa, 314, 17 N. W. Rep. 522. **Maine**: *Brown v. Brown*, 66 Me. 316. **Maryland**: *Carey v. Dennis*, 13 Md. 1. **Massachusetts**: *Hale v. Joslin*, 134 Mass. 310; *Shurtleff v. Francis*, 118 Mass. 154. **Michigan**: *Taft v. Taft*, 59 Mich. 185, 26 N. W. Rep. 426, 60 Am.

Rep. 291. **Minnesota**: *Conrad v. Douglass* (Minn.), 61 N. W. Rep. 673. **Missouri**: *Sneathen v. Sneathen*, 104 Mo. 201, 16 S. W. Rep. 497. **New Hampshire**: *Cook v. Brown*, 34 N. H. 460. **New Jersey**: *Martling v. Martling*, 47 N. J. Eq. 122, 20 Atl. Rep. 41. **North Carolina**: *Baldwin v. Maulsby*, 5 Ired. 505. **Ohio**: *Phipps v. Hope*, 16 Ohio St. 586; *Williams v. Schatz*, 42 Ohio St. 47. **Pennsylvania**: *Duraind's App.* 116 Pa. St. 93, 8 Atl. Rep. 922; *Turner v. Scott*, 51 Pa. St. 126. **South Carolina**: *Babb v. Harrison*, 9 Rich. Eq. 111, 70 Am. Dec. 203.

<sup>2</sup> *Cline v. Jones*, 111 Ill. 563. See, also, *Hill v. Hill*, 119 Ill. 242, 10 N. E. Rep. 667, where the father placed the deed in his son's trunk, where it was found after the father's death, and it was held that there was a delivery of the deed. *Hayes v. Boylan*, 141 Ill. 400, 30 N. E. Rep. 1041, is a similar case.

A father who had executed a deed to his adult children handed it to one of them, telling him to put it in a box used by both father and son for keeping valuable papers, and the son did so. The circumstances showed that it was the intention of the grantor that the deed should take effect only after his death. The father retained possession of the land conveyed till his death. It was held that the deed was inoperative for want of delivery. See, also, *Lancaster v. Blaney*, 149 Ill. 202, 29 N. E. Rep. 870; *Lang v. Smith*, 37 W. Va. 725, 17 S. E. Rep. 213; *McGraw v. McGraw*, 79 Me. 257, 9 Atl. Rep. 846.

would make his gifts to all his children equal. He retained the deed in his possession till his death, when it was found among his papers. He told his daughter and others that the land would be hers at his death, but that if she would live upon the land it should then be hers. He retained the possession and use of the land. There appearing no intention on the part of the grantor that his deed should be operative in his lifetime, it was held after his death that the deed never took effect, and that the land passed to his heirs. Mr. Justice Sheldon, delivering the opinion of the court, said: "The deed by its purport was absolute, conveying the grantor's entire interest, to operate immediately. But the evidence shows the deed was not to be absolute, but to be qualified in its effect; that it was not intended to convey the grantor's whole interest, but that he meant to have a life estate unless the grantee should move upon the land, which she never did; that the deed was not intended to operate presently, but only upon the grantor's death, or going upon the land to reside. The evidence shows the distinct intention not to create a present estate in the grantee, as that there was never any actual delivery of the deed, but the grantor ever held it in his own possession; and, as it never was his intention that the deed should presently take effect and become operative according to its terms, there was no delivery of the instrument as the deed of the grantor, and it was not valid as a deed."

1234. A deed may be delivered to take effect upon the grantor's death. If a grantor delivers a deed to a third person absolutely as his deed, without reservation and without intending to reserve any control over the instrument, though this is not to be delivered to the grantee till the death of the grantor, the deed when delivered upon the grantor's death is valid, and takes effect from the first delivery.<sup>1</sup> The deed in such case passes

<sup>1</sup> *McCalla v. Bane*, 45 Fed. Rep. 828. *California*: *Bury v. Young*, 98 Cal. 446, 33 Pac. Rep. 338. *Connecticut*: *Merrills v. Swift*, 18 Conn. 257, 46 Am. Dec. 315; *Woodward v. Camp*, 22 Conn. 457. *Illinois*: *Loveland v. Loveland*, 136 Ill. 75, 26 N. E. Rep. 381; *Hill v. Hill*, 119 Ill. 242, 10 N. E. Rep. 667; *Stone v. Duvall*, 77 Ill. 475. *Indiana*: *Owen v. Williams*, 114 Ind. 179, 15 N. E. Rep. 678; *Smiley v. Smiley*, 114 Ind. 258, 16 N. E. Rep. 588; *Hockett v. Jones*, 70 Ind. 227; *Squires v. Summers*, 85 Ind. 252; *Goodpaster v. Leathers*, 123 Ind. 121, 23 N. E. Rep. 1090. *Iowa*: *Hinson v. Bailey*, 73 Iowa, 544, 35 N. W. Rep. 626. *Massachusetts*: *Wheelwright v. Wheelwright*, 2 Mass. 447; *Foster v. Mansfield*, 3 Met. 412; *Mather v. Corliss*, 103 Mass. 568; *Regan v. Howe*, 121 Mass. 424. *Michigan*:

a present interest to be enjoyed in the future. If the grantor reserves control of the instrument, and it is subject during his life to revocation, no present estate passes to the grantee, and the deed is invalid for want of delivery.<sup>1</sup>

1235. The fact that the grantor in his deed conveyed the property "after my decease and not before" does not necessarily make the deed testamentary in character, but operates

Howard v. Patrick, 38 Mich. 795, 805; Thatcher v. St. Andrew's Church, 37 Mich. 264; Latham v. Udell, 38 Mich. 238; Wallace v. Harris, 32 Mich. 380; Taft v. Taft, 59 Mich. 185, 26 N. W. Rep. 426, 60 Am. Rep. 291. **Missouri:** Sneathen v. Sneathen, 104 Mo. 201, 16 S. W. Rep. 497; Rogers v. Carey, 47 Mo. 232; Williams v. Latham, 113 Mo. 165, 20 S. W. Rep. 99; Rothenbarger v. Rothenbarger, 111 Mo. 1, 19 S. W. Rep. 932; Allen v. De Groodt, 105 Mo. 442, 16 S. W. Rep. 494, 1049; Crowder v. Searcy, 103 Mo. 97, 15 S. W. Rep. 346; Standiford v. Standiford, 97 Mo. 231, 10 S. W. Rep. 836; Burke v. Adams, 80 Mo. 504; Huey v. Huey, 65 Mo. 689. **New York:** Ruggles v. Lawson, 13 Johns. 285, 7 Am. Dec. 375; Diefendorf v. Diefendorf, 132 N. Y. 100, 8 N. Y. Supp. 617, 30 N. E. Rep. 375; Hathaway v. Payne, 34 N. Y. 92; Rousseau v. Bleau, 131 N. Y. 177, 30 N. E. Rep. 52; Munoz v. Wilson, 111 N. Y. 295, 18 N. E. Rep. 855; Crain v. Wright, 36 Hun, 74. **North Carolina:** Egerton v. Carr, 94 N. C. 648, 55 Am. Rep. 630. **Ohio:** Williams v. Schatz, 42 Ohio St. 47; Crooks v. Crooks, 34 Ohio St. 610; Ball v. Foreman, 37 Ohio St. 132; Mitchell v. Ryan, 3 Ohio St. 377. **Pennsylvania:** Stephens v. Huss, 54 Pa. St. 20; Stephens v. Rinehart, 72 Pa. St. 434. **Vermont:** Orr v. Clark, 62 Vt. 136, 19 Atl. Rep. 929. **Wisconsin:** Prutsman v. Baker, 30 Wis. 644; Campbell v. Thomas, 42 Wis. 437; Le Saulnier v. Loew, 53 Wis. 207, 10 N. W. Rep. 145; Albright v. Albright, 70 Wis. 528, 36 N. W. Rep. 254.

<sup>1</sup> Stinson v. Anderson, 96 Ill. 373; Benneson v. Aiken, 102 Ill. 284, 40 Am. Rep. 592; Byars v. Spencer, 101 Ill. 429, 40 Am. Rep. 212; Jones v. Loveless, 99

Ind. 317; Miller v. Lullman, 81 Mo. 311; Huey v. Huey, 65 Mo. 689; McLaughlin v. McManigle, 63 Tex. 553; Miller v. Physick, 24 Ark. 244; Otto v. Doty, 61 Iowa, 23; Davis v. Williams, 57 Miss. 843; Goodlett v. Kelly, 74 Ala. 213; Brown v. Brown, 66 Me. 316; Prutsman v. Baker, 30 Wis. 644, 11 Am. Rep. 592; Bailey v. Bailey, 7 Jones, 44; Patterson v. Snell, 67 Me. 559; Shurtleff v. Francis, 118 Mass. 154.

It is true that the cases are not wholly in accord. Thus, in Morse v. Slason, 13 Vt. 296, effect was given to a deed executed and delivered to a third person, in trust, to be delivered to the grantee at the decease of the grantor, though the deed was not absolutely delivered; but there was an express understanding that, if the grantor recovered from an illness under which he was then suffering, the deed should be delivered to him. The grantor died soon afterwards, and upon the delivery of the deed to the grantee it was held that it took effect from the first delivery. See, also, Belden v. Carter, 4 Day (Conn.), 66, 4 Am. Dec. 185, and Ruggles v. Lawson, 13 Johns. 285, 7 Am. Dec. 375; Hoffman v. Hoffman, 81 Iowa, 292, 46 N. W. Rep. 1106. As to all these cases the language of Judge Virgin in Brown v. Brown, 66 Me. 316, is to be commended: "We feel certain that they are opposed to the large current of authority; and our opinion is that they cannot be defended on principle." Belden v. Carter, 4 Day (Conn.), 66, 4 Am. Dec. 185, is commented upon and approved in Stewart v. Stewart, 5 Conn. 317; Jones v. Jones, 6 Conn. 111, 16 Am. Dec. 35; Woodward v. Camp, 22 Conn. 457.



merely to show that the grantee's use and enjoyment of the land was not to begin until after the grantor's death.<sup>1</sup> The legal effect of an absolute deed delivered for the purpose of passing the title is not changed by the facts that one object in making it was to save the expense and trouble of administering the grantor's estate after his death, and that the grantee, who was the grantor's wife, placed the deed, after delivery, where her husband equally with herself could have access to it.<sup>2</sup>

Where a deed has been executed conveying land after the grantor's death, the execution of a lease to the grantee of the same land for the life of the lessor is not inconsistent with the deed previously executed; and it is error to leave the jury to determine whether the execution of the lease is inconsistent with the delivery of the deed.<sup>3</sup>

A conveyance to take effect upon the death of the grantor is valid without any intermediate estate to support it.<sup>4</sup>

**1236.** A deed to take effect after the grantor's death, not unconditionally delivered during the life of the grantor, is ineffectual as a deed.<sup>5</sup> Even if the grantor puts a deed duly exe-

<sup>1</sup> *Owen v. Williams*, 114 Ind. 179, 15 N. E. Rep. 678; *Spencer v. Robbins*, 106 Ind. 580; *Youngblood v. Youngblood*, 74 Ga. 614; *Chrisman v. Wyatt* (Tex. Civ. App.), 26 S. W. Rep. 759.

<sup>2</sup> *Le Saulnier v. Loew*, 53 Wis. 207, 10 N. W. Rep. 145.

<sup>3</sup> *Robbins v. Spencer*, 121 Ind. 594, 22 N. E. Rep. 660.

<sup>4</sup> *Shackelton v. Sebree*, 86 Ill. 616; *Savage v. Lee*, 90 N. C. 320, 47 Am. Rep. 523.

<sup>5</sup> *McCalla v. Bane*, 45 Fed. Rep. 828. **Illinois**: *Stinson v. Anderson*, 96 Ill. 373; *Bovee v. Hinde*, 135 Ill. 137, 25 N. E. Rep. 694; *McElroy v. Hiner*, 133 Ill. 156, 24 N. E. Rep. 435; *Gorman v. Gorman*, 98 Ill. 361; *Byars v. Spencer*, 101 Ill. 429, 40 Am. Rep. 212. **Indiana**: *Anderson v. Anderson*, 126 Ind. 62, 24 N. E. Rep. 1036; *Jones v. Loveless*, 99 Ind. 317. **Iowa**: *Otto v. Doty*, 61 Iowa, 23, 15 N. W. Rep. 578; *Miller v. Murfield*, 79 Iowa, 64, 44 N. W. Rep. 540. **Kansas**: *Stone v. French*, 37 Kans. 145, 14 Pac. Rep. 530. **Michigan**: *Taft v.*

*Taft*, 59 Mich. 185, 26 N. W. Rep. 426. **Mississippi**: *Weisniger v. Cock*, 67 Miss. 511, 7 So. Rep. 495. **Missouri**: *Allen v. De Groodt*, 105 Mo. 442, 16 S. W. Rep. 494; *Huey v. Huey*, 65 Mo. 689; *Green v. Yarnall*, 6 Mo. 326. **New York**: *Stilwell v. Hubbard*, 20 Wend. 44; *Fisher v. Hall*, 41 N. Y. 416. **Ohio**: *Williams v. Schatz*, 42 Ohio St. 47. **Pennsylvania**: *Duraind's App.* 116 Pa. St. 93, 8 Atl. Rep. 922.

In *Taft v. Taft*, 59 Mich. 185, 26 N. W. Rep. 426, 60 Am. Rep. 291, a father, a few months before his death, executed and acknowledged a deed to his son, and caused a note for a hundred dollars payable to his daughter to be drawn, which he folded with the deed, and he locked up both papers in his bureau drawer, the key to which he kept in his pocket-book on his person. He directed his daughter to open the drawer at his death, and, on the execution of the note by her brother, to deliver the deed to him. The deed was delivered after the father's death. He declared his intention of retaining control of all his property during his lifetime. It

cuted and acknowledged in a place to which the grantee has access, so that he can without hindrance transfer the instrument to his own possession, with the intent on the part of the grantor that the grantee may, after his death, take it and have it recorded, this does not constitute a delivery of the deed.<sup>1</sup> Thus, a delivery is not shown by proof that a father executed and acknowledged a deed conveying land to a son by way of gift, and with the son's knowledge deposited and kept the deed with his other papers in a chest to which the son, who lived with him, had access, and that after the father's death the son took the deed and had it recorded.<sup>2</sup>

was held that there was no delivery of the deed, and that there was nothing which justified the submission of the question of delivery to the jury. The note was to be executed as a condition precedent to the transfer of the title, and the delivery of the deed was meant to be, and in fact was, after the grantor's death, and was therefore void.

<sup>1</sup> Huey v. Huey, 65 Mo. 689; Scott v. Scott, 95 Mo. 300, 8 S. W. Rep. 161; Tyler v. Hall, 106 Mo. 313, 17 S. W. Rep. 319. See, however, Hill v. Hill, 119 Ill. 242, 10 N. E. Rep. 667. But in this case the grantor had attempted to deliver the deed to a third person, who declined to hold it, and he then placed the deed in the grantee's trunk.

<sup>2</sup> Huey v. Huey, 65 Mo. 689. The court by Hough, J., say: "After a most careful consideration of the testimony, we find ourselves unable to escape the conclusion that it was the purpose and intent of the father that the son should acquire no rights whatever, under the conveyance made to him, until after the father's death. And the statement made to the son by the father, that he might have the deed recorded after his death, cannot be construed to be a present verbal delivery, but, viewed in connection with other statements made by him, would seem to have been prompted by the supposition that, if the deed should remain intact and be found among his papers after his death, the son, as grantee therein, would be au-

thorized to have it recorded, and to claim the title to the property therein described. In short, it would seem that the father labored under the impression that he could make this deed perform the office of a will. No construction which can be legitimately placed upon the acts done and the things said by the father will enable us to give effect to the purpose which he obviously had in view, and the son must abide the consequences of the father's evident want of knowledge of the existing state of the law. Had the deed been delivered to some third party, with instructions to deliver it after his death if not previously recalled, there would have been some act in his life to which the delivery by such person after his death could perhaps relate."

In Reichart v. Wilhelm, 83 Iowa, 105, 50 N. W. Rep. 19, a son and his mother testified to certain facts tending to show that his father had delivered to them certain deeds, dated July 27, 1887, and the son stated that they were delivered. The deeds were not recorded, however, during the father's lifetime, and upon his death they were found in his house, in a box belonging to him, of which he had control, and in which he had kept his private papers for many years. The son and his mother had access to the box, which had no lock on it, and the son also kept his private papers therein. The father asserted his ownership over the land until his death, May 19, 1888, three days after

A gift by will of a chest and its contents does not carry land described in an undelivered deed to the legatee, who was the grantee in the deed contained in the chest, as the deed is not property, but simply evidence of title; and the fact that the deed was retained in the grantor's possession during his life is conclusive that there was no delivery.<sup>1</sup>

1237. In this class of cases the burden of proving a delivery during the grantor's lifetime is upon the grantee, and those claiming under the deed. Thus, where it appeared that the deed under which a son claimed a conveyance from his father was found by the administrator, after the decease of the father, in a desk kept by him and under his control, among other papers belonging to him, and was by the administrator delivered to the son, it was held that the burden of proof of delivery before the father's death was on the son and those claiming under him.<sup>2</sup>

If the deed was intended to take effect only upon the death of the grantor, and for this reason was not recorded, but retained by the grantor until shortly before his death, when he handed it to the grantee in a sealed envelope, to be placed in a bank vault for safe-keeping, such transfer of the custody of the deed does not amount to a delivery.<sup>3</sup> To constitute a delivery the grantor must part with all dominion over the deed, so that it is beyond his control both present and future. Thus, a grantor executed a deed, and retained possession of it several years, but then, being apprehensive of death, told an attendant to bring a box, and stated that it contained the deed and other papers. She then told the attendant where the key was, and directed her to return the box to its place in a closet. She closed by saying: "I have said enough, so that you will know what to do with the box in case I should die. If I live, I will talk further about the contents of the box; but don't open it until after my funeral." The grantor died about a month later. It was held that there had been no delivery of the deed.<sup>4</sup>

which the son had the deed recorded. It was held that the evidence was insufficient to show a delivery.

<sup>1</sup> Parrott v. Avery, 159 Mass. 594, 35 N. E. Rep. 94.

<sup>2</sup> Tyler v. Hall, 106 Mo. 313, 17 S. W. Rep. 319.

<sup>3</sup> Bovee v. Hinde, 135 Ill. 137, 25 N. E.

Rep. 694, following Cline v. Jones, 111 Ill. 563. And see Hayes v. Boylan, 141 Ill. 400, 30 N. E. Rep. 1041; Porter v. Woodhouse, 59 Conn. 568, 22 Atl. Rep. 299; Davis v. Williams, 57 Miss. 843; Maddox v. Gray, 75 Ga. 452.

<sup>4</sup> Porter v. Woodhouse, 59 Conn. 568, 22 Atl. Rep. 299.

**1238.** The date of a deed is *prima facie* evidence of the time of its execution and delivery;<sup>1</sup> but the deed takes effect only from the time of its delivery, and the time of delivery may always be shown.<sup>2</sup> The presumption that a deed was delivered on the day it bears date is not overcome by the fact that the acknowledgment of the deed bears a later date.<sup>3</sup> The certified acknowledgment at a later date is not inconsistent with a prior delivery at the date of the deed, and it is not at any rate sufficient to rebut the presumption arising from the date of the instrument.<sup>4</sup> The presumption of delivery stands until the contrary is proved. This presumption is not overcome by the fact that it was not acknowledged until six months after its execution.

If the deed be without date, it takes effect from the time of its delivery, which is proved as any fact.<sup>5</sup>

The mere fact that the date of a deed in a chain of title is subsequent to the date of its acknowledgment does not justify a refusal to take a conveyance of the land on the ground that the title is not clear. The real date of the delivery of the deed may be subsequent to its acknowledgment, and even after registration.<sup>6</sup>

<sup>1</sup> **Arkansas**: *Meech v. Fowler*, 14 Ark. 29. **California**: Civ. Code, § 1055; *Gordon v. San Diego* (Cal.), 41 Pac. Rep. 301; *Ward v. Dougherty*, 75 Cal. 240, 17 Pac. Rep. 193. **Florida**: *Billings v. Stark*, 15 Fla. 297. **Illinois**: *Jayne v. Gregg*, 42 Ill. 413; *Blake v. Fash*, 44 Ill. 302; *Deininger v. McConnel*, 41 Ill. 227; *Hardin v. Osborne*, 60 Ill. 93. **Indiana**: *Faulkner v. Adams*, 126 Ind. 459, 26 N. E. Rep. 170. **Maine**: *Egery v. Woodard*, 56 Me. 45. **Massachusetts**: *Smith v. Porter*, 10 Gray, 66. **Michigan**: *Eaton v. Trowbridge*, 38 Mich. 454. **New Jersey**: *Ellsworth v. Central R. Co.* 34 N. J. L. 93. **New York**: *People v. Snyder*, 41 N. Y. 397; *Crager v. Reis*, 12 N. Y. Supp. 729; *Robinson v. Wheeler*, 25 N. Y. 252. **Pennsylvania**: *Cover v. Manaway*, 115 Pa. St. 338, 8 Atl. Rep. 393. **Virginia**: *Raines v. Walker*, 77 Va. 92; *Harvey v. Alexander*, 1 Rand. 219, 10 Am. Dec. 519; *Seibel v. Rapp*, 85 Va. 28, 6 S. E. Rep. 478; *Harmon v. Oberdorfer*, 33 Gratt. 497. **West Virginia**: *Ferguson v. Bond*, 39 W. Va. 561, 20 S. E. Rep. 591.

**Wisconsin**: *Wheeler v. Single*, 62 Wis. 380, 22 N. W. Rep. 569.

<sup>2</sup> *Treadwell v. Reynolds*, 47 Cal. 171; *Mitchell v. Bartlett*, 51 N. Y. 447; *Harris v. Norton*, 16 Barb. 264; *Whitman v. Heneberry*, 73 Ill. 109; *Eaton v. Trowbridge*, 38 Mich. 454; *McDowel v. Chambers*, 1 Strob. Eq. 347, 47 Am. Dec. 539; *McCullough v. Day*, 45 Mich. 554, 8 N. W. Rep. 535; *Saunders v. Blythe*, 112 Mo. 1, 20 S. W. Rep. 319.

<sup>3</sup> *Deininger v. McConnel*, 41 Ill. 227; *Jayne v. Gregg*, 42 Ill. 413; *Blake v. Fash*, 44 Ill. 302; *Hardin v. Crate*, 78 Ill. 533; *Harman v. Oberdorfer*, 33 Gratt. 497; *Rodgers v. McCluer*, 4 Gratt. 81; *Raines v. Walker*, 77 Va. 92.

<sup>4</sup> *Smith v. Porter*, 10 Gray, 66; *Crager v. Reis*, 12 N. Y. Supp. 729; *Darst v. Bates*, 51 Ill. 439; *Jayne v. Gregg*, 42 Ill. 413.

<sup>5</sup> *McMichael v. Carlyle*, 53 Wis. 504, 10 N. W. Rep. 556.

<sup>6</sup> *Dresel v. Jordan*, 104 Mass. 407, 417; *Parker v. Hill*, 8 Met. 447; *Hedge v. Drew*, 12 Pick. 141.

Upon the question whether a deed executed and acknowledged upon the day of its date was then delivered, it is a material inquiry whether the minds of the parties were agreed in regarding the deed as presently the deed of the grantor without any condition or reservation. A delivery at its date being practicable, and there being positive evidence that it was delivered either at that time or afterwards, evidence that it was not delivered at that time, consisting of verbal admissions and the testimony of prejudiced parties, is not, in a proceeding in equity, regarded as convincing.<sup>1</sup>

The presumption that an instrument was executed and delivered at the time it bears date does not hold in relation to deeds in fee unattested and unacknowledged.<sup>2</sup>

**1239. The presumption of delivery at the date of the deed is greatly strengthened if the deed was acknowledged on the same date.**<sup>3</sup> It has sometimes been said that the date of the acknowledgment, when that differs from the date of the deed, is to be presumed to be the date of delivery, though this presumption may be overcome by proof of an earlier date of delivery.<sup>4</sup>

This presumption may be overcome by proof. In case the grantee has died between the date of the deed and the date of the acknowledgment, it is presumed that the deed was delivered in his lifetime.<sup>5</sup> Where a deed is acknowledged by parties living in different counties and on different days, the presumption arising from the date of the deed, and that it was delivered on that day, cannot stand against the positive averments, in the acknowledgment, that it was executed afterwards.<sup>6</sup>

The officer taking the acknowledgment of a deed must certify the same, with the day and year when it was made; and he will

<sup>1</sup> *McCullough v. Day*, 45 Mich. 554, 8 N. W. Rep. 535.

<sup>2</sup> *Elsey v. Metcalf*, 1 Den. 323; *Genter v. Morrison*, 31 Barb. 155.

<sup>3</sup> *Cover v. Manaway*, 115 Pa. St. 338, 8 Atl. Rep. 393.

<sup>4</sup> *Henry Co. v. Bradshaw*, 20 Iowa, 355; *Clark v. Akers*, 16 Kans. 166; *Ford v. Gregory*, 10 B. Mon. 175; *Breckenridge v. Todd*, 3 T. B. Mon. 52, 16 Am. Dec. 83; *Loomis v. Pingree*, 43 Me. 299; *Johnson v. Moore*, 28 Mich. 3; *Eaton v. Trowbridge*, 38 Mich. 454; *Blanchard v. Tyler*,

12 Mich. 339, 86 Am. Dec. 57; *Fontaine v. Boatman's Sav. Inst.* 57 Mo. 552; *Brolasky v. Furey*, 12 Phila. 428; *Kent v. Cecil* (Tex. Civ. App.), 25 S. W. Rep. 715.

In *Alabama*, where acknowledgment as well as delivery is necessary to give effect to a deed, a delivery before acknowledgment does not give effect to the deed, but it takes effect only from its acknowledgment. *Webb v. Mullins*, 78 Ala. 111.

<sup>5</sup> *Eaton v. Trowbridge*, 38 Mich. 454.

<sup>6</sup> *Henderson v. Baltimore*, 8 Md. 352.

be presumed to have performed his duty, and will not be supposed, without proof, to have taken the acknowledgment before the deed was executed.<sup>1</sup>

In case of a conveyance and a mortgage taken for part of the purchase-money, though the mortgage bears date subsequent to the date of the conveyance, if it appears that they were acknowledged on the same day and recorded at the same time, it may be inferred that they were executed together, and were intended to take effect at the same time.<sup>2</sup> The same presumption would arise in regard to the execution of the mortgage and a separate defeasance, if both instruments were acknowledged and recorded at the same time.

The presumption that a deed was delivered at or about the day of its date and acknowledgment is rebutted by the execution and delivery of a similar deed between the same parties several years later.<sup>3</sup>

### III. *To Whom It may be Made.*

1240. It is not essential that the delivery be to the grantee himself. It may be made to the grantee's agent, and even to a third person who is not his agent, for the grantee's use, provided the grantee afterwards assents to the deed or receives it.<sup>4</sup> A

<sup>1</sup> Cover v. Manaway, 115 Pa. St. 338, 8 Atl. Rep. 393.

<sup>2</sup> Pendleton v. Pomeroy, 4 Allen, 510; Summers v. Darne, 31 Gratt. 791.

<sup>3</sup> Flynn v. Flynn (N. J. Eq.), 31 Atl. Rep. 30.

<sup>4</sup> Butler & Baker's Case, 3 Rep. 25, per Lord Coke; Thompson v. Leach, 2 Vent. 198; Doe v. Knight, 5 Barn. & C. 671; Linton v. Brown, 20 Fed. Rep. 455. **California:** Hibberd v. Smith, 67 Cal. 547, 56 Am. Rep. 726. **Connecticut:** Merrills v. Swift, 18 Conn. 257. **Illinois:** Skinner v. Baker, 79 Ill. 496; Morrison v. Kelly, 22 Ill. 610; Crocker v. Lowenthal, 83 Ill. 579; Rivard v. Walker, 39 Ill. 413; Rawson v. Fox, 65 Ill. 200; Byars v. Spencer, 101 Ill. 429, 40 Am. Rep. 212; Haenni v. Bleisch, 146 Ill. 262, 34 N. E. Rep. 153. **Indiana:** Guard v. Bradley, 7 Ind. 600; Fewell v. Kessler, 30 Ind. 195; Nye v. Lowry, 82 Ind. 316;

Squires v. Summers, 85 Ind. 252. **Iowa:** McCormick v. McCormick, 71 Iowa, 379, 33 N. W. Rep. 648. **Kentucky:** London v. Todd, 5 J. J. Marsh. 182; Hayden v. Easter (Ky.), 24 S. W. Rep. 626; Colyer v. Hyden (Ky.), 21 S. W. Rep. 868. **Maryland:** Duer v. James, 42 Md. 492. **Massachusetts:** Hatch v. Hatch, 9 Mass. 307; Foster v. Mansfield, 3 Met. 412; Marsh v. Austin, 1 Allen, 235; Mather v. Corliss, 103 Mass. 568. **Michigan:** Hosley v. Holmes, 27 Mich. 416; Thatcher v. St. Andrew's Church, 37 Mich. 264. **Minnesota:** Holcombe v. Richards, 38 Minn. 38, 35 N. W. Rep. 714. **New Hampshire:** Buffum v. Green, 5 N. H. 71; Canning v. Pinkham, 1 N. H. 353; Peavey v. Tilton, 18 N. H. 151. **New Jersey:** Vreeland v. Vreeland, 48 N. J. Eq. 56, 21 Atl. Rep. 627. **New York:** Souverbye v. Arden, 1 Johns. Ch. 240, 254; Fonda v. Van Horne, 15 Wend. 631; Ernst v. Reed, 49 Barb. 367;

deed may be delivered to a third person as the agent or bailee of the grantee, though the latter has not at the time constituted him such.<sup>1</sup> Especially is this the case if the person to whom the deed is delivered be a known relative, friend, guardian, or servant of the grantee;<sup>2</sup> or, if the deed has been executed in pursuance of a previous arrangement between the parties, a notary or justice of the peace, who is directed by the grantor to take the deed after its execution to the registry, may be regarded as the grantee's agent in receiving and recording the deed.<sup>3</sup>

1241. If a deed be delivered absolutely, and beyond the grantor's control and right of dominion, for the grantee's use, to a person not at the time authorized by him to receive it, and

*Munoz v. Wilson*, 111 N. Y. 295, 18 N. E. Rep. 855; *Diefendorf v. Diefendorf*, 132 N. Y. 100, 30 N. E. Rep. 375, affirming 8 N. Y. Supp. 617; *Brown v. Danforth*, 9 N. Y. Supp. 19. **North Carolina**: *Wesson v. Stephens*, 2 Ired. Eq. 557. **Ohio**: *Black v. Hoyt*, 33 Ohio St. 203. **Oregon**: *Fain v. Smith*, 14 Oregon, 82, 12 Pac. Rep. 365, 58 Am. Rep. 281. **Pennsylvania**: *Eckman v. Eckman*, 55 Pa. St. 269. **South Carolina**: *Guess v. South Bound Ry. Co.* 40 S. C. 450, 19 S. E. Rep. 68. **Texas**: *McLaughlin v. McManigle*, 63 Tex. 553; *Diehl v. Fowler* (Tex. Civ. App.), 30 S. W. Rep. 1086.

In *Souverby v. Arden*, 1 Johns. Ch. 240, 255, Chancellor Kent said: "If it be declared or agreed, at the time of the execution, that the deed is not to pass out of the possession of the grantor until certain conditions are complied with, the deed will not operate until those conditions are fulfilled. . . . But if there be no such agreement or intention made known at the time, and both parties are present, and the usual formalities of execution take place, and the contract is to all appearances consummated, and the deed is left in the power of the grantee, or in the custody of his particular friend, without special instructions, there is no case to be found in law or equity in which such a delivery is not held binding."

<sup>1</sup> *Munoz v. Wilson*, 111 N. Y. 295, 18 N. E. Rep. 855; *Souverby v. Arden*, 1

*Johns. Ch.* 240; *Church v. Gilman*, 15 Wend. 656, 30 Am. Dec. 82; *Greene v. Conant*, 151 Mass. 223, 24 N. E. Rep. 44; *Mather v. Corliss*, 103 Mass. 568; *Parker v. Parker*, 56 Iowa, 111, 8 N. W. Rep. 806; *Cook v. Patrick*, 135 Ill. 499, 26 N. E. Rep. 658; *Byington v. Moore*, 62 Iowa, 470, 17 N. W. Rep. 644.

<sup>2</sup> *Ward v. Small* (Ky.), 13 S. W. Rep. 1070; *Parker v. Parker*, 56 Iowa, 111, 8 N. W. Rep. 806; *McCormick v. McCormick*, 71 Iowa, 379, 33 N. W. Rep. 648; *Brown v. Danforth*, 55 Hun, 612, 9 N. Y. Supp. 19; *Arrison v. Harmstead*, 2 Pa. St. 191; *Hamilton v. Armstrong*, 120 Mo. 597, 25 S. W. Rep. 545; *Allen v. De Groodt*, 105 Mo. 442, 16 S. W. Rep. 494, 1049; *Sneathen v. Sneathen*, 104 Mo. 201, 16 S. W. Rep. 497; *Crowder v. Searcy*, 103 Mo. 97, 15 S. W. Rep. 346; *Standiford v. Standiford*, 97 Mo. 231, 10 S. W. Rep. 836; *Harris v. Hopkins*, 43 Mich. 272, 5 N. W. Rep. 318; *Colyer v. Hyden* (Ky.), 21 S. W. Rep. 868; *Turner v. Warren*, 160 Pa. St. 336, 28 Atl. Rep. 781; *Martin v. Flaharty*, 13 Mont. 96, 32 Pac. Rep. 287.

<sup>3</sup> *Green v. Conant*, 151 Mass. 223, 24 N. E. Rep. 44; *Martz v. Eggemann*, 44 Mich. 430, 6 N. W. Rep. 873; *Adams v. Ryan*, 61 Iowa, 733, 17 N. W. Rep. 159; *Orr v. Clark*, 62 Vt. 136, 19 Atl. Rep. 929; *Holt's App.* 98 Pa. St. 257; *Jamison v. Craven*, 4 Del. Ch. 311; *Henrichsen v. Hodgen*, 67 Ill. 179.

the grantee afterwards accepts it, or authorizes the custodian to accept it, the deed is effectual from the time it was placed in the hands of such person.<sup>1</sup> If a deed be delivered to a custodian, and afterwards the latter delivers it to the grantee, who makes no disclaimer of the deed, delivery and acceptance are inferred.<sup>2</sup> Of course, if the delivery of the deed be to one who has no authority to accept it, as for instance to an attorney employed to examine the title and for no other purpose, the grantee may refuse to accept the deed. After the grantee has refused to accept the delivery under such circumstances, he cannot afterwards accept it, and claim its validity from the time of the delivery to the attorney, so as to cut off the lien of an intermediate judgment against the grantor.<sup>3</sup>

A delivery to a *cestui que trust* is sufficient without any delivery to the trustee, for the possession of the former is in legal effect the possession of the latter.<sup>4</sup>

A grantor may make a good delivery of a deed to his wife for the use of a third person.<sup>5</sup>

**1242.** If a person buys lands, and takes deeds in the names of third persons to whom he intends to give the lands, the

<sup>1</sup> *Linton v. Brown*, 20 Fed. Rep. 455. **Delaware**: *Jamison v. Craven*, 4 Del. Ch. 311. **Illinois**: *Morrison v. Kelly*, 22 Ill. 610, 74 Am. Dec. 169; *Byars v. Spencer*, 101 Ill. 429; *Crocker v. Lowenthal*, 83 Ill. 579; *Rawson v. Fox*, 65 Ill. 200; *Haenni v. Bleisch*, 146 Ill. 262, 34 N. E. Rep. 153. **Iowa**: *Parker v. Parker*, 56 Iowa, 111, 8 N. W. Rep. 806. **Maine**: *Turner v. Whidden*, 22 Me. 121. **Missouri**: *Crowder v. Searcy*, 103 Mo. 97, 15 S. W. Rep. 346; *Tobin v. Bass*, 85 Mo. 654; *Standiford v. Standiford*, 97 Mo. 231, 10 S. W. Rep. 836; *Allen v. De Groodt*, 105 Mo. 442, 16 S. W. Rep. 494, 1049, 98 Mo. 159, 11 S. W. Rep. 240, 15 S. W. Rep. 314; *Hammerslough v. Cheatham*, 84 Mo. 13; *Rogers v. Carey*, 47 Mo. 232; *Sneathen v. Sneathen*, 104 Mo. 201, 16 S. W. Rep. 497. **Ohio**: *Black v. Hoyt*, 33 Ohio St. 203. **Pennsylvania**: *Blight v. Schenck*, 10 Pa. St. 285, 51 Am. Dec. 478.

A person purchased land with his own

means, and took deeds to others, who in fact had no knowledge of the transactions. The actual purchaser took possession of the lands, and received the rents and profits during his life, without recording the deeds. Upon his death the grantees had the deeds recorded and took possession. It was held that there was a valid delivery of the deeds, and acceptance by the real purchaser as agent for the grantees. *Cook v. Patrick*, 135 Ill. 499, 26 N. E. Rep. 658.

<sup>2</sup> *Gifford v. Corrigan*, 21 N. Y. St. Rep. 972, 4 N. Y. Supp. 89.

<sup>3</sup> *Carnes v. Platt*, 7 Abb. Prac. N. S. 42.

<sup>4</sup> *Holcombe v. Richards*, 38 Minn. 38, 35 N. W. Rep. 714.

<sup>5</sup> *White v. Pollock*, 117 Mo. 467, 22 S. W. Rep. 1077; *Sneathen v. Sneathen*, 104 Mo. 201, 16 S. W. Rep. 497. And see *Squires v. Summers*, 85 Ind. 252; *Colyer v. Hyden* (Ky.), 21 S. W. Rep. 868.



delivery is good, and the grantees may afterwards ratify the deeds by accepting them, though they knew nothing of the transactions at the time. Thus, where one bought land with his own money, taking the title in the names of others, and kept the deeds unrecorded, paid taxes in the names of the grantees, and used as his own all money received by him from rents, but frequently expressed his intention that the property should go to such grantees at his death, it was held, in a suit brought by his heirs, that he had only a resulting trust for life, with remainder to the grantees. The grantors in the several deeds parted with all dominion over them when they delivered them to the donor, and, as the latter was not a grantor in any of the deeds, it was not essential that he should deliver them or any of them to the grantees, or that there should be a delivery of them to such grantees in his lifetime. The absolute delivery of the deeds to the donor, and the acceptance of them by him, and the subsequent ratification by the grantees of such acts of acceptance, were amply sufficient to invest such grantees with title.<sup>1</sup>

**1243. A deed may be delivered though it remains in the grantor's hands.** It is not essential in all cases that the deed be placed in the actual custody of the grantee or his agent. It may remain in the grantor's hands, and it will be a valid deed if there are other acts or declarations sufficient to show an intention to treat the deed as delivered and accepted, and beyond the grantor's control.<sup>2</sup> But in such case it is generally necessary to prove

<sup>1</sup> *Cook v. Patrick*, 135 Ill. 499, 26 N. E. Rep. 658; *Hall v. Hall*, 107 Mo. 101, 17 S. W. Rep. 811. See *Moore v. Flynn*, 135 Ill. 74, 25 N. E. Rep. 844, and *Lancaster v. Blaney*, 140 Ill. 203, 29 N. E. Rep. 870.

<sup>2</sup> *Linton v. Brown*, 20 Fed. Rep. 455; *Regan v. Howe*, 121 Mass. 424, per Colt, J.; *Snow v. Orleans*, 126 Mass. 453; *Ruckman v. Ruckman*, 32 N. J. Eq. 259; *Cannon v. Cannon*, 26 N. J. Eq. 316; *Alexander v. Alexander*, 71 Ala. 295; *Tallman v. Cooke*, 39 Iowa, 402; *Newton v. Bealer*, 41 Iowa, 334; *Stevens v. Hatch*, 6 Minn. 64; *Thompson v. Easton*, 31 Minn. 99, 16 N. W. Rep. 542; *Harris v. Saunders*, 2 Strob. Eq. 370; *Jamison v. Craven*, 4 Del. Ch. 311; *Wallace v. Ber-*

*dell*, 97 N. Y. 13; *Scrugham v. Wood*, 15 Wend. 545. In this case a man about to be married executed a deed for the benefit of his children, conveying all his real estate to trustees, who were to permit the grantor to enjoy the property during his life, and after his death to convey the same to his children. The deed was prepared for execution, was signed by the grantor and the trustees, and acknowledged by all the parties before a commissioner at the house of one of the trustees. It was not formally delivered, but it was recorded. After the grantor's death, the deed was found among his papers. It was held that there was a sufficient delivery. The fact that the deed was in his possession at his death afforded no pre-

knowledge on the part of the grantee of the making of the deed, and such further facts as will afford a reasonable presumption of his acceptance of it.<sup>1</sup> Thus, where a father executed a deed to a son bearing the same date as his will, and after the grantor's death it was found in the same envelope with his will, and it did not appear that the son knew of the existence of the deed until after his father's death, while it was shown that the father had rented the land to his son after the date of the deed, and that the latter had paid rent for the estate, it was held that there was no evidence of delivery, but on the contrary, evidence that there was no delivery.<sup>2</sup>

**1244. A deed from a husband to his wife may be effectually delivered though it remains in his hands and never came into the wife's hands.** Thus, where a husband executed a deed to his wife and filed it for record, for the purpose and with the intention of passing title to her as of the date of the deed, he thereby made a valid delivery of the deed, and title passed to the wife,

sumption against a delivery, because the grantor, having a life interest under it, was much more interested in its preservation than were the trustees. For a similar case, see *Steele v. Lowry*, 4 Ohio, 72, 19 Am. Dec. 581.

In *Bliss v. West*, 58 Hun, 71, 11 N. Y. Supp. 374, the grantor made deeds for the use of his children to a trustee, who also executed and acknowledged the deeds and accepted the trusts. Although the deeds remained in the grantor's safe at the time of his death, it was held that they were delivered to the trustee at the time of their execution. For similar case, see *Seibel v. Rapp*, 85 Va. 28, 6 S. E. Rep. 478; *Young v. Cardwell*, 6 Lea, 168; *Wallace v. Berdell*, 97 N. Y. 13.

In *Haeg v. Haeg*, 53 Minn. 33, 55 N. W. Rep. 1114, deeds were executed by a father to his children, and delivered to a third person to be delivered to the grantees after the grantor's death. After the execution of the deeds by the grantor and delivery to the depository, the grantor, in the presence of the depository, placed the deeds, inclosed in an envelope, in a box in a safety deposit vault rented by the grantor, and the depository then and

there agreed to deliver the deeds as requested by the grantor. The box in the vault was made accessible to the depository to enable him to carry out his agreement. The deeds were delivered by him to the grantees after the grantor's death. It was held that the delivery was effectual, and passed the title by relation from the first delivery to the depository.

<sup>1</sup> *McLaughlin v. McManigle*, 63 Tex. 553; *Tuttle v. Turner*, 28 Tex. 759; *Weisinger v. Cock*, 67 Miss. 511, 7 So. Rep. 495. See, however, *Fletcher v. Fletcher*, 4 Hare, 67.

<sup>2</sup> *Miller v. Murfield*, 79 Iowa, 64, 44 N. W. Rep. 540; *Otto v. Doty*, 61 Iowa, 23, 15 N. W. Rep. 578.

In *Watson v. Hillman*, 57 Mich. 607, 24 N. W. Rep. 663, it appeared that the grantor made a deed to his brother under an arrangement that was afterwards abandoned, but the grantor obtained a conveyance back to his wife, which was not delivered to her but to him. It was held that her heirs could not claim under the deed without producing some evidence that she was a party to the delivery, or was cognizant of the transaction. See, also, *Lancaster v. Blaney*, 140 Ill. 203, 29 N. E. Rep. 780.

though the deed remained in his possession.<sup>1</sup> In another case, on an issue as to the delivery of a deed made by a husband to his wife, it appeared that after executing the deed he assigned the policies of insurance on the premises to his wife, and afterwards renewed them in her name, besides procuring the issuance of new policies to her, in which the buildings were described as belonging to her, and it was in proof that the wife's money paid for the buildings. It also appeared that the husband had entire charge of the wife's estate, which was large, collecting money due her and depositing it in bank to his credit, and making payments by checks thereon. It was held that, though the wife never saw the deed, after execution her husband held it as her agent, and there was no occasion for further delivery.<sup>2</sup>

A deed to a married woman may be delivered to her husband, and a deed to the husband may be delivered to the wife. Even if the deed contains a clause whereby the grantee assumes the payment of a mortgage upon the land conveyed, the husband or wife of the grantee may be shown to have authority to accept it, and the confidential relation of the parties should be taken into account as showing such authority.<sup>3</sup>

**1245.** A delivery to one of two or more grantees who take the title as tenants in common is, in the absence of evidence to the contrary, a delivery to both or all.<sup>4</sup> There is a decision to the effect that a delivery of a deed to one of several grantees does not operate as a delivery to the others unless so expressed by the grantor.<sup>5</sup> But this is not the general rule. "How an expressed intention to deliver for all, when delivered only to one, is essential to constitute a delivery to all the grantees, when all the circumstances indicate such an intention, we are unable to understand."<sup>6</sup>

A writing executed by joint tenants, for the purpose of conveying the fee to the survivor, is sufficiently delivered when it is left

<sup>1</sup> *Glaze v. Three Rivers Farmers' Mut. Fire Ins. Co.* 87 Mich. 349, 49 N. W. Rep. 595.

<sup>2</sup> *Vought v. Vought*, 50 N. J. Eq. 177, 27 Atl. Rep. 489.

<sup>3</sup> *Freeman v. Lawton* (Minn.), 60 N. W. Rep. 667.

<sup>4</sup> *Powers v. Minor*, 87 Tex. 83; *Minor v. Powers* (Tex. Civ. App.), 24 S. W.

Rep. 710; *Eshelman v. Henrietta Vineyard Co.* 102 Cal. 199, 36 Pac. Rep. 579.

<sup>5</sup> *Hannah v. Swarner*, 8 Watts, 9.

<sup>6</sup> *Breathwit v. Bank*, 60 Ark. 26, 28 S. W. Rep. 511, citing *Shelden v. Erskine*, 78 Mich. 627, 44 N. W. Rep. 146; *Hubby v. Hubby*, 5 Cush. 516; *Jones, Chat. Mortg.* (4th ed.) § 109, 1 Devl. Deeds, §§ 298, 299; *Boone, Mortg.* § 238.

by mutual consent in the possession of the person who drew it, with a declaration of its purpose.<sup>1</sup>

1246. The deed itself may provide for a delivery of it without an actual passing-over of the instrument. The grantor executed a deed to his brothers and sisters by way of gift, though the deed recited a nominal money consideration, and provided that it was to take effect, so far as regarded the handing-over of the property, at his death. He reserved to himself the right to revoke the deed at any time during his life by filing in the clerk's office a written revocation under his hand and seal; and he furthermore declared that the execution of the deed and the placing it among his papers was intended by him as a delivery of the property at his death, and the deed was to take effect in possession at that time. It was held that the deed was a present conveyance to take effect in possession at the grantor's death. The placing of the deed among his papers was a delivery, for there was a clearly expressed intention to make that act take the place of a formal handing-over of the deed.<sup>2</sup>

1247. If a deed be executed with the usual formalities in the presence of the grantee, a delivery may be inferred though the deed be left with the grantor;<sup>3</sup> and, the deed having once been delivered, it is not invalidated by the fact that it remains in the possession of the grantor.<sup>4</sup> A delivery may be still more strongly inferred in case the deed is in the form of an indenture, containing stipulations on the part of both parties to it, and is executed by both parties in the presence of subscribing witnesses.<sup>5</sup>

<sup>1</sup> *Orr v. Clark*, 62 Vt. 136, 19 Atl. Rep. 329.

<sup>2</sup> *Wall v. Wall*, 30 Miss. 91, 64 Am. Dec. 147. The correctness of this decision may be questioned, because the deed remained in the grantor's control and subject to his revocation. See, also, *Belden v. Carter*, 4 Day, 66, 4 Am. Dec. 185.

<sup>3</sup> *Kent's Com.* 456; *Shep. Touch.* 58; *Linton v. Brown*, 20 Fed. Rep. 455; *Scrugham v. Wood*, 15 Wend. 545; *Wallace v. Berdell*, 97 N. Y. 13; *Otis v. Spencer*, 102 Ill. 622, 627, 40 Am. Rep. 617; *Hubbard v. Cox*, 76 Tex. 239, 13 S. W. Rep. 170; *Newton v. Bealer*, 41 Iowa, 334; *Adams v. Ryan*, 61 Iowa, 733, 17 N. W. Rep. 159; *McGrath v. Hyde* (Cal.), 21

*Pac. Rep.* 948; *Crawford v. Bertholf*, 1 N. J. Eq. 458; *Folly v. Vantuyl*, 9 N. J. L. 153; *Ruckman v. Ruckman*, 32 N. J. Eq. 259; *Farrar v. Bridges*, 5 Humph. 411, 42 Am. Dec. 439.

<sup>4</sup> *Wallace v. Berdell*, 97 N. Y. 13, per *Rapallo, J.*; *Souverbye v. Arden*, 1 Johns. Ch. 240; *Hart v. Rust*, 46 Tex. 556, 571; *Hubbard v. Cox*, 76 Tex. 239, 13 S. W. Rep. 170.

<sup>5</sup> *McGrath v. Hyde* (Cal.), 21 *Pac. Rep.* 948. In this case a husband signed and acknowledged a deed conveying land to his wife, stating to the notary before whom he acknowledged it that he wished to give the property to her. The wife testified that her husband put the deed on the

IV. *Presumption of Delivery from Possession of the Deed.*

1248. Possession of the deed by the grantee at any time, unexplained, raises the presumption of a delivery to him by the grantor.<sup>1</sup> This presumption is not overcome by proof that

table, told her what it was, and directed her to put it away, saying that it could be recorded at any time. She stated that she put the deed in a trunk, and at another time said that her husband did so. Their daughter corroborated her mother, and stated that her father said he would put it away for her mother, and that she could record it at any time. An inmate of the house stated that she was in a position to have heard any such conversation if it had occurred, but that she neither saw nor heard anything of the deed, but her testimony was vague as to the continuousness of her presence. It was held that the deed was delivered. The court say: "Taking all the circumstances together, we think that the intention to pass the title was complete, and the retention of the deed by the grantor was merely for its safe-keeping, which, considering the relation of the parties, was quite natural and proper." *McLean v. Button*, 19 Barb. 450.

<sup>1</sup> *Mills v. Mills*, 57 Fed. Rep. 873. **Alabama**: *Goodlett v. Kelly*, 74 Ala. 213; *Simmons v. Simmons*, 78 Ala. 365; *Cherry v. Herring*, 83 Ala. 458, 3 So. Rep. 667; *Lewis v. Watson*, 98 Ala. 479, 13 So. Rep. 570. **California**: *Kidder v. Stevens*, 60 Cal. 414; *Ward v. Dougherty*, 75 Cal. 240. **Florida**: *Campbell v. Carruth*, 32 Fla. 264, 13 So. Rep. 432. **Georgia**: *Black v. Thornton*, 30 Ga. 361. **Illinois**: *Tunison v. Chamblin*, 88 Ill. 378; *Hill v. Hill*, 119 Ill. 242, 10 N. E. Rep. 667; *Griffin v. Griffin*, 125 Ill. 430, 17 N. E. Rep. 782; *Loveland v. Loveland*, 136 Ill. 75, 26 N. E. Rep. 381. **Indiana**: *Squires v. Summers*, 85 Ind. 252; *McFall v. McFall*, 136 Ind. 622, 36 N. E. Rep. 517; *Scobey v. Walker*, 114 Ind. 254, 15 N. E. Rep. 674; *Berry v. Anderson*, 22 Ind. 36; *Faulkner v. Adams*, 126 Ind. 459, 26 N.

E. Rep. 170; *Pool v. Davis*, 135 Ind. 323, 34 N. E. Rep. 1130. **Iowa**: *Wolverton v. Collins*, 34 Iowa, 238; *Foley v. McNamara* (Iowa), 62 N. W. Rep. 26; *Craven v. Winter*, 38 Iowa, 471; *Blair v. Howell*, 68 Iowa, 619, 28 N. W. Rep. 199; *Hutton v. Smith*, 88 Iowa, 238, 55 N. W. Rep. 326. **Maine**: *Hatch v. Haskins*, 17 Me. 391; *Andrews v. Dyer*, 78 Me. 427. **Massachusetts**: *Butrick v. Tilton*, 141 Mass. 93, 6 N. E. Rep. 563; *Valentine v. Wheeler*, 116 Mass. 478; *Maynard v. Maynard*, 10 Mass. 456; *Ward v. Lewis*, 4 Pick. 518; *Chandler v. Temple*, 4 Cush. 285; *Moore v. Hazelton*, 9 Allen, 102; *Adams v. Frye*, 3 Met. 103. **Michigan**: *Dawson v. Hall*, 2 Mich. 390. **Minnesota**: *Windom v. Schuppel*, 39 Minn. 35, 38 N. W. Rep. 757. **Mississippi**: *Morris v. Henderson*, 37 Miss. 492. **Missouri**: *Allen v. De Groodt*, 105 Mo. 442, 16 S. W. Rep. 494, 1049; *Scott v. Scott*, 95 Mo. 300, 8 S. W. Rep. 161; *Yarnell v. Yarnell*, 6 Mo. 326. **Nebraska**: *Brittain v. Work*, 13 Neb. 347. **New Hampshire**: *Little v. Gibson*, 39 N. H. 505. **New Jersey**: *Black v. Shreve*, 13 N. J. Eq. 455; *Vreeland v. Vreeland*, 48 N. J. Eq. 56, 21 Atl. Rep. 627; *Benson v. Woolverton*, 15 N. J. Eq. 158. **New York**: *Strough v. Wilder*, 119 N. Y. 530, 23 N. E. Rep. 1057; *Scrugham v. Wood*, 15 Wend. 545; *People v. Snyder*, 41 N. Y. 397; *Robinson v. Wheeler*, 25 N. Y. 252; *McClellan v. Zwingli*, 24 N. Y. Supp. 371. **North Carolina**: *Whitman v. Shingleton*, 108 N. C. 193, 12 S. E. Rep. 1027; *Williams v. Springs*, 7 Ired. 384; *Tuttle v. Rainey*, 98 N. C. 513, 4 S. E. Rep. 475. **Oregon**: *Flint v. Phipps*, 16 Ore. 437, 19 Pac. Rep. 543. **Pennsylvania**: *Cover v. Manaway*, 115 Pa. St. 338, 8 Atl. Rep. 393; *Rhine v. Robinson*, 27 Pa. St. 30; *Turner v. Warren*, 160 Pa. St. 336, 34 W. N. C. 245, 28 Atl. Rep.

the deed was delivered to the grantee on a condition that it should not take effect as a deed until the grantee had performed a certain act, or until the happening of a future event.<sup>1</sup> The legal effect of a deed complete in form and execution and delivered cannot be defeated or varied by oral proof of an agreement not contained in the deed. If the deed is afterwards found in the grantee's possession, a delivery is presumed, and any one assailing the deed must rebut this presumption by clear and convincing evidence showing that the grantee obtained possession of it improperly or illegally, or otherwise showing that it had not been delivered.<sup>2</sup> Such presumption is not overcome by testimony that the grantor, after acknowledging certain deeds, directed one of the grantees to "put them away," and that such grantee said he did not intend to record the deed till the grantor died.<sup>3</sup>

The same rule applies to possession by a person claiming under the grantee, and to possession by an agent of the grantee or any one claiming under him.<sup>4</sup> Where a father purchases land and has the deed made to his daughter, the finding of the deed in the hands of her husband is sufficient to show a delivery.<sup>5</sup>

On the other hand, though the finding of a deed in the possession of the grantor may afford a presumption of non-delivery, especially if the deed has not been recorded, such a presumption does not always hold. Thus, it has been held that, in the case of a mortgage or other instrument containing a defeasance which the grantor may be interested in preserving, the fact of its being found in his possession does not create any presumption that there was no delivery of it at the time of its execution.<sup>6</sup>

781. *Texas*: Tuttle v. Turner, 28 Tex. 759; Smith v. Adams, 4 Tex. Civ. App. 5, 23 S. W. Rep. 49. *Vermont*: Dwinell v. Bliss, 58 Vt. 353, 5 Atl. Rep. 317. *West Virginia*: Newlin v. Beard, 6 W. Va. 110.

<sup>1</sup> *Cherry v. Herring*, 83 Ala. 458, 3 So. Rep. 667; *Black v. Shreve*, 13 N. J. Eq. 455.

<sup>2</sup> *Mills v. Mills*, 57 Fed. Rep. 873; *Simmons v. Simmons*, 78 Ala. 365; *Cherry v. Herring*, 83 Ala. 458, 3 So. Rep. 667; *Cutts v. York Manuf. Co.* 18 Me. 190; *McCann v. Atherton*, 106 Ill. 31; *Tunison v. Chamblin*, 88 Ill. 378; *Cover v. Manaway*, 115 Pa. St. 338, 8 Atl. Rep.

393; *Cummings v. Glass*, 162 Pa. St. 241, 29 Atl. Rep. 848; *Strough v. Wilder*, 49 Hun, 405, 3 N. Y. Supp. 567; *Blair v. Howell*, 68 Iowa, 619, 28 N. W. Rep. 199; *Pitts v. Sheriff*, 108 Mo. 110, 18 S. W. Rep. 1071; *Richmond v. Morford*, 4 Wash. St. 337, 30 Pac. Rep. 241, 31 Pac. Rep. 513.

<sup>3</sup> *McFall v. McFall*, 136 Ind. 622, 36 N. E. Rep. 517.

<sup>4</sup> *Ward v. Dougherty*, 75 Cal. 240, 17 Pac. Rep. 193; *Branson v. Caruthers*, 49 Cal. 374.

<sup>5</sup> *Appeal of Daisz*, 128 Pa. St. 572, 18 Atl. Rep. 414.

<sup>6</sup> *Blakemore v. Byrnside*, 7 Ark. 505.

**1249.** If the deed is not fully executed and ready for delivery, the presumption of delivery arising from possession of it is, of course, not so strong; as where it appears that the deed was not acknowledged nor executed in the presence of attesting witnesses; but in such case other circumstances may confirm the presumption of delivery and justify a finding that the deed was executed and delivered. Thus, if the execution of such a deed is proved by witnesses who were present at the execution, and testified that the grantor declared that he intended that the grantee should have the premises described in the deed, and it appeared that the grantee rented the premises to others, paid the taxes, and made repairs during the grantor's life, after the execution of the deed, and exercised other acts of ownership over the property, a finding of delivery is justified.<sup>1</sup> A delivery is shown where a mother executed a deed to her son, and after acknowledging it left it with the notary, who afterwards delivered it to the son, in whose safety-deposit box it was found, unrecorded, at his death, three years later; it appearing, also, that the mother's title was derived through a deed the consideration for which was paid by the son, who afterwards obtained a loan on the property, to secure which his mother, at his request, executed a note and mortgage, and that he rented and insured the houses on the land himself.<sup>2</sup>

**1250.** If the name of the grantee in the deed and that of the person producing it are not the same, this presumption does not apply, provided the variation between the names be material. In such case, before the presumption can apply, there must first be proof that the person producing the deed is the grantee intended to be named in the deed.<sup>3</sup> Neither does the presumption apply in case of a deed which is incomplete in any essential particular, such as not having been acknowledged, or being without an attesting witness, under laws requiring attestation,<sup>4</sup> or not having been executed by all grantors who were to join in it.<sup>5</sup>

**1251. Re-delivery for a specific purpose.**— If a deed is delivered to the grantee, it takes effect from such delivery; though

<sup>1</sup> *Strong v. Wilder*, 119 N. Y. 530, 23 N. E. Rep. 1057.

<sup>2</sup> *Loveland v. Loveland*, 136 Ill. 75, 26 N. E. Rep. 381.

<sup>3</sup> *Andrews v. Dyer*, 78 Me. 427, 6 Atl. Rep. 833.

<sup>4</sup> *Goodlett v. Kelly*, 74 Ala. 213.

<sup>5</sup> *Healy v. Seward*, 5 Wash. 319, 31 Pac. Rep. 874.

it be afterwards handed back to the maker for a specific purpose, —for instance, for safe-keeping during the grantee's minority, to obtain a release of dower by the maker's wife, to have it acknowledged or recorded, or to correct an informality in it, the delivery is not invalidated.<sup>1</sup> A court of equity, on the ground of a trust, may decree a restoration of a deed, or, if the deed has been destroyed, may decree the execution of a good and sufficient conveyance of the premises.<sup>2</sup> If there has been a delivery, the grantee in trust cannot be defeated by the grantor's obtaining possession of the deed in any way,<sup>3</sup> or by his subsequent declaration that there had been no delivery.<sup>4</sup>

**1252. Delivery to grantee for examination.** — It is not a delivery to a grantee, however, if the deed is merely handed to him for inspection, or for the purpose of transmitting it to another to hold in escrow, to await a complete execution or acknowledgment by another party, or to await the determination of the grantee whether he will accept it or not.<sup>5</sup> Thus, the parties to an oral agreement for the sale of land went together to an attorney and had the deed drawn, and the grantor signed it, and the grantee paid part of the consideration, both parties having examined the deed and expressed themselves satisfied with the form of it. The grantor then took it for the purpose of procuring a release of dower by his wife. It was held that there was no delivery of the deed, and that it could not therefore take effect either as a deed or as a memorandum in writing for the sale of the land, within the statute of frauds.<sup>6</sup>

**1253. A deed may be placed in the grantee's hands to be**

<sup>1</sup> *Albert v. Burbank*, 25 N. J. Eq. 404; *Brooks v. Isbell*, 22 Ark. 488; *Hargrave v. Melbourne*, 86 Ala. 270, 5 So. Rep. 285; *Thomas v. Groesbeck*, 40 Tex. 530; *Hart v. Rust*, 46 Tex. 556; *Towery v. Henderson*, 60 Tex. 291; *Otis v. Spencer*, 102 Ill. 622, 40 Am. Rep. 617; *Wallace v. Berdell*, 97 N. Y. 13.

<sup>2</sup> *Albert v. Burbank*, 25 N. J. Eq. 404.

<sup>3</sup> *Connard v. Colgan*, 55 Iowa, 538, 8 N. W. Rep. 351.

<sup>4</sup> *Squires v. Summers*, 85 Ind. 252.

<sup>5</sup> *Fairbanks v. Metcalf*, 8 Mass. 230; *Parker v. Parker*, 1 Gray, 409; *Cherry v. Herring*, 83 Ala. 458, 3 So. Rep. 667;

*Graves v. Dudley*, 20 N. Y. 76; *Gilbert v. North Am. F. Ins. Co.* 23 Wend. 43, 35 Am. Dec. 543; *Brackett v. Barney*, 28 N. Y. 333; *Chouteau v. Suydam*, 21 N. Y. 179; *Ford v. James*, 2 Abb. App. 159; *Pennington v. Pennington*, 75 Mich. 600, 42 N. W. Rep. 985; *Chick v. Sisson*, 95 Mich. 412, 54 N. W. Rep. 895; *Brown v. Reynolds*, 5 Sneed, 639; *Gould v. Wise*, 97 Cal. 532, 32 Pac. Rep. 576, 33 Pac. Rep. 323; *Comer v. Baldwin*, 16 Minn. 172; *Lee v. Richmond (Iowa)*, 57 N. W. Rep. 613; *Overman v. Kerr*, 17 Iowa, 485; *Farmers' and Traders' Bank v. Harney*, 87 Iowa, 101, 54 N. W. Rep. 61.

<sup>6</sup> *Parker v. Parker*, 1 Gray, 409.



held for a future delivery, as where a grantor, having executed a deed in trust for the benefit of his children, sent it immediately to the trustee therein named, with a message that he should put it away, and the grantor would see him the next morning. The grantor did not in fact see the trustee for more than a month afterwards; but when he saw him, the deed being produced, he delivered it to the trustee, telling him he was now the trustee, and giving him verbal directions. It was held that there was no delivery until this meeting of the parties and formal delivery.<sup>1</sup>

1254. The circumstances under which the grantee became possessed of a deed may be shown, although the possession of the deed by the grantee is *prima facie* evidence of delivery. Such evidence is admissible, even in a court of law, to avoid the effect of a delivery.<sup>2</sup> If the deed was delivered to a third person to be delivered to the grantee upon the performance of some condition subsequent, it may be shown that the custodian of the deed delivered it without authority before the performance of such condition, and consequently that it is not an operative deed. In such case the law even goes further than this, and declares that where the proof is clear that the final transfer to the grantee was not to be made unless certain terms and conditions should be complied with, the grantee's unexplained possession of the deed is not even *prima facie* proof of the performance of the condition, but the party claiming the benefit of the deed must show that the condition was complied with.<sup>3</sup>

1255. An unauthorized delivery by the custodian to the grantee is ineffectual to vest the title in him.<sup>4</sup> Thus where a man, for the purpose of escaping liability to be drafted in the army, executed deeds, in which his wife joined, to third persons without their knowledge, and gave the deeds to his wife, telling

<sup>1</sup> Abert v. Lape (Ky.), 15 S. W. Rep. 134.

<sup>2</sup> Dwinell v. Bliss, 58 Vt. 353, 5 Atl. Rep. 317; Southern Life Ins. Co. v. Cole, 4 Fla. 359; Whitman v. Shingleton, 108 N. C. 193, 12 S. E. Rep. 1027; Clayton v. Liverman, 4 Dev. & Bat. 238; Cincinnati, W. & Z. R. Co. v. Iliff, 13 Ohio St. 235; Black v. Shreve, 13 N. J. Eq. 455; Price v. Hudson, 125 Ill. 284, 17 N. E. Rep. 817; Jones v. Loveless, 99 Ind. 317;

Carnes v. Platt, 6 Robt. (N. Y.) 270; Roberts v. Jackson, 1 Wend. 478; Southern Life Ins. Co. v. Cole, 4 Fla. 359; Haworth v. Norris, 28 Fla. 763, 10 So. Rep. 18.

<sup>3</sup> Black v. Shreve, 13 N. J. Eq. 455; Chick v. Sisson, 95 Mich. 412, 54 N. W. Rep. 895.

<sup>4</sup> Moody v. Dryden, 72 Iowa, 461, 34 N. W. Rep. 210.

her to be careful of them, without giving her other instructions or any authority to deliver them, she, during his absence from home, and without his knowledge or consent, delivered them, and induced the grantees to convey the property to herself. It was held that the grantor's deeds were ineffectual to pass any title to the grantees, and consequently their deeds to his wife were void.<sup>1</sup> In like manner, where a voluntary deed was left by the grantor in the hands of the attorney who drew it, with directions to have it recorded at the grantor's expense, and to deliver it to no one but himself, and the attorney, contrary to such direction, delivered it to the grantee, the deed was ineffectual and was set aside in equity.<sup>2</sup>

1256. A deed which the grantee has fraudulently or wrongfully obtained possession of without the grantor's knowledge or consent is not effectual to pass the title,<sup>3</sup> even, according to some decisions, as against a subsequent purchaser for value without notice.<sup>4</sup> It is possible that a case might arise where the grantor's negligence in placing the deed, when all ready for delivery, where the grantee might readily obtain possession of it, has been of such a degree that he would be estopped from setting up title as against innocent third persons whom the grantee has thus been enabled to deceive.<sup>5</sup> Thus the fact that one executed a deed to his son, and placed it fully executed in a trunk in which the son also kept his papers, is some evidence either of a delivery or of negligence that might create such an estoppel; but there would be no such estoppel in case the deed was not fully executed, so that the grantee could not avail himself of it without committing forgery as well as theft.<sup>6</sup>

Of course there is no delivery in case the grantee has obtained

<sup>1</sup> Cannon v. Cannon, 26 N. J. Eq. 316.

<sup>2</sup> Armstrong v. Armstrong, 19 N. J. Eq. 357.

<sup>3</sup> Stokes v. Anderson, 118 Ind. 533, 21 N. E. Rep. 331; Huey v. Huey, 65 Mo. 689; Foley v. McNamara (Iowa), 62 N. W. Rep. 26; Woodman v. Coolbroth, 7 Greenl. 181; Healy v. Seward, 5 Wash. 319, 31 Pac. Rep. 874; Hutton v. Smith, 88 Iowa, 238, 55 N. W. Rep. 326; Stevens v. Castel, 63 Mich. 111, 29 N. W. Rep. 828; Golden v. Hardesty (Iowa), 61 N.

W. Rep. 913; Steel v. Miller, 40 Iowa, 402.

<sup>4</sup> Fitzgerald v. Goff, 99 Ind. 28; Henry v. Carson, 96 Ind. 412; Gould v. Wise, 97 Cal. 532, 32 Pac. Rep. 576, 33 Pac. Rep. 323.

This position is disputed and considered in §§ 1315-1318.

<sup>5</sup> Tisher v. Beckwith, 30 Wis. 55, 11 Am. Rep. 546; Everts v. Agnes, 4 Wis. 343, 6 Wis. 453, 65 Am. Dec. 314.

<sup>6</sup> Tisher v. Beckwith, 30 Wis. 55, 11 Am. Rep. 546.

possession of the deed by fraud or other undue means, as by grabbing the instrument after it was executed, but before it was intended to be delivered, or in any way other than by the free consent of the grantor.<sup>1</sup> A son procured from his mother, who was advanced in years, a conveyance of her land, which was intended to take effect after her death, but which did not contain any power of revocation, or any reservation of a life estate. The son obtained possession of the box in which the deeds were kept, broke it open, abstracted the deeds, and had them recorded without his mother's consent or knowledge. It was held that there was no delivery, either actual or constructive, the grantor having no intention to deliver the deed and pass the title.<sup>2</sup>

1257. The grantor may ratify the title of a grantee who has wrongfully obtained possession of a deed; but the ratification must be explicit, or there must be such an acquiescence, after such a knowledge of the facts, as would raise a presumption of an express ratification.<sup>3</sup> If the ratification has been obtained by misrepresentation and undue influence, and is made by the grantor in ignorance of his rights, and without independent advice, it will be set aside.<sup>4</sup>

<sup>1</sup> McDonald v. Minnick, 147 Ill. 651, 35 N. E. Rep. 367; Cincinnati, W. & Z. R. Co. v. Iliff, 13 Ohio St. 235; Stevens v. Stevens, 150 Mass. 557, 23 N. E. Rep. 378.

<sup>2</sup> Martling v. Martling, 47 N. J. Eq. 122, 20 Atl. Rep. 41.

<sup>3</sup> Hadlock v. Hadlock, 22 Ill. 384; Holbrook v. Chamberlin, 116 Mass. 155; McNulty v. McNulty, 47 Kans. 208, 27 Pac. Rep. 819; Tucker v. Allen, 16 Kans. 312; Cotton v. Gregory, 10 Neb. 125, 4 N. W. Rep. 939; Waddell v. Latham, 71 Miss. 351, 15 So. Rep. 32; Titus v. Phillips, 18 N. J. Eq. 541. In the latter case the grantor placed a deed in the hands of a third person with instructions not to deliver it until the grantee should execute a note for a part of the purchase-money, but the deed was delivered without requiring the execution of the note, the grantee honestly believing that the amount of the incumbrances assumed was the whole consideration. The grantor after-

wards brought suit for the amount of the note; but the suit was held not to estop him setting up the invalidity of the deed, inasmuch as it appeared that the circumstances of the delivery of the deed were not known to the grantor until the trial of the action.

<sup>4</sup> Martling v. Martling, 47 N. J. Eq. 122, 20 Atl. Rep. 41. But where a grantor of land in a deed, which was never lawfully delivered, with knowledge that the grantee had surreptitiously obtained the deed and placed it on record, recognizes the grantee's title for three years thereafter by acting as his agent in renting the land, accounting to him for the proceeds, and paying the taxes in his name, he thereby ratifies the invalid delivery, and cannot afterwards be heard to say that the ratification was the result of a doubt in his mind as to his legal rights. McNulty v. McNulty, 47 Kans. 208, 27 Pac. Rep. 819.

*V. Destruction, Cancellation, or Surrender of Deed.*

1258. The destruction or surrender of a deed, after it has once been delivered though not recorded, does not defeat the grantee's title.<sup>1</sup> Thus where a deed was executed and delivered to the grantee, who re-delivered it to the grantor to get his wife's signature to it, and she not only refused to sign it but destroyed it, it was held that the title passed by the formal delivery, and was not impaired by the subsequent destruction of the deed. The existence of a deed executed and delivered having been admitted or proved, secondary evidence of its contents is admissible; and where the evidence is vague and imperfect, every presumption is to be allowed against the party who is shown to have had possession of it, but refuses to produce it or alleges its destruction.<sup>2</sup>

A husband made a deed to a trustee for the benefit of his wife and it was signed and acknowledged by both the grantor and the trustee. After the grantor's decease it was found among his papers, or was produced by his wife, in a mutilated and cancelled condition. It was held that, the deed having been delivered and accepted, it was not within the grantor's power to revoke it.<sup>3</sup>

The fact that the third person to whom the grantor has delivered a deed, to be kept till his death and then delivered to the grantees, violates his trust and delivers the deed after the grantor's death to another person who destroys it, makes no difference so far as the question of delivery is concerned. The title passed to the grantees by force of the delivery to the third person. This

<sup>1</sup> *Hyne v. Osborn*, 62 Mich. 235, 28 N. W. Rep. 821; *Warren v. Tobey*, 32 Mich. 45; *Albert v. Burbank*, 25 N. J. Eq. 404; *Thomas v. Groesbeck*, 40 Tex. 530; *Edwards v. Dickinson*, 102 N. C. 519, 9 S. E. Rep. 456; *Ray v. Wilcoxon*, 107 N. C. 514, 12 S. E. Rep. 443; *Rogers v. Rogers*, 53 Wis. 36, 10 N. W. Rep. 2, 40 Am. Rep. 756; *Albright v. Albright*, 70 Wis. 528, 36 N. W. Rep. 254; *McAllister v. Mitchner*, 68 Miss. 672, 9 So. Rep. 829; *Vaughn v. Moore*, 89 Va. 925, 17 S. E. Rep. 320; *Henderson v. Hodgen*, 67 Ill. 179; *Feely v. Hoover*, 130 Pa. St. 107, 18 Atl. Rep. 611.

After an intentional voluntary delivery of the deed, the grantor is completely divested of his title, and his ownership cannot be restored without the execution and delivery of a proper deed of conveyance in the same manner as if he had been theretofore an entire stranger to the title. *Blewett v. Front-Street Cable Ry. Co.* 49 Fed. Rep. 126.

<sup>2</sup> *Orr v. Clark*, 62 Vt. 136, 19 Atl. Rep. 929.

<sup>3</sup> *Seibel v. Rapp*, 85 Va. 28, 6 S. E. Rep. 478.

is certainly the case if the presumption may be indulged that the grantees would accept the gift, as in case they are minors.<sup>1</sup>

**1259.** The cancellation, destruction, or surrender of a deed does not divest the grantee of the title, nor revest it in the grantor, though such was the intention of the parties.<sup>2</sup> Neither does the subsequent alteration of a deed, though this be material and fraudulent, divest or invalidate the grantee's title.<sup>3</sup> The

<sup>1</sup> *Douglas v. West*, 140 Ill. 455, 31 N. E. Rep. 403.

<sup>2</sup> **Alabama:** *Reavis v. Reavis*, 50 Ala. 60; *Kimball v. Greig*, 47 Ala. 230; *Hollingsworth v. Walker*, 98 Ala. 543, 13 So. Rep. 6; *Whisenant v. Gordon* (Ala.), 10 So. Rep. 513; *Bailey v. Campbell*, 82 Ala. 342, 2 So. Rep. 646; *Brady v. Huff*, 75 Ala. 80; *Smith v. Cockrell*, 66 Ala. 64; *Gimon v. Davis*, 36 Ala. 589; *King v. Crocheron*, 14 Ala. 822. **Arkansas:** *Taliaferro v. Rolton*, 34 Ark. 503; *Strawn v. Norris*, 21 Ark. 80; *Watters v. Wagley*, 53 Ark. 509, 14 S. W. Rep. 774; *Campbell v. Jones*, 52 Ark. 493, 12 S. W. Rep. 1016. **California:** *Cranmer v. Porter*, 41 Cal. 462; *Kearse v. Kilian*, 18 Cal. 491. **Connecticut:** *Botsford v. Morehouse*, 4 Conn. 550. **Georgia:** *Jordan v. Pollock*, 14 Ga. 145. **Illinois:** *Walton v. Burton*, 107 Ill. 54; *Douglas v. West*, 140 Ill. 455, 31 N. E. Rep. 403. **Kentucky:** *Berry v. Kinnaird* (Ky.), 20 S. W. Rep. 511. **Massachusetts:** *Marshall v. Fisk*, 6 Mass. 24, 4 Am. Dec. 76; *Holbrook v. Tirrell*, 9 Pick. 105. **Michigan:** *Warren v. Tobey*, 32 Mich. 45; *Hyne v. Osborn*, 62 Mich. 235, 28 N. W. Rep. 821. **Mississippi:** *McAllister v. Mitchner*, 68 Miss. 672, 9 So. Rep. 829; *Kelly v. Wagner*, 61 Miss. 299; *Connor v. Tippet*, 57 Miss. 594; *Partee v. Mathews*, 53 Miss. 140; *Burton v. Wells*, 30 Miss. 688. **Missouri:** *Tibbeau v. Tibbeau*, 19 Mo. 78, 59 Am. Dec. 329. **New York:** *Raynor v. Wilson*, 6 Hill, 469. **Ohio:** *Dukes v. Spangler*, 35 Ohio St. 119; *Starr v. Starr*, 1 Ohio, 321; *Jeffers v. Philo*, 35 Ohio St. 173. **Pennsylvania:** *Turner v. Warren*, 160 Pa. St. 336, 28 Atl. Rep. 781. **Tennessee:** *Howard v. Huffman*, 3 Head, 562, 75 Am. Dec. 783. **Texas:** *Lapowski v. Smith*, 1 Tex. Civ.

App. 391, 20 S. W. Rep. 957, per Stephens, J. **Virginia:** *Seibel v. Rapp*, 85 Va. 28, 6 S. E. Rep. 478; *Graysons v. Richards*, 10 Leigh, 61. **West Virginia:** *Ferguson v. Bond*, 39 W. Va. 561, 20 S. E. Rep. 591. **Wisconsin:** *Parker v. Kane*, 4 Wis. 1, 65 Am. Dec. 283.

In **North Carolina** the probate and registration of a deed is regarded as a substitute for livery of seisin; and a deed delivered but not registered is regarded as passing only an inchoate and equitable title to the land. Therefore, before registration a cancellation of the deed by agreement of all parties to it, or interested under it, may be made, unless such cancellation would be fraudulent or to the prejudice of third persons. *Edwards v. Dickinson*, 102 N. C. 519, 9 S. E. Rep. 456; *Hare v. Jernigan*, 76 N. C. 471; *Fortune v. Watkins*, 94 N. C. 304; *South-erland v. Hunter*, 93 N. C. 310; *Ray v. Wilcoxon*, 107 N. C. 514, 12 S. E. Rep. 443; *Davis v. Inscoe*, 84 N. C. 396. But if the grantee be a married woman, another obstacle arises to prevent an extinction of her equitable interest by her own act, and that is the law of the State that she can convey no title to her land, either legal or equitable, except by joining with her husband in its execution, and acknowledging it upon a privy examination. *Miller v. Church*, 112 N. C. 626, 17 S. E. Rep. 437; *Ray v. Wilcoxon*, 107 N. C. 514, 12 S. E. Rep. 443. But a re-delivery of an unregistered deed is no re-conveyance. It is only an estoppel on the grantee. *Arrington v. Arrington*, 114 N. C. 151, 19 S. E. Rep. 351.

<sup>3</sup> *Chessman v. Whittemore*, 23 Pick. 231; *Hatch v. Hatch*, 9 Mass. 307, 6 Am. Dec. 67.

deed is only the evidence of a conveyance, and the cancellation, alteration, or destruction of the deed only affects the evidence, not the title itself.

But a grantee who has voluntarily consented to the destruction or surrender of his deed, with the intention of defeating his own title, is not allowed to have an affirmation of the deed. He is estopped from setting it up, or from showing its contents by parol evidence.<sup>1</sup> In this way the destruction of the deed has the effect of a reconveyance, because there is no competent evidence that the title ever passed by deed. The destruction of the deed by consent of both parties is not a reconveyance, but in its effect operates like a reconveyance.<sup>2</sup>

1260. A deed made in consideration that the grantee should support the grantor during his life cannot be cancelled by the grantor after the grantee has taken possession under the deed and performed his part of the agreement, so long as the grantor remains with him and stands ready to continue to comply with its terms, though the deed was never actually delivered. Thus a father made a deed of his farm to one of his sons in consideration of his written agreement to provide for him and one of his daughters during their lives, but the deed was not recorded. The grantee resided on the property so conveyed, and supported the father and daughter as agreed for two years, when, without the grantee's fault, the father left. Thereafter, with the consent of all his other children, he cancelled the deed and contract, and executed to another son a deed of the same property. It was held that, although the first deed was never delivered, the grantee under the last deed having taken the property thereby conveyed with notice of the partly executed agreement under the first deed, he could not have his title thereto quieted as against the grantee in the first deed.<sup>3</sup>

1261. A written indorsement upon a deed surrendered, that the grantee "relinquished all his right and title to the within deed," does not operate as a reconveyance of the legal title, though it may be evidence of an agreement to reconvey which a

<sup>1</sup> Howard v. Huffman, 3 Head, 562, 75 Am. Dec. 783; Farrar v. Farrar, 4 N. H. 191, 17 Am. Dec. 410; Parker v. Kane, 4 Wis. 1, 65 Am. Dec. 283; Dukes v. Spangler, 35 Ohio St. 119.

<sup>2</sup> Farrar v. Farrar, 4 N. H. 191, 17 Am. Dec. 410.

<sup>3</sup> Decker v. Decker (Iowa), 61 N. W. Rep. 921.

court of equity might enforce by specific performance if it is supported by a valuable consideration.<sup>1</sup> A written declaration, made by a donor and recorded in the registry of deeds, to the effect that he had not delivered to his daughter the deed of gift, and that he revoked and annulled the deed, is not admissible in evidence, in favor of his vendee of the premises, several years after the deed of gift was executed and recorded.<sup>2</sup>

**1262. New deed by grantor upon surrender of old deed.** — But if a grantee who has not recorded his deed, though he has taken possession under it, sells the land to another, and gives up his deed to the grantor, who thereupon makes a new deed of the land to the last purchaser, which is recorded, the title of such purchaser will prevail against that of a creditor of the grantee who surrendered his deed.<sup>3</sup> If in such case the first grantee has given a mortgage for a part of the purchase-money, and the mortgage, though recorded, and the mortgage notes, be given up or destroyed, the title of the substituted purchaser is good as against both the grantor and grantee.<sup>4</sup> But the surrender of a deed to the grantor, leaving uncanceled a mortgage given to him to secure part of the purchase-money, is not sufficient to revest the whole title in him,<sup>5</sup> and his assignee of such mortgage may enforce it as against a substituted grantee of the land.<sup>6</sup>

**1263. But such surrender to the grantor and a new deed from him to a new grantee are ineffectual as against the lien of a judgment entered against the first grantee while he held the title.**<sup>7</sup> If, however, a deed conveying an absolute estate be cancelled before acceptance by the grantee, he being a minor at that time, and a new deed be made to the grantee conveying a life estate only, which he accepts, and takes possession of the land conveyed after coming of age, no title passes by the first deed, and an execution against the grantee can be levied only upon his life estate acquired by the second conveyance.<sup>8</sup> A creditor

<sup>1</sup> *Tunstall v. Cobb*, 109 N. C. 316, 14 S. E. Rep. 28; *Linker v. Long*, 64 N. C. 296.

<sup>2</sup> *Blalock v. Miland*, 87 Ga. 573, 13 S. E. Rep. 551.

<sup>3</sup> *Trull v. Skinner*, 17 Pick. 213; *Holbrook v. Tirrell*, 9 Pick. 105; *Commonwealth v. Dudley*, 10 Mass. 403; *Patterson v. Yeaton*, 47 Me. 308; *Sawyer v. Peters*, 50 N. H. 143; *Farrar v. Farrar*, 4 N. H. 191, 17 Am. Dec. 410; *Barncord v. Kuhn*, 36 Pa. St. 383.

<sup>4</sup> *Lawrence v. Stratton*, 6 Cush. 163; *Nason v. Grant*, 21 Me. 160.

<sup>5</sup> *Patterson v. Yeaton*, 47 Me. 308.

<sup>6</sup> *Watters v. Wagley*, 53 Ark. 509, 14 S. W. Rep. 774.

<sup>7</sup> *Feely v. Hoover*, 130 Pa. St. 107, 18 Atl. Rep. 611.

<sup>8</sup> *Owings v. Tucker* (Ky.), 13 S. W. Rep. 1078.

who was not such at the time the grantee received the deed originally, and was not such when the grantor surrendered the deed for cancellation and substitution of another grantee, cannot subject the land to an execution in his favor against the original grantee.<sup>1</sup>

1264. If a mortgage be cancelled with the intent to vest the estate unconditionally in the mortgagor, or if a separate defeasance be cancelled with the intent to vest the estate unconditionally in the mortgagee, the estate by such surrender or cancellation becomes absolute in accordance with such intention. "Such cancellation," as Chief Justice Shaw says in a case relating to the cancellation of a defeasance, "does not operate by way of transfer, nor strictly speaking by way of release working upon the estate, but rather as an estoppel arising from the voluntary surrender of the legal evidence by which alone the claim could be supported, like the cancellation of an unregistered deed, and a conveyance by the first grantor to a third person without notice. The cancellation reconveys no interest to the grantor, and yet, taken together, such cancellation and conveyance to a third person make a good title to the latter by operation of law. It gives a *seisin de facto*, a conveyance by deed duly registered being to many purposes equivalent to livery of seisin; it is good against the grantor and his heirs by force of the second deed, and it is good against the first grantee, and all claiming under him, by force of the registry acts."<sup>2</sup>

1265. The remedy to enforce the delivery of a deed is by a bill in equity. The jurisdiction of a court of full equity powers would generally arise from the inadequacy of the remedy at law, especially if it be alleged that the deed could not be reached by an action of replevin; for in action of tort damages only are recoverable, and in many cases a judgment for damages would be a wholly inadequate remedy.

If a deed fully executed and delivered be re-delivered to the grantor to obtain his wife's release of dower, or for the like purpose, and the grantor then refuses on demand after payment or tender of the consideration to deliver the deed, the grantee's remedy is at law by an action of tort or replevin; though, if the deed is secreted or withheld so that it cannot be replevied, a bill in equity may be maintained, but the bill should bring the case

<sup>1</sup> Sorenson v. Sorenson, 69 Mich. 351,      <sup>2</sup> Trull v. Skinner, 17 Pick. 213.  
37 N. W. Rep. 358.



within the equity jurisdiction of the court by alleging that it is so secreted or withheld.<sup>1</sup>

If it be a matter of dispute and doubt whether a deed has ever taken effect by delivery, the question is one of fact whether the legal title has passed to the grantee, and is therefore a question for a jury in a court of law, and not within the jurisdiction of a court of equity.<sup>2</sup>

1266. A court of equity has jurisdiction to compel the grantor or his heirs to execute a conveyance in place of an unrecorded deed which has been lost<sup>3</sup> or destroyed by the grantor.<sup>4</sup> Before this can be done, the contents of the lost deed must be proved so clearly as not to leave any reasonable doubt as to the substance of the material parts of the instrument.<sup>5</sup> This remedy is given because, although the title is in the grantee, he is in danger of losing all evidence of it, and at best his title is defective and of little value.

## VI. *When Delivery is Complete.*

1267. The delivery of a deed is complete only when the grantor has put it beyond his power to revoke or reclaim it.<sup>6</sup>

<sup>1</sup> Travis v. Tyler, 7 Gray, 146. In Snoddy v. Finch, 9 Rich. Eq. 355, 357, 70 Am. Dec. 216, it is said that the bill ought to allege danger of loss or destruction of the deed.

<sup>2</sup> Gee v. Gee, 32 Miss. 190.

<sup>3</sup> Pomeroy's Eq. Jur. § 1376 n.; Bennett v. Waller, 23 Ill. 97, 178.

<sup>4</sup> Stone v. King, 7 R. I. 358, 84 Am. Dec. 557.

<sup>5</sup> Bennett v. Waller, 23 Ill. 97.

<sup>6</sup> Cecil v. Butcher, 2 Jac. & W. 565; Doe v. Knight, 5 Barn. & C. 671; Younge v. Guilbeau, 3 Wall. 636; Tompkins v. Wheeler, 16 Pet. 106. **California**: Hibberd v. Smith, 67 Cal. 547, 59 Am. Rep. 726; Dean v. Parker, 88 Cal. 283, 26 Pac. Rep. 91. **Connecticut**: Porter v. Woodhouse, 59 Conn. 568, 22 Atl. Rep. 299; Hoboken City Bank v. Phelps, 34 Conn. 92; Alsop v. Swathel, 7 Conn. 500; Woodward v. Camp, 22 Conn. 457. **Georgia**: Rutledge v. Montgomery, 30 Ga. 899; Wellborn v. Weaver, 17 Ga. 267, 63 Am. Dec. 235; O'Neal v. Brown, 67 Ga.

707. **Illinois**: Stinson v. Anderson, 96 Ill. 373; Bryan v. Wash, 7 Ill. 557; Gunnell v. Cockerill, 84 Ill. 319; Byars v. Spencer, 101 Ill. 429, 40 Am. Rep. 212; Oliver v. Oliver, 149 Ill. 542, 36 N. E. Rep. 955; Provart v. Harris, 150 Ill. 40, 36 N. E. Rep. 958; Lancaster v. Blaney, 140 Ill. 203, 29 N. E. Rep. 870; Hayes v. Boylan, 141 Ill. 400, 30 N. E. Rep. 1041. **Indiana**: Wiggins v. Lusk, 12 Ind. 132. **Iowa**: Logsdon v. Newton, 54 Iowa, 448, 6 N. W. Rep. 715; Richardson v. Grays, 85 Iowa, 149, 52 N. W. Rep. 10. **Maine**: Brown v. Brown, 66 Me. 316. **Maryland**: Duer v. James, 42 Md. 492. **Massachusetts**: Hale v. Joslin, 134 Mass. 310; Maynard v. Maynard, 10 Mass. 456, 6 Am. Dec. 146; Hawkes v. Pike, 105 Mass. 560, 562, 7 Am. Rep. 554; Shurtleff v. Francis, 118 Mass. 154; Fay v. Richardson, 7 Pick. 91. **Michigan**: Hosley v. Holmes, 27 Mich. 416; Taft v. Taft, 59 Mich. 185, 26 N. W. Rep. 426, 60 Am. Rep. 291; Burk v. Sproat, 96 Mich. 404, 55 N. W. Rep. 985. **Mississippi**: Weis-

It follows, therefore, that a delivery to a third person who is merely the agent of the grantor is not complete until the grantee has assented to the conveyance, unless the circumstances are such that the grantee's assent may be presumed from the beneficial nature of the conveyance. In the absence of such assent, either actual or presumed, the deed is within the control of the grantor, who may recall it.<sup>1</sup> But if a deed be delivered unconditionally to a third person as the agent of the grantee, and it is received and held by him as such agent, then, if the law will, from the beneficial nature of the conveyance, presume the assent of the grantee, the delivery is complete and the estate passes at once.<sup>2</sup> In the absence of such presumed acceptance by the grantee, his actual acceptance is necessary to complete the delivery, though such acceptance may relate back to the delivery to the agent, if that delivery was an absolute one for the use of the grantee.<sup>3</sup>

Where one executed a deed and placed it in the hands of a third person, with instructions to deliver it to the grantee upon the grantor's death, and the grantor afterwards informed the grantee that he had given him the deed and directed him to

*Anger v. Cock*, 67 Miss. 511, 7 So. Rep. 95; *Hall v. Barnett*, 71 Miss. 37, 14 So. Rep. 732. **Missouri**: *Miller v. Lullman*, 1 Mo. 311; *Huey v. Huey*, 65 Mo. 689; *Ellis v. Mo. Pac. Ry. Co.* 40 Mo. App. 65; *Tyler v. Hall*, 106 Mo. 313, 17 S. W. Rep. 319; *Hall v. Hall*, 107 Mo. 101, 7 S. W. Rep. 811. **New Hampshire**: *Baker v. Haskell*, 47 N. H. 479, 93 Am. Dec. 455; *Cook v. Brown*, 34 N. H. 460; *Parker v. Dustin*, 22 N. H. 424; *Johnson v. Farley*, 45 N. H. 505. **New York**: *Fisher v. Hall*, 41 N. Y. 416; *Jackson v. Leek*, 12 Wend. 105; *Jackson v. Phipps*, 2 Johns. 418; *Wainwright v. Low*, 10 J. Y. Supp. 888; *Jacobs v. Alexander*, 9 Barb. 243; *Brown v. Austen*, 35 Barb. 41; *Stilwell v. Hubbard*, 20 Wend. 44. **North Carolina**: *Baldwin v. Maultsby*, 5 red. 505. **Ohio**: *Hood v. Brown*, 2 Ohio, 66. **Pennsylvania**: *Eckman v. Eckman*, 5 Pa. St. 269. **Tennessee**: *Brevard v. Feely*, 2 Sneed, 164; *Cazassa v. Cazassa*, 2 Tenn. 573, 22 S. W. Rep. 560. **Texas**: *Jeffian v. Milmo Nat. Bank*, 69 Tex. 513, S. W. Rep. 823. **Vermont**: *Lindsay v.*

*Lindsay*, 11 Vt. 621. **West Virginia**: *Lang v. Smith*, 37 W. Va. 725, 17 S. E. Rep. 213; *Davis v. Ellis*, 39 W. Va. 226, 19 S. E. Rep. 399. **Wisconsin**: *Prutsmann v. Baker*, 30 Wis. 644, 11 Am. Rep. 592.

<sup>1</sup> *Davis v. Ellis*, 39 W. Va. 226, 19 S. E. Rep. 399.

A person by executing a deed to his intended wife, and leaving it with his attorney with instructions to deliver it to the wife so soon as the marriage is solemnized, does not thereby relinquish all dominion over it, but merely leaves it in the hands of an agent, whose possession, so long as it continues, is the possession of the principal; and where the attorney fails to deliver it to the wife, but returns it to the grantor, who himself delivers it after the marriage, the latter delivery is the only one by which the conveyance becomes effectual. *Barrows v. Barrows*, 138 Ill. 649, 28 N. E. Rep. 983.

<sup>2</sup> *Johnson v. Farley*, 45 N. H. 505; *Brown v. Austen*, 35 Barb. 341.

<sup>3</sup> *Doe v. Knight*, 5 Barn. & C. 671, 692.

take possession of the land, and the grantee took possession and retained it, it was held to be a question of fact for the jury whether the deed was deposited with the third person, so that it passed beyond the grantor's control during his life, and that the deed should be considered as delivered or not, as the finding of the jury might be on the question of his intention. In other words, the jury were to find whether the grantor intended to reserve any control over the deed; and if they found that he reserved such control there was no delivery, but if they found that he did not intend to reserve any such control there was a delivery.<sup>1</sup>

**1268.** The statement that the validity of the deed in such case depends upon the grantor's intention does not, however, fully embody the true rule of law upon this subject. The grantor's intention to part with all dominion over the deed does not alone prevent his subsequently exercising such dominion over it, if he has not put the deed beyond his recall, and has done no act which would estop him from recalling it. So long as he has the right and the power to recall it there is no delivery.<sup>2</sup> The grantor retains the right to recall or rescind the deed until it is delivered to the grantee to become presently operative.<sup>3</sup>

**1269.** To constitute a delivery the deed must pass under the control of the grantee, or of some other person for him with the consent of the grantor.<sup>4</sup> Where a grantor signed and

<sup>1</sup> *Parker v. Dustin*, 22 N. H. 424. And see *Hayes v. Davis*, 18 N. H. 600, 602; *Boody v. Davis*, 20 N. H. 140, 142, 51 Am. Dec. 210; *Hibberd v. Smith*, 67 Cal. 547, 56 Am. Rep. 726; *Wiggins v. Lusk*, 12 Ill. 132; *Rivard v. Walker*, 39 Ill. 413; *Price v. Hudson*, 125 Ill. 284, 17 N. E. Rep. 817; *Kingsbury v. Burnside*, 58 Ill. 310; *Provart v. Harris*, 150 Ill. 40, 36 N. E. Rep. 958.

<sup>2</sup> *Baker v. Haskell*, 47 N. H. 479, 481, 93 Am. Dec. 455, per Smith, J.

<sup>3</sup> *Pennington v. Pennington*, 75 Mich. 600, 42 N. W. Rep. 985.

<sup>4</sup> *Ruckman v. Ruckman*, 6 Fed. Rep. 225. **Arkansas**: *Pillow v. King*, 55 Ark. 633, 18 S. W. Rep. 764; *Miller v. Physick*, 24 Ark. 244. **Georgia**: *O'Neal v. Brown*, 67 Ga. 707. **Illinois**: *Oliver v. Oliver*, 149 Ill. 542, 36 N. E. Rep. 955; *Byars v. Spencer*, 101 Ill. 429, 40 Am. Rep. 212; *Miller v. Meers*, 155 Ill. 284, 40 N. E. Rep. 577; *Blackman v. Preston*, 123 Ill. 381, 15 N. E. Rep. 42; *Hayes v. Boylan*, 141 Ill. 400, 30 N. E. Rep. 1041; *Bovee v. Hinde*, 135 Ill. 137, 25 N. E. Rep. 694. **Indiana**: *Dearmond v. Dearmond*, 10 Ind. 191; *Berry v. Anderson*, 22 Ind. 36; *Stewart v. Weed*, 11 Ind. 92; *Woodbury v. Fisher*, 20 Ind. 387, 83 Am. Dec. 325; *Purviance v. Jones*, 120 Ind. 162, 21 N. E. Rep. 1099. **Iowa**: *Adams v. Adams*, 70 Iowa, 253, 30 N. W. Rep. 795. **Kansas**: *Stone v. French*, 37 Kans. 145, 14 Pac. Rep. 530. **Maine**: *Patterson v. Snell*, 67 Me. 559. **Massachusetts**: *Stevens v. Stevens*, 150 Mass. 557, 23 N. E. Rep. 378; *Hawkes v. Pike*, 105 Mass. 560; *Shurtleff v. Francis*, 118 Mass. 154. **Michigan**: *Watson v. Hillman*, 57 Mich. 607, 24 N. W. Rep. 663. **Minnesota**: *Thompson v. Easton*, 31 Minn. 99,

acknowledged a deed, and left it upon the table, but did not say or do anything to indicate an intention to deliver it, and reserved the right to examine it next day, and it was agreed that if it was incorrect the corrections should be made, and while the papers were so lying upon the table they were taken possession of by a person for the grantee, it was held that there was no delivery.<sup>1</sup> A father, after signing deeds to two of his sons, put them in a tin box on the mantel, in a room occupied by him in the house of one of his sons. The box belonged to the father, but his son also kept papers in it. The two sons, in the absence of their father and without his consent, opened the box and saw the deeds, but did not take them. The father, two weeks before his death, stated to a third person that he had deeded the land to his sons, and that the deeds were in the box for them, but he never told the sons about them. There was evidence that the father told another son that he had burned the deeds, and some evidence that the grantees did not consider themselves owners of the land after their father's death. After his death the deeds could not be found. They were never in the actual possession of the grantees. It was held that there was no delivery.<sup>2</sup> Where a father made deeds to his wife and his son, which were not recorded during the father's lifetime, but upon his death were found in his house, in a box belonging to him, of which he had

16 N. W. Rep. 542; *Conlan v. Grace*, 36 Minn. 276, 30 N. W. Rep. 880. **Mississippi**: *Weisinger v. Cock*, 67 Miss. 511, 7 So. Rep. 495. **Missouri**: *Huey v. Huey*, 65 Mo. 689; *Hammerslough v. Cheatham*, 84 Mo. 13. **New York**: *Fisher v. Hall*, 41 N. Y. 416; *Stilwell v. Hubbard*, 20 Wend. 44. **Pennsylvania**: *Duraind's Appeal*, 116 Pa. St. 93, 8 Atl. Rep. 922. **Tennessee**: *Cazassa v. Cazassa*, 92 Tenn. 573, 22 S. W. Rep. 560; *Martin v. Ramsey*, 5 Humph. 349. **Vermont**: *Gorham v. Meacham*, 63 Vt. 231, 22 Atl. Rep. 572; *Paddock v. Potter*, 67 Vt. 360, 31 Atl. Rep. 784. **West Virginia**: *Lang v. Smith*, 37 W. Va. 725, 17 S. E. Rep. 213; *Davis v. Ellis*, 39 W. Va. 226, 19 S. E. Rep. 399. **Wisconsin**: *Flannigan v. Goggins*, 71 Wis. 28, 36 N. W. Rep. 846. The deposit of a deed in the post-office directed

to the grantee is a good delivery to him. *M'Kinney v. Rhoads*, 5 Watts, 343.

<sup>1</sup> *Stokes v. Anderson*, 118 Ind. 533, 21 N. E. Rep. 331.

<sup>2</sup> *Anderson v. Anderson*, 126 Ind. 62, 24 N. E. Rep. 1036. Where a husband signed and acknowledged a deed to his wife and placed it in a trunk, whereby it fell into the hands of his wife, it was held that this was not such a delivery as the law contemplates, and was not sufficient to convey the title to the wife. *Pitts v. Sheriff*, 108 Mo. 110, 18 S. W. Rep. 1071. Where, however, a father placed his deed to his son in the son's trunk, where it was found after the father's death, it was held that there was a delivery by the father in his lifetime. *Hill v. Hill*, 119 Ill. 242, 10 N. E. Rep. 667. See, also, *Wiggins v. Lusk*, 12 Ill. 132; *Patterson v. Snell*, 67 Me. 559.

control, and in which he had kept his private papers for many years, though the son and his mother had access to the box, which had no lock on it, the son also keeping his private papers in it, and after the father's death the son took the deeds and had them recorded, it was held that there was no sufficient evidence of delivery.<sup>1</sup>

1270. The grantor may be permitted to testify that he never parted with the possession of the deed with the intent that it should take effect as a deed. Mr. Justice Devens, delivering the opinion, said: "Undoubtedly a concealed intention that a delivery made with such formalities, or declarations, or under such circumstances, that the grantee believed, and was justified in believing, that the manual transfer was made with the purpose of passing the property to him and accepting it as such, could not prevail against the intention expressed, or fairly to be implied, from the declarations or conduct of the grantor."<sup>2</sup>

A person heavily in debt conveyed his land to his nephew, who executed and delivered to the grantor a quitclaim deed conveying the land to the latter's wife. This latter deed was never recorded during the grantor's life, but was found among his papers by his administrator fourteen years after its execution. The deed to the nephew was duly recorded; and two years after its execution, when the grantor had paid his debts, the nephew reconveyed the land to him by deed, which was promptly recorded. There was evidence of statements made by the grantor to the effect that he deeded the land to his nephew to keep it from his creditors. The grantor continued in possession of the land until his death, and there was no clear evidence that his wife ever heard of the deed to her until after her husband's death. It was held that the evidence did not show a delivery of the deed to the wife.<sup>3</sup>

1271. Delivery to the grantee upon the grantor's death. — A third person in whose hands a grantor has placed a deed, to be delivered to the grantee after the grantor's death, cannot be regarded as the agent of the grantee when it appears that the grantee did not know of the deed till after the grantor's death, and there is no evidence that the grantor made the third person

<sup>1</sup> *Reichert v. Wilhelm*, 83 Iowa, 510, 50 N. W. Rep. 19. And see *Lancaster v. Blaney*, 140 Ill. 203, 29 N. E. Rep. 870.

<sup>2</sup> *Stevens v. Stevens*, 150 Mass. 557, 559, 23 N. E. Rep. 378.

<sup>3</sup> *Lancaster v. Blaney*, 140 Ill. 203, 29 N. E. Rep. 870.

the agent of the grantee by making the delivery to him absolute, and beyond the recall of the grantor.<sup>1</sup> There is no delivery when it appears that the grantor intended that the grantee should not have any present interest in the land, and intended to keep in himself the dominion and control of it.<sup>2</sup>

1272. If, however, there was an intention that a deed delivered to a third person should take effect as a present conveyance, and an acceptance by the grantee may be inferred, the deed is valid, though it does not actually come into the possession of the grantee till after the death of the grantor.<sup>3</sup> Thus, where a deed was delivered to the husband of the grantee in trust for her benefit, with a request that it should be kept secret until the grantor's death, but it appeared that the grantee was in the house when the deed was executed, and was present at a conversation shortly previous when the grantor announced his intention to convey the property to the grantee, it was held that the circumstances authorized the presumption that the deed was delivered with the intent that it should take immediate effect, and that it was accepted by the grantee.<sup>4</sup>

<sup>1</sup> See §§ 1236, 1237; *Hale v. Joslin*, 134 Mass. 310; *Brown v. Brown*, 66 Me. 316; *Williams v. Schatz*, 42 Ohio St. 47; *Wiggins v. Lusk*, 12 Ill. 132; *Duraind's App.* 116 Pa. St. 93, 8 Atl. Rep. 922; *Jacobs v. Alexander*, 19 Barb. 243; *Davis v. Cross*, 14 Lea, 637, 52 Am. Rep. 177; *Phillips v. Houston*, 5 Jones, 302; *Bailey v. Bailey*, 7 Jones, 44; *Lyon v. Lyon*, 76 Mich. 610, 43 N. W. Rep. 586; *Taft v. Taft*, 59 Mich. 185, 26 N. W. Rep. 426, 60 Am. Rep. 291; *Jones v. Loveless*, 99 Ind. 317.

<sup>2</sup> *Burk v. Sproat* (Mich.), 55 N. W. Rep. 985; *Pennington v. Pennington*, 75 Mich. 600, 42 N. W. Rep. 985; *Schuffert v. Grote*, 88 Mich. 650, 50 N. W. Rep. 657; *Conrad v. Douglas* (Minn.), 61 N. W. Rep. 673; *Weisinger v. Cock*, 67 Miss. 511, 7 So. Rep. 495; *Shurtleff v. Francis*, 118 Mass. 154; *Stinson v. Anderson*, 96 Ill. 373; *Stilwell v. Hubbard*, 20 Wend. 44; *Prutsman v. Baker*, 30 Wis. 644, 11 Am. Rep. 592; *Baker v. Haskell*, 47 N. H. 479, 93 Am. Dec. 455, *Cook v. Brown*, 34 N. H. 460; overruling *Shed v. Shed*, 3 N. H. 432. In the latter case a

father placed his deed in the hands of a depository to be delivered to his sons upon his decease, in case he should not otherwise direct, and died without further directions. The court held the delivery good. But in *Cook v. Brown* the court held that, where a deed was placed in the hands of a depository to be delivered to the grantee upon the death of the grantor, provided it was not previously recalled, there was not a good delivery.

<sup>3</sup> *O'Neal v. Brown*, 67 Ga. 707; *Holt's App.* 98 Pa. St. 257; *Martin v. Flaharty*, 13 Mont. 96, 32 Pac. Rep. 287; *Campbell v. Morgan*, 68 Hun, 490, 22 N. Y. Supp. 1001; *Diefendorf v. Diefendorf*, 8 N. Y. Supp. 617, affirmed 132 N. Y. 100, 30 N. E. Rep. 375; *Hathaway v. Payne*, 34 N. Y. 92; *Ruggles v. Lawson*, 13 Johns. 285; *Haeg v. Haeg*, 53 Minn. 33, 55 N. W. Rep. 1114.

<sup>4</sup> *Crain v. Wright*, 36 Hun, 74, affirmed 114 N. Y. 307, 21 N. E. Rep. 401. And see *Owen v. Williams*, 114 Ind. 179, 15 N. E. Rep. 678; *Dinwiddie v. Smith* (Ind.), 40 N. E. Rep. 748; *Smiley v.*

**1273.** The grantor's intention to confer a present title will be carried into effect when the delivery is sufficient to put the deed within the control of the grantee or his agent, though the deed is not to take effect in giving the grantee possession of the land until after the grantor's death.<sup>1</sup> Thus, where a father conveyed land to his son, and took from the latter a lease of the same for life, and, not wishing to have the deed recorded till after his death, lodged the deed with a third person, it was held that the circumstances showed that the intention was to confer a present title upon the son. If the design had been that the deed should not be considered as delivered till the grantor's death, there would have been no occasion for a lease. Although the grantor afterwards, because of the illness of the depositary, took back the deed for safe-keeping, the original delivery was not invalidated.<sup>2</sup>

Where a man executed two deeds, — one to his wife and the other to his sons, — and, after keeping them some time, on the day before his death told his wife to “get the deeds,” which she did, whereupon he handed one to his wife, telling her it was for her, and the other to one of his sons, telling him that it was for him and his brother, there was a sufficient delivery of the deeds.<sup>3</sup>

A father consulted a friend in regard to the legality of his conveying all his land to a minor son, saying, as a reason for the inquiry, that he had been told he could not make a valid deed unless he had other lands left. His friend informed him that he could legally do so, but suggested that he make a will; but this he declined to do, saying, “I want to give it to him now, before my own death.” The deed was accordingly signed and handed to his friend, the grantor saying, “You take that deed and file it for record.” His friend then suggested that it might be prudent not to have it recorded just then, as the grantor might need to sell some portion of the land in order to support himself. The grantor then said, “You take that deed and keep it safely.” His

Smiley, 114 Ind. 258, 16 N. E. Rep. 585; *Corker v. Corker*, 95 Cal. 308, 30 Pac. Rep. 541; *Williams v. Latham*, 113 Mo. 626; *Trask v. Trask* (Iowa), 57 N. W. Rep. 841; *Douglas v. West*, 140 Ill. 455, 31 N. E. Rep. 403.

<sup>2</sup> *Brown v. Brown*, 1 Woodb. & M. 325; *Lang v. Smith*, 37 W. Va. 725, 17 S. E. Rep. 213.

<sup>1</sup> *Trask v. Trask* (Iowa), 57 N. W. Rep. 841; *Stow v. Miller*, 16 Iowa, 460; *Bury v. Young*, 98 Cal. 446, 33 Pac. Rep. 338; <sup>3</sup> *Benson v. Hall*, 150 Ill. 60, 36 N. E. Rep. 947.

friend kept the deed until the grantor's death, when he filed it for record. It was held that there was an absolute delivery of the deed for the benefit of his son, and that it took effect from the time of such delivery.<sup>1</sup>

1274. There are many circumstances from which a delivery may be inferred. A father made deeds of land to his sons, and stated to the officer taking the acknowledgments, and to others, that he would put the deeds where the boys could get them when he was gone. It happened that the father placed the deeds in a trunk belonging to one of the grantees. The sons after his death took possession of the deeds, and stated that they found them among their own papers. In a suit by the widow and other children to set the deeds aside, it was held that the evidence was sufficient to sustain a decree finding that the deeds were delivered.<sup>2</sup> And where a husband executed and delivered a deed of land to his wife, for the purpose of avoiding an administration of the grantor's estate after his death, and the grantee placed the deed after delivery where her husband, equally with herself, could have access to it, it was held that the conveyance was valid.<sup>3</sup> A delivery was established where a husband made a deed to his wife which after his death was found in his office safe, in an envelope containing other papers belonging to his wife, and his will, executed shortly before his death, declared that he had "executed and delivered" such conveyance to his wife.<sup>4</sup>

A delivery of a deed made by a husband to his wife, with the intention of vesting the title in her, is not defective because he requested her to refrain from recording it until after his death, or because he intended to cancel or destroy the deed and revest the title in himself in case his wife should not survive him.<sup>5</sup>

1275. Revocation inferred. — A father made and acknowledged a deed to his minor children, and left it with the justice of the peace before whom he acknowledged it, requesting him to keep it for the grantor, saying if he wanted it he would call for it, but if he should die the deed was to be delivered to the grantees. Afterwards, while the deed still remained in the hands

<sup>1</sup> *Standiford v. Standiford*, 97 Mo. 231, 10 S. W. Rep. 836.

<sup>2</sup> *Hill v. Hill*, 119 Ill. 242, 10 N. E. Rep. 667.

<sup>3</sup> *Le Saulnier v. Loew*, 53 Wis. 207, 10 N. W. Rep. 145.

<sup>4</sup> *Toms v. Owen*, 52 Fed. Rep. 417.

<sup>5</sup> *Dimmick v. Dimmick*, 95 Cal. 323, 30 Pac. Rep. 547.



1585. Priority of lien between the holders of several notes secured by a mortgage is, by some authorities, determined according to the order of their maturity.<sup>1</sup> If judgment is obtained on one of the notes, that takes the place of the note on which it was rendered.<sup>2</sup> The holder of the note first maturing may, upon default, or at any time afterwards, foreclose and sell the premises in satisfaction of his debt.<sup>3</sup> His delay to enforce his rights does not impair his prior right.<sup>4</sup> But the mortgagee may by agreement give to particular notes a prior lien upon the security, irrespective of the time of their maturity; and therefore one who takes an assignment of a part of the notes secured by a mortgage should inquire of the maker and of the payee whether the others have been sold with a preferred lien upon the security. It is negligence on his part not to make such inquiry; and if the preferred lien has been given, it will be valid against such assignee.<sup>5</sup> One holding a mortgage securing several promissory notes may assign part of the notes, and a corresponding interest in the mortgage, giving priority to the assignee, or a *pro rata* interest in the security, according to the terms of the assignment.<sup>6</sup>

A mortgage executed by one partner in the partnership name of real estate belonging to the firm, to secure a partnership debt, conveys the legal interest of such partner and the equitable interest of the copartner; as where A executed a mortgage in the firm name of A & Bro., and himself acknowledged it. But a person taking a subsequent mortgage, properly executed by both partners, has priority as to the interest of the partner who did not execute the first mortgage.<sup>7</sup> A mortgage by one tenant in common of his interest in partnership real estate, made for a valid consideration to one who has no notice of the partnership, is not subject to any equities arising out of the partnership relation of the grantor.<sup>8</sup>

#### 1586. As between several unrecorded mortgages or other

<sup>1</sup> See Jones on Mortgages, §§ 1699-1702, 1939; Aultman-Taylor Co. v. McGeorge, 31 Kans. 329, 2 Pac. Rep. 778; Wilson v. Eigenbrodt, 30 Minn. 4, 13 N. W. Rep. 907.

<sup>2</sup> Funk v. McReynold, 33 Ill. 481.

<sup>3</sup> Marine Bank v. International Bank, 9 Wis. 57; Wood v. Trask, 7 Wis. 566, 76 Am. Dec. 230; Lyman v. Smith, 21 Wis. 674.

<sup>4</sup> Lyman v. Smith, 21 Wis. 674.

<sup>5</sup> Walker v. Dement, 42 Ill. 272.

<sup>6</sup> Lane v. Davis, 14 Allen, 225; Howard v. Schmidt, 29 La. Ann. 129.

<sup>7</sup> Chavener v. Wood, 2 Oregon, 182; Haynes v. Seachrest, 13 Iowa, 455. And see Brazleton v. Brazleton, 16 Iowa, 417.

<sup>8</sup> See Jones on Mortgages, §§ 119, 120; McDermot v. Lawrence, 7 Serg. & R. 438, 10 Am. Dec. 468.

conveyances, that of prior execution takes precedence,<sup>1</sup> and, in determining such priority, fractions of a day will be considered.<sup>2</sup>

Of two mortgages executed at the same time, to secure debts which mature at different times, if there be no other ground of priority, according to the authorities in some States that is the prior lien which secures the payment of the note which first falls due. The rule is the same as it is when one mortgage secures debts maturing at different times; they are to be paid in the order of their maturity.<sup>3</sup> It makes no difference in the order of payment that, after the assignment of the note first maturing to one person, the note next maturing is assigned to another with the mortgage or trust deed. The holding of the mortgage security gives no preference in order of payment.<sup>4</sup>

In other States such mortgages confer equal rights, and the fact that one becomes due before the other gives no priority.<sup>5</sup>

**1587.** Where several mortgages are executed and recorded at the same time, whether the parties intended that one of them should have priority is a matter of fact for the jury to determine from the evidence of such intention.<sup>6</sup> Though the mortgagor intended that one should have priority, and first delivered that one to the recorder, yet if the recorder's certificate showed that they were filed for record simultaneously, neither is entitled to priority over the other. The fact that one instrument was handed to the recorder an instant before the other is immaterial. Neither is the intention with which the act was done important.<sup>7</sup>

**1588.** Agreement fixing the priority of mortgages. — The parties may, as between themselves, make a valid agreement, though it be verbal only, that one of two mortgages shall be prior

<sup>1</sup> *Ely v. Scofield*, 35 Barb. 330; *Berry v. Mut. Ins. Co.* 2 Johns. Ch. 603.

<sup>2</sup> *Gibson v. Keyes*, 112 Ind. 568, 14 N. E. Rep. 591.

<sup>3</sup> *Jones on Mortgages*, § 1699; *Isett v. Lucas*, 17 Iowa, 503; *Bank v. Covert*, 13 Ohio, 240; *Gardner v. Diedrichs*, 41 Ill. 158; *Murdock v. Ford*, 17 Ind. 52; *Harris v. Harlan*, 14 Ind. 439; *Marine Bank v. International Bank*, 9 Wis. 57; *Roberts v. Mansfield*, 32 Ga. 228.

According to other authorities this cir-

cumstance is no evidence to determine the fact of priority. *Gilman v. Moody*, 43 N. H. 239; *Granger v. Crouch*, 86 N. Y. 494.

<sup>4</sup> *Gwathmeys v. Ragland*, 1 Rand. 466.

<sup>5</sup> *Jones on Mortgages*, §§ 1699-1707; *Collerd v. Huson*, 34 N. J. Eq. 38; *Riddle v. George*, 58 N. H. 25; *Shaw v. Newsom*, 78 Ind. 335.

<sup>6</sup> *Gilman v. Moody*, 43 N. H. 239.

<sup>7</sup> *Koevenig v. Schmitz*, 71 Iowa, 175, 32 N. W. Rep. 320.

is not generally followed in the later cases. The present and better rule is that there must be some evidence of delivery.<sup>1</sup> Enough must be shown to make the grantor who retains possession of his deed a bailee of it for the grantee.<sup>2</sup> If a delivery is not shown, and the grantor retains the deed in his absolute control, he may revoke it or destroy it. He may at any time before delivery change his intention as to making the gift.<sup>3</sup> It is undoubtedly true that the presumption of the delivery and acceptance of a deed in case of a voluntary settlement is stronger than in a case of bargain and sale.<sup>4</sup>

Vern. 473; *Boughton v. Boughton*, 1 Atk. 625; *Johnson v. Boyfield*, 1 Ves. 314; *Villers v. Beaumont*, 1 Vern. 100; *Bale v. Newton*, 1 Vern. 464. These cases show that a voluntary settlement not containing a power of revocation cannot be revoked, though the grantor keeps the deed in his power. See, also, *Lady Hudson's Case*, 2 Vern. 476; *Exton v. Scott*, 6 Simons, 31; *Reed v. Douthit*, 62 Ill. 348; *Tate v. Tate*, 1 Dev. & B. Eq. 22; *Wall v. Wall*, 30 Miss. 91, 64 Am. Dec. 147; *Bunn v. Winthrop*, 1 Johns. Ch. 329; *Verplank v. Sterry*, 12 Johns. 536, 550, 7 Am. Dec. 348; *Ruggles v. Lawson*, 13 Johns. 285, 7 Am. Dec. 315; *Meth. Epis. Church v. Jaques*, 1 Johns. Ch. 450. See *McGrath v. Hyde*, 81 Cal. 38, 21 Pac. Rep. 948, 22 Pac. Rep. 293; *Brinckerhoff v. Lawrence*, 2 Sandf. Ch. 400; *McLean v. Button*, 19 Barb. 450; *Tooley v. Dibble*, 2 Hill, 641; *Goodell v. Pierce*, 2 Hill, 659; *Jackson v. Bodle*, 20 Johns. 184.

<sup>1</sup> *Ireland v. Geraghty*, 15 Fed. Rep. 35; *Cline v. Jones*, 111 Ill. 563; *Shovers v. Warrick*, 152 Ill. 355, 38 N. E. Rep. 792; *Wallace v. Berdell*, 97 N. Y. 13; *Fisher v. Hall*, 41 N. Y. 416; *Hale v. Joslin*, 134 Mass. 310; *Hibberd v. Smith*, 67 Cal. 547, 56 Am. Rep. 726; *Frank v. Frank* (Tex. Civ. App.), 25 S. W. Rep. 819.

In *Williams v. Schartz*, 42 Ohio St. 47, a father, having executed and acknowledged in due form a deed of gift of real estate to his son, said to his physician then in attendance: "Take this deed, and keep it. If I get well I will call for it. If I don't, give it to Billy," the grantee.

The father was then ill, and died in a few days afterwards of the same illness. The custodian of the deed then handed it to the grantee, who caused it to be recorded. It was held that there was no delivery of the instrument, and that it was invalid as a deed. The court said that the physician was the agent of the grantor and also of the grantee, and hence the deed was not only revocable by the grantor at any time before his death, but, not having parted with all dominion over it during life, it became, on his death, a mere nullity.

<sup>2</sup> *Fisher v. Hall*, 41 N. Y. 416; *Ireland v. Geraghty*, 15 Fed. Rep. 35; *Burkholder v. Casad*, 47 Ind. 418; *Fulton v. Fulton*, 48 Barb. 581.

<sup>3</sup> *Gorman v. Gorman*, 98 Ill. 361; *Berneson v. Aiken*, 102 Ill. 284; *Rountree v. Smith*, 152 Ill. 493, 38 N. E. Rep. 680.

<sup>4</sup> *Masterson v. Cheek*, 23 Ill. 72; *Bryan v. Wash*, 7 Ill. 557; *Reed v. Douthit*, 62 Ill. 348; *Rivard v. Walker*, 39 Ill. 413; *Cline v. Jones*, 111 Ill. 563; *Williams v. Williams*, 148 Ill. 426, 36 N. E. Rep. 104; *Winterbottom v. Pattison*, 152 Ill. 334, 38 N. E. Rep. 1050; *Douglas v. West*, 140 Ill. 455, 31 N. E. Rep. 403; *Haenni v. Bleisch*, 146 Ill. 262, 34 N. E. Rep. 153; *Walker v. Walker*, 42 Ill. 311; *Otis v. Beckwith*, 49 Ill. 121; *Souverbye v. Arden*, 1 Johns. Ch. 240; *Bunn v. Winthrop*, 1 Johns. Ch. 329; *Scrugham v. Wood*, 15 Wend. 545; *Urann v. Coates*, 109 Mass. 581; *Tompkins v. Wheeler*, 16 Pet. 106, 114.

1278. Sometimes a delivery and acceptance have been regarded as made out upon proof of slight circumstances tending to show them. Thus, where a father made a voluntary conveyance to his son, and after the execution of the deed spoke of the land as his son's, and allowed the son to exercise acts of ownership over the land, a delivery was regarded as made out, although the father retained possession of the deed until his death.<sup>1</sup> In another case, a husband about to enlist in the army executed a deed of his real estate to his wife and caused it to be recorded. The wife never saw the deed until after his death, which occurred within a few months, when she found it among his papers, which were left in her possession. She knew of his intention to make the deed, and after his death she received the rents and profits, and afterwards sold the property. It was held that the facts showed a delivery and acceptance of the deed.<sup>2</sup>

1279. If the grantee assumes control of the property, this affords strong evidence, if not conclusive evidence, of his acceptance of the deed.<sup>3</sup> The acts of ownership which one may exercise are various and numerous. They may be acts of improvement or cultivation of the land, or acts which imply ownership, such as collecting rents from tenants of the property, making leases of it, or any form of conveyance of it. The directing

<sup>1</sup> *Scrugham v. Wood*, 15 Wend. 545; *Walker v. Walker*, 42 Ill. 311, 89 Am. Dec. 445; *Cline v. Jones*, 111 Ill. 563, 568; *Reed v. Douthit*, 62 Ill. 348. "In the view that this was a voluntary settlement upon the son, the decisions are uniform that the possession of the deed by the grantor until his death did not invalidate or defeat it." Per Breese, J., citing *Vilbas v. Beaumont*, 6 Vern. 100; *Bole v. Newton*, 6 Vern. 464; *Bunn v. Winthrop*, 1 Johns. Ch. 329, per Kent, Ch.; *Cecil v. Beaver*, 28 Iowa, 246; *Compton v. White*, 86 Mich. 33, 48 N. W. Rep. 635.

<sup>2</sup> *Dale v. Lincoln*, 62 Ill. 22. See, also, *Hill v. Hill*, 119 Ill. 242, 10 N. E. Rep. 667.

<sup>3</sup> *Brown v. Danforth*, 55 Hun, 612, 9 N. Y. Supp. 19; *Gifford v. Corrigan*, 105 N. Y. 223, 11 N. E. Rep. 498, 4 N. Y. Supp. 89. *Snow v. Orleans*, 126 Mass. 453. In

this case, on the issue whether a deed to a town of a lot of land, conveyed on condition that a library building should be erected upon it, had been delivered to, and accepted by, the town, there was evidence that the deed after being signed was left with the grantor; that it was acknowledged by him about a month afterwards, and recorded twelve days after the acknowledgment; that the town voted to erect the building on the land, and a building committee, appointed by the town, soon after began and have since completed the library building. It was held that the evidence was sufficient to warrant a finding that the deed had been so delivered and accepted; and also, that evidence that the deed was found in the grantor's house after his death and that the selectmen of the town had no knowledge of any delivery, was not conclusive in law to overcome the other evidence.

of a sale of the property by the grantee shows an acceptance of the deed.<sup>1</sup>

1280. A deed made in pursuance of a previous arrangement between the grantor and grantee is presumed to have the latter's assent without a formal delivery and acceptance.<sup>2</sup> Thus, where a creditor demanded the making of a mortgage to him by his debtor in accordance with the promise of the latter, and the creditor directed the drawing up of a mortgage and sent it to the debtor at his home for execution, and the latter signed and acknowledged it before a justice of the peace, who left it at the registry for record, it was held that the mortgagee's assent should be inferred, the mortgage being for his benefit and made in pursuance of such previous arrangement. The finding of the jury was warranted that there was a delivery before an attachment made a few days after the recording of the deed, though the mortgagee did not see the deed after its execution till after the attachment.<sup>3</sup>

A deed made in pursuance of an understanding with the grantee that he should receive it as security for the grantor's indebtedness to him may be regarded as delivered to him; certainly if it be actually delivered to another for the creditor.<sup>4</sup>

1281. Acceptance is presumed in case the grantee is entitled to the conveyance and has paid the consideration.<sup>5</sup> Thus, if a deed for which the grantee has paid the consideration be sent to the register to be recorded, or be given to a third person to place upon record, it may properly be inferred not only that such sending of the deed or such giving of it was intended by the grantor to be a delivery, but also that the grantee accepted the deed he had paid for, so that it would take effect from the time it left the grantor's hands.<sup>6</sup> If a deed be delivered to a third person for a purchaser who has paid the price, and such third person was authorized to receive the deed, there is a presump-

<sup>1</sup> *Niland v. Murphy*, 73 Wis. 326, 41 N. W. Rep. 335.

<sup>2</sup> *McCormick v. McCormick*, 71 Iowa, 379, 33 N. W. Rep. 648; *Black v. Hoyt*, 33 Ohio St. 203; *Bundy v. Iron Co.* 38 Ohio St. 300.

<sup>3</sup> *Greene v. Conant*, 151 Mass. 223, 24 N. E. Rep. 44.

<sup>4</sup> *Doe v. Knight*, 5 B. & C. 671, 12 Eng.

Ch. 351; *Jones v. Swayze*, 42 N. J. L. 279; *Everett v. Whitney*, 55 Iowa, 146, 7 N. W. Rep. 487.

<sup>5</sup> *Church v. Gilman*, 15 Wend. 656, 30 Am. Dec. 82; *Hibberd v. Smith*, 67 Cal. 547, 56 Am. Rep. 726.

<sup>6</sup> *Armstrong v. Armstrong*, 19 N. J. Eq. 357.

tion of delivery, though the agent never delivers the deed to his principal.<sup>1</sup>

1282. The fact that a conveyance is beneficial to the grantee, and imposes no burdens on him, is in numerous cases the ground for asserting the general proposition that an acceptance of such a deed may always be inferred.<sup>2</sup> The rule is stated to be that if a deed is delivered to a third person for the grantee, neither the presence of the grantee, nor his previous authority, nor his subsequent express assent, is necessary to make the delivery valid. If the deed is beneficial to the grantee, his assent will be presumed in the absence of proof of his dissent.<sup>3</sup>

But if these cases do not fall within some of the exceptions to the general rule requiring acceptance, they are not reconcilable with the greater number of recent authorities. There is no valid general rule that a deed may be regarded as accepted merely because it is for the benefit of the grantee. It is essential that there be evidence of such additional circumstances as will afford a reasonable presumption or proof of acceptance.<sup>4</sup> It must at least appear that the deed was delivered unconditionally to the third person for the use of the grantee, and that it is received by such third person as the agent of the grantee; and in that case the grantee's acceptance may be presumed from the beneficial nature of the conveyance, in the absence of his express dissent.<sup>5</sup>

<sup>1</sup> *Miller v. Irish Catholic Asso.* 36 Minn. 357, 31 N. W. Rep. 215.

<sup>2</sup> *Thompson v. Leach*, 2 Vent. 198; *Townson v. Tickell*, 3 B. & A. 31, 36; *Gugenheimer v. Lockridge*, 39 W. Va. 457, 19 S. E. Rep. 874; *Diefendorf v. Diefendorf*, 132 N. Y. 100, 30 N. E. Rep. 375, affirming 8 N. Y. Supp. 617; *Davis v. Garrett*, 91 Tenn. 147, 18 S. W. Rep. 113; *Jones v. Swayze*, 42 N. J. L. 279; *Elsberry v. Boykin*, 65 Ala. 336; *Mitchell v. Ryan*, 3 Ohio St. 377; *Rivard v. Walker*, 39 Ill. 413; *McLean v. Nelson*, 1 Jones, 396; *Guard v. Bradley*, 7 Ind. 600; *Stewart v. Weed*, 11 Ind. 92; *Henry v. Anderson*, 77 Ind. 361; *Vaughan v. Godman*, 103 Ind. 499, 3 N. E. Rep. 257; *Cecil v. Beaver*, 28 Iowa, 241, 4 Am. Rep. 174; *Robinson v. Gould*, 26 Iowa, 89; *Tibbals*

*v. Jacobs*, 31 Conn. 428; *Merrills v. Swift*, 18 Conn. 257, 46 Am. Dec. 315; *Moore v. Giles*, 49 Conn. 570; *Renfro v. Harrison*, 10 Mo. 411.

<sup>3</sup> *Tibbals v. Jacobs*, 31 Conn. 428; *Ross v. Campbell*, 73 Ga. 309.

<sup>4</sup> *Moore v. Flynn*, 135 Ill. 74, 25 N. E. Rep. 844; *Hulick v. Scovil*, 9 Ill. 159; *Tuttle v. Turner*, 28 Tex. 759; *Commonwealth v. Jackson*, 10 Bush, 424; *Hibberd v. Smith*, 67 Cal. 547, 56 Am. Rep. 726.

<sup>5</sup> *Tompkins v. Wheeler*, 16 Pet. 106, 118; *Johnson v. Farley*, 45 N. H. 505; *Brown v. Austen*, 35 Barb. 341; *Jones v. Swayze*, 42 N. J. L. 279; *Church v. Gilman*, 15 Wend. 656, 30 Am. Dec. 82; *Munoz v. Wilson*, 111 N. Y. 295, 18 N. E. Rep. 855.

If the grantee is an infant and the deed is beneficial to him, his acceptance is almost always presumed.<sup>1</sup>

**1283.** Acceptance is not presumed in case the deed imposes any burden or obligation upon the grantee, such, for instance, as the assumption of an existing mortgage upon the property. In case the grantee, upon being informed of the conveyance, refuses to accept it, but at the grantor's request executes a deed to reconvey the title, his deed of reconveyance is not a recognition of the deed to himself and an acceptance of it, and does not render him liable under the clause reciting his assumption of the mortgage.<sup>2</sup>

**1284.** Acceptance of an assignment for the benefit of creditors is presumed if the assignment is a valid one; but there is no such presumption in case the assignment does not conform to statutory regulations upon the subject.<sup>3</sup>

**1285.** The acceptance by creditors of a mortgage beneficial to them will be presumed in the absence of evidence to the contrary.<sup>4</sup>

#### VIII. *Presumption of Delivery from Recitals or Acknowledgment.*

**1286.** A recital of delivery in the formal parts of a deed, duly signed, sealed, and attested, is not sufficient evidence of its delivery.<sup>5</sup> It is immaterial whether this recital be in the *in*

<sup>1</sup> Hall v. Hall, 107 Mo. 101, 17 S. W. Rep. 811; Tobin v. Bass, 85 Mo. 654; Palmer v. Palmer, 62 Iowa, 204, 17 N. W. Rep. 463; Spencer v. Carr, 45 N. Y. 406; Masterson v. Cheek, 23 Ill. 72; Cook v. Patrick, 135 Ill. 499, 26 N. E. Rep. 658; Davenport v. Prewett, 9 B. Mon. 94, 98; Owings v. Tucker, 90 Ky. 297, 13 S. W. Rep. 1078.

<sup>2</sup> Best v. Brown, 25 Hun, 223; Rittmaster v. Brisbane, 19 Colo. 371, 35 Pac. Rep. 736.

<sup>3</sup> Tompkins v. Wheeler, 16 Pet. 106; Brooks v. Marbury, 11 Wheat. 78; Wilt v. Franklin, 1 Binn. 502, 2 Am. Dec. 474; Johnson v. Farley, 45 N. H. 505; Price v. Parker, 11 Iowa, 144; American, &c. Co. v. Frank, 62 Iowa, 202, 17 N. W. Rep. 464; Skipwith v. Cunningham, 8 Leigh, 271, 281, 285; Zell Guano Co. v. Heatherly, 38 W. Va. 409, 18 S. E. Rep. 611.

<sup>4</sup> Breathwit v. Bank, 60 Ark. 26, 28 S. W. Rep. 511, citing Hempstead v. Johnston, 18 Ark. 123; McCain v. Pickens, 32 Ark. 399, 405; Grove v. Brien, 8 How. 429; Tompkins v. Wheeler, 16 Pet. 106; Townson v. Tickell, 3 Barn. & A. 31, 36; Ensworth v. King, 50 Mo. 477; Robinson v. Gould, 26 Iowa, 89; Jackson v. Bodle, 20 Johns. 184.

<sup>5</sup> Fisher v. Hall, 41 N. Y. 416; Bryant v. Bryant, 42 N. Y. 11; Weed v. Hewlett, 12 N. Y. Supp. 606; Cusack v. Tweedy, 11 N. Y. Supp. 16. A recital of delivery made in the attestation clause has, however, in a few cases been regarded as some evidence from which the jury may be allowed to find a deed was delivered. Diehl v. Emig, 65 Pa. St. 320; Burton v. Boyd, 7 Kans. 17; Nay v. Mognain, 24 Kans. 75; Moore v. Hazelton, 9 Allen, 102, 106, per Gray, J.; Parrott v. Avery, 159 Mass.

*testimonium* clause of the deed, in the attestation clause, or in the certificate of acknowledgment; this recital does not even amount to a presumption of delivery. Thus, where a deed of real estate was executed by the grantor, and attested by witnesses under a clause stating that it had been sealed and delivered in their presence, but the grantee was not then present, and remained ignorant of the existence of the deed until long after the death of the grantor, who had continuously remained in possession of the property until his death, when the deed was found among his papers, it was held that no delivery could be presumed or inferred.<sup>1</sup>

A recital in a will made shortly before the testator's death that he had "executed and delivered" to his wife a certain deed described, and such a deed duly executed was found in his office safe after his death, in an envelope containing other valuable papers belonging to his wife of which he had charge, in connection with the relationship of the parties and the way in which the wife's valuable papers were kept, was held to establish a delivery of the deed.<sup>2</sup>

594, 35 N. E. Rep. 94; *Howe v. Howe*, 99 Mass. 98, per Hoar, J.; *Stewart v. Redditt*, 3 Md. 67; *Hill v. McNichol*, 80 Me. 209, 13 Atl. Rep. 883; *Rushin v. Shields*, 11 Ga. 636, 56 Am. Dec. 436; *Davis v. Williams*, 57 Miss. 843; *Stone v. French*, 37 Kans. 145, 14 Pac. Rep. 530. See, however, *Farrar v. Bridges*, 5 Humph. 411.

<sup>1</sup> *Fisher v. Hall*, 41 N. Y. 416, 421. "A rule of law by which a voluntary deed executed by the grantor, afterward retained by him during his life in his own exclusive possession and control, never during that time made known to the grantee, and never delivered to any one for him, or declared by the grantor to be intended as a present operative conveyance, could be permitted to take effect as a transmission of the title, is so inconsistent with every substantial right of property as to deserve no toleration whatever from any intelligent court either of law or equity." Per Daniels, J. And see *Critchfield v. Critchfield*, 24 Pa. St. 100; *Wiggins v. Lusk*, 12 Ill. 132.

In *Benneson v. Aiken*, 102 Ill. 284, 289, 40 Am. Rep. 592, Craig, C. J., said: "If a man signs and acknowledges a deed, but, making no delivery, merely retains it in his possession until his death, when it is found among his papers, no one would pretend that such an instrument would pass title."

<sup>2</sup> *Toms v. Owen*, 52 Fed. Rep. 417, 420. Jackson, J., delivering judgment, said: "There is no fact or circumstance disclosed by the evidence that fairly or necessarily negatives the presumption arising from the formal execution of the conveyance, and its being deposited with and found among other valuable papers of the grantee, that the deed was never delivered so as to become operative in the lifetime of the grantee. . . . When the grantor formally declared in his will that he had 'executed and delivered' to his wife such a conveyance, the language should be given its natural force and legal meaning, and, in view of the other facts and circumstances, should be held sufficient to establish the delivery of the deed."



**1287. Acknowledgment** in addition to the signing of a deed affords no legal presumption of delivery.<sup>1</sup> The acknowledgment only proves that the deed was signed. But if there are other facts from which a presumption of delivery arises, as that the deed is found in the hands of the grantee, the due acknowledgment of the deed strengthens the presumption.<sup>2</sup> The presumption arising from the grantee's possession of the deed would be greatly impaired, if not defeated, in case it appeared that the deed had not been completed ready for delivery. But acknowledgment is by many authorities regarded as a circumstance tending to show delivery, but, of course, not at all conclusive of delivery.<sup>3</sup>

Where a deed was executed and acknowledged, but was retained by the grantor, with the consent of the grantee, to await the payment of the consideration, and the grantor died before the payment was made, and the deed was found among his papers, there was no delivery by the grantor or acceptance by the grantee, and therefore the deed was without effect.<sup>4</sup>

**1288. Some authorities** hold, however, that a deed duly executed and acknowledged is *prima facie* a valid deed, in the absence of controlling evidence, although there was no formal delivery of it, and the deed, after the death of the grantor, was found among his private papers.<sup>5</sup> If there is nothing to qualify the declaration of delivery in the presence of witnesses, and the certificate of the officer taking the acknowledgment, but the keeping of the deed in the hands of the party who executed it, his intention that the deed should operate immediately may be inferred from his declared delivery of it.<sup>6</sup> If the deed was actu-

<sup>1</sup> *Boyd v. Slayback*, 63 Cal. 493; *Porter v. Buckingham*, 2 Harr. (Del.) 197; *Hutchinson v. Rust*, 2 Gratt. 394; *Fain v. Smith*, 14 Oreg. 82, 12 Pac. Rep. 365; *Davis v. Williams*, 57 Miss. 843; *Turner v. Carpenter*, 83 Mo. 333; *Union Mut. Life Ins. Co. v. Campbell*, 95 Ill. 267, 35 Am. Rep. 166; *McFadgen v. Eisensmidt*, 10 Humph. 567; *Alexander v. De Kermel*, 81 Ky. 345.

<sup>2</sup> *Cover v. Manaway*, 115 Pa. St. 338, 8 Atl. Rep. 393.

<sup>3</sup> *Ferguson v. Bond*, 39 W. Va. 561, 20 S. E. Rep. 591; *Hutchison v. Rust*, 2 Gratt. 394.

<sup>4</sup> *Jackson v. Dunlap*, 1 Johns. Cas. 114, 1 Am. Dec. 100.

<sup>5</sup> *Linton v. Brown*, 20 Fed. Rep. 455; *Blight v. Schenck*, 10 Pa. St. 285, 51 Am. Dec. 478; *Diehl v. Emig*, 65 Pa. St. 320; *Schrugham v. Wood*, 15 Wend. 545, 30 Am. Dec. 75; *Souverye v. Arden*, 1 Johns. Ch. 240; *Kille v. Ege*, 79 Pa. St. 15; *Himes v. Keighblynger*, 14 Ill. 469; *Lyon v. McIlvaine*, 24 Iowa, 9; *Kane v. Mackin*, 9 S. & M. 387; *Leppoc v. Nat. Union Bank*, 32 Md. 136; *Hutchins v. Dixon*, 11 Md. 29; *Phelps v. Phelps*, 17 Md. 120; *Ensworth v. King*, 50 Mo. 477.

<sup>6</sup> *Pennel v. Weyant*, 2 Harr. (Del.)

ally delivered it is a deed, though it be afterwards found in the possession of the grantor.<sup>1</sup> But if at the time of the formal execution of a deed the grantor directed it to be recorded and returned to him, with the avowed intention of delivering it only on some future contingency which never occurred, and there never was any actual delivery, the paper remaining in the grantor's custody till his death, there was no delivery sufficient to make an effectual deed.<sup>2</sup>

*IX. Recording alone does not constitute a Delivery.*

1289. The recording of a deed without the knowledge of the grantee does not generally, without other circumstances, amount to a delivery of it.<sup>3</sup> The register is not ordinarily an

501, 508, per Clayton, C. J.; Seibel v. Rapp, 85 Va. 28.

<sup>1</sup> Furguson v. Bond, 39 W. Va. 561, 20 S. E. Rep. 591.

<sup>2</sup> Pennel v. Weyant, 2 Harr. (Del.) 501, 505. And see Wiggins v. Lusk, 12 Ill. 132.

<sup>3</sup> Younge v. Guilbeau, 3 Wall. 636, 641; Parmelee v. Simpson, 5 Wall. 81. Colorado: Rittmaster v. Brisbane, 19 Colo. 371, 35 Pac. Rep. 736. Delaware: Pennel v. Weyant, 2 Harr. 501, 508; Jones v. Bush, 4 Harr. 1. Illinois: Weber v. Christen, 121 Ill. 91, 98, 11 N. E. Rep. 893; Union Mut. Ins. Co. v. Campbell, 95 Ill. 267, 35 Am. Rep. 166; Thompson v. Dearborn, 107 Ill. 87; Byars v. Spencer, 101 Ill. 429, 40 Am. Rep. 212; Kingsbury v. Burnside, 58 Ill. 310, 11 Am. Rep. 67; Krebaum v. Cordell, 63 Ill. 23; Wiggins v. Lusk, 12 Ill. 132; Herbert v. Herbert, Breese, 278, 12 Am. Dec. 192, 194. In the latter case the court said: "The act of recording a deed cannot amount to a delivery when there does not appear an assent or knowledge by the grantee of the act. In this case there is not a scintilla of evidence calculated to lead the mind to the belief that the grantee knew of the existence of the deed until after the death of the grantor. There could, then, have been no acceptance by the grantee, because the possession, if such had been the fact, derived after the death of the grantor,

could not amount to one, there having been no delivery during the life of the grantor." Quoted with approval in Union Mut. Ins. Co. v. Campbell, 95 Ill. 267, 282, 35 Am. Rep. 166. Indiana: Woodbury v. Fisher, 20 Ind. 387, 83 Am. Dec. 325; Jones v. Loveless, 99 Ind. 317; Vaughan v. Godman, 94 Ind. 191. Iowa: Deere v. Nelson, 73 Iowa, 186, 34 N. W. Rep. 809; Day v. Griffith, 15 Iowa, 104; Cobb v. Chase, 54 Iowa, 253, 6 N. W. Rep. 300. Kentucky: Alexander v. De Kermel, 81 Ky. 345; Jefferson Co. Build. Asso. v. Heil, 81 Ky. 513. Maine: Patterson v. Snell, 67 Me. 559; Hill v. McNichol, 80 Me. 209, 13 Atl. Rep. 883; McGraw v. McGraw, 79 Me. 257; Oxnard v. Blake, 45 Me. 602. Maryland: Leppoe v. Union Bank, 32 Md. 136. Massachusetts: Maynard v. Maynard, 10 Mass. 456, 6 Am. Dec. 146; Samson v. Thornton, 3 Met. 275, 37 Am. Dec. 135; Parker v. Hill, 8 Met. 447; Hawkes v. Pike, 105 Mass. 560, 7 Am. Rep. 554; Brabrook v. Bank, 104 Mass. 228, 231; Commonwealth v. Cutler, 153 Mass. 252, 26 N. E. Rep. 855; Parrott v. Avery, 159 Mass. 590, 35 N. E. Rep. 94; Barnes v. Barnes, 161 Mass. 381, 37 N. E. Rep. 370. Michigan: Hendricks v. Rasson, 53 Mich. 575, 19 N. W. Rep. 192. Missouri: Cravens v. Rossiter, 116 Mo. 338, 22 S. W. Rep. 736. New Hampshire: Derry Bank v. Webster, 44 N. H. 264; Barns v. Hatch, 3

agent of the grantee to accept the conveyance, unless the grantee has constituted him such agent, or the circumstances warrant the presumption of such agency.<sup>1</sup> Thus, a register of deeds wrote a deed for the grantor, which the latter signed and sealed and left with the register to be recorded. The register had no authority from the grantee, who was absent, to receive or keep the deed for him, and did not undertake to act for him, but gave the deed back to the grantor after recording it. It was held that there was no delivery of the deed to the grantee.<sup>2</sup>

Where an administrator became indebted to the estate he was administering, and for the purpose of securing such indebtedness he executed a note and mortgage to himself as administrator, which were found among his papers after his decease, it was held that there was no sufficient evidence of the delivery of the mortgage, and that the subsequent recording of it by his successor in the trust did not give it validity.<sup>3</sup>

A deed executed by a father, conveying land to his son, was left by the grantor in the hands of the scrivener, with directions to get it recorded, and it was recorded; but the deed at the grantor's request still remained in the scrivener's hands until the death of the son, when the father reclaimed and cancelled it, the son having known nothing of the transaction. It was held that the father was still entitled to the land, as against the son's heirs, the conveyance never having been perfected by delivery.

N. H. 304; *Johnson v. Farley*, 45 N. H. 505, 510, per Bellows, J. **New Jersey**: *Beckett v. Heston*, 49 N. J. Eq. 510, 23 Atl. Rep. 1014. **New York**: *Jackson v. Phipps*, 12 Johns. 418; *Stilwell v. Hubbard*, 20 Wend. 44; *Gifford v. Corrigan*, 105 N. Y. 223, 11 N. E. Rep. 498. **Pennsylvania**: *Critchfield v. Critchfield*, 24 Pa. St. 100. **Tennessee**: *Thompson v. Jones*, 1 Head, 574; *McEwen v. Bamberger*, 3 Lea, 576; *Davis v. Cross*, 14 Lea, 637, 52 Am. Rep. 177. See, however, *Davis v. Garrett*, 91 Tenn. 147, 18 S. W. Rep. 113. **Texas**: *Culmore v. Genove (Tex.)*, 24 S. W. Rep. 83. **Vermont**: *Walsh v. Vt. Mut. F. Ins. Co.* 54 Vt. 351; *Elmore v. Marks*, 39 Vt. 538; *Denton v. Perry*, 5 Vt. 382; *Gorham v. Meacham*, 63 Vt. 231, 22 Atl. Rep. 572.

<sup>1</sup> *Parmelee v. Simpson*, 5 Wall. 81.

<sup>2</sup> *Hawkes v. Pike*, 105 Mass. 560, 7 Am. Rep. 554. "The register was employed by the grantor only, and all that he was to do, or undertook to do, was, in his official capacity of register, to record the deed. . . . It was, then, simply a delivery to the register for the purpose of registration, which is wholly insufficient to pass any title to the grantee. There was no agent to accept the deed; no delivery to give effect to the deed as a conveyance. On the contrary, it appears from the grantor's testimony, which seems to be uncontradicted, that the delivery which he had in his mind was to take the deed from the register and send it by mail to his son in California." Per Ames, J.

<sup>3</sup> *Gorham v. Meacham*, 63 Vt. 231, 22 Atl. Rep. 572.

The act of registering the deed did not amount to a delivery, because there was no assent to the registry by the grantee.<sup>1</sup>

An elderly woman, wishing to distribute her property in her lifetime and retain its use and control for her support, executed a deed of the property she wished her son to have, and placed it on record, and then asked her son to execute to her a declaration of trust, when she would deliver to him the deed. The son refused to execute the declaration of trust, and claimed the land absolutely. He never had possession of the deed, except to carry it in an envelope from the post-office to his mother, to whom it was sent by mail by the recorder. There had consequently been no delivery, and the mother was entitled to relief in equity by having the deed set aside.<sup>2</sup>

1290. The recording of a deed by the grantor, taken in connection with other acts and circumstances showing an intention on his part to deliver the deed, and an intention on the part of the grantee to accept the deed, is entitled to much consideration in making out a delivery.<sup>3</sup> Without other evidence of delivery the record of a deed is at most only *prima facie* evidence of it.<sup>4</sup> But if it be *prima facie* evidence of delivery, the burden is imposed upon the grantor and those claiming under him to show by clear countervailing proof that a delivery was not intended.<sup>5</sup> There are numerous cases, however, in which the appearance of a deed upon the record seems not to be regarded as alone even *prima facie* proof of delivery, and as dispensing in the first instance with the necessity of proof of delivery. There must be something more than a mere delivery of the deed to the recorder for record to constitute a delivery to the grantee. The grantor's

<sup>1</sup> Maynard v. Maynard, 10 Mass. 456, 6 Am. Dec. 146. And see McGraw v. McGraw, 79 Me. 257; Thatcher v. St. Andrews Church, 37 Mich. 264, 268.

<sup>2</sup> Beckett v. Heston, 49 N. J. Eq. 510, 23 Atl. Rep. 1014. And see Armstrong v. Armstrong, 19 N. J. Eq. 357; Cannon v. Cannon, 26 N. J. Eq. 316.

<sup>3</sup> Younge v. Guilbeau, 3 Wall. 636; Hedge v. Drew, 12 Pick. 141, 52 Am. Dec. 416; Davis v. Cross, 14 Lea, 637, 15 Am. Rep. 177; Leppoc v. Union Bank, 32 Md. 136, per Alvey, J.; Walton v. Burton, 107 Ill. 54; Blight v. Schenck, 10 Pa. St.

285, 51 Am. Dec. 478; Pearce v. Dansforth, 13 Mo. 360; Burke v. Adams, 80 Mo. 504; Glaze v. Three Rivers F. Ins. Co. 87 Mich. 349, 49 N. W. Rep. 595; Bliss v. West, 11 N. Y. Supp. 374.

<sup>4</sup> Walsh v. Vt. Mut. F. Ins. Co. 54 Vt. 351; Boardman v. Dean, 34 Pa. St. 252; Blight v. Schenck, 10 Pa. St. 289, 51 Am. Dec. 478; Union Mut. Ins. Co. v. Campbell, 95 Ill. 267, 35 Am. Rep. 166; Chess v. Chess, 1 Pa. 32, 21 Am. Dec. 350; Phelps v. Phelps, 17 Md. 120; Hutchins v. Dixon, 11 Md. 29.

<sup>5</sup> Burke v. Adams, 80 Mo. 504.

unexpressed intention to pass the title to the grantee, and the recording of the deed by the register, do not constitute a delivery.<sup>1</sup>

**1291.** The presumption of a delivery arising from recording is stronger in the case of a mortgage or deed to secure an actual indebtedness, or has so been regarded in some cases, provided the mortgage imposes no duties or liabilities upon the grantee. At any rate, there are cases holding that a delivery and acceptance of a mortgage may be presumed from its registration, though the mortgagee did not know of its existence till after the death of the mortgagor.<sup>2</sup> The better rule of law, however, is that there must be in the case of a mortgage, as in the case of an absolute deed, some evidence of delivery and acceptance, and that the recording of the mortgage does not of itself raise a presumption of delivery and acceptance.<sup>3</sup>

If the deed imposes any obligation upon the grantee, such as the assumption of an existing incumbrance upon the property, delivery and acceptance cannot be inferred from the recording of the deed.<sup>4</sup>

**1292.** There is much authority for the rule that the recording of a deed affords a presumption of a legal delivery to the grantee.<sup>5</sup> This presumption seems to be founded upon the as-

<sup>1</sup> *Barnes v. Barnes*, 161 Mass. 381, 37 N. E. Rep. 379.

<sup>2</sup> *Tompkins v. Wheeler*, 16 Pet. 106; *Merrills v. Swift*, 18 Conn. 257, 46 Am. Dec. 315; *Wilsey v. Dennis*, 44 Barb. 354; *Geissmann v. Wolf*, 46 Hun, 289; *Munoz v. Wilson*, 111 N. Y. 295, 18 N. E. Rep. 855; *Ensworth v. King*, 50 Mo. 477; *Elsberry v. Boykin*, 65 Ala. 336. See *Jamison v. Craven*, 4 Del. Ch. 311; *Mallett v. Page*, 8 Ind. 364.

<sup>3</sup> *Jefferson Co. Build. Asso. v. Heil*, 81 Ky. 513.

<sup>4</sup> *Thompson v. Dearborn*, 107 Ill. 87; *Best v. Brown*, 25 Hun, 223; *Gifford v. Corrigan*, 105 N. Y. 257, 22 N. E. Rep. 22, 38 Hun, 350.

<sup>5</sup> *Bulkley v. Buffington*, 5 McLean, 457; *Laughlin v. Calumet, &c. Dock Co.* (C. C. App.) 65 Fed. Rep. 441. **Alabama**: *Alexander v. Alexander*, 71 Ala. 295; *Elsberry v. Boykin*, 65 Ala. 336; *Sheffield Land, &c. Co. v. Neill*, 87 Ala.

158, 6 So. Rep. 1; *Lewis v. Watson*, 98 Ala. 479, 13 So. Rep. 570. **California**: *Bensley v. Atwill*, 12 Cal. 231. **Georgia**: *Wellborn v. Weaver*, 17 Ga. 267, 63 Am. Dec. 235; *Ross v. Campbell*, 73 Ga. 309; *Gordon v. Trimmier*, 91 Ga. 472, 18 S. E. Rep. 404. **Illinois**: *Hines v. Keighlingher*, 14 Ill. 469; *Union Mut. Ins. Co. v. Campbell*, 95 Ill. 267, 35 Am. Rep. 166; *Kingsbury v. Burnside*, 58 Ill. 310, 11 Am. Rep. 67; *Warren v. Jacksonville*, 15 Ill. 236; *Grundies v. Reid*, 107 Ill. 304; *McDaid v. Call*, 111 Ill. 298. **Indiana**: *Quick v. Milligan*, 108 Ind. 419, 9 N. E. Rep. 392. **Iowa**: *Robinson v. Gould*, 26 Iowa, 89, per *Dillon, J.* **Kansas**: *Heil v. Redden*, 45 Kans. 562, 26 Pac. Rep. 2. **Maine**: *Rowell v. Hayden*, 40 Me. 582. **Maryland**: *Leppoc v. Bank*, 32 Md. 136; *Stokes v. Detrick*, 75 Md. 256, 23 Atl. Rep. 846. **Michigan**: *Stevens v. Castel*, 63 Mich. 111, 29 N. W. Rep. 828; *Compton v. White*, 86 Mich. 33, 48 N. W. Rep. 635; *Gage v. Gage*,

sumption that the recorder is the agent of the grantee, and acts for him in receiving and recording the deed, and that hence it is his duty after recording it to hold it for the grantee and return it to him. The recorder's possession of the deed is regarded as the possession of the grantee.<sup>1</sup> This may be true in case the grantor has delivered the deed to the recorder for the use of the grantee, and to be handed to him when it has been spread upon the record.<sup>2</sup> The grantee may confirm the agency; or there may be circumstances which will make the delivery complete from the time the deed is delivered to the recorder, or even before that time, though there has never been a formal delivery to the grantee. But in cases where the intention of the grantor is not otherwise manifested, or where the grantor has directed the return of the deed to himself, the recording of it is not a circumstance of weight in making out a delivery.<sup>3</sup> What the grantor said to the register at the time of leaving the deed for record is

36 Mich. 229; Patrick v. Howard, 47 Mich. 40, 10 N. W. Rep. 71; Glaze v. Three Rivers F. Ins. Co. 87 Mich. 349, 49 N. W. Rep. 595. **Mississippi**: Ingraham v. Grigg, 21 Miss. 22; Bullitt v. Taylor, 34 Miss. 708, 69 Am. Dec. 412; Metcalfe v. Brandon, 60 Miss. 685. **Nebraska**: Bowman v. Griffith, 35 Neb. 361, 53 N. W. Rep. 140. **New Jersey**: Collins v. Collins, 45 N. J. Eq. 813, 18 Atl. Rep. 860. **New York**: Jackson v. Perkins, 2 Wend. 308; Gilbert v. N. A. Fire Ins. Co. 23 Wend. 43, 35 Am. Dec. 543; Messelback v. Norman, 46 Hun, 414; Elsay v. Metcalf, 1 Den. (N. Y.) 323; Scrugham v. Wood, 15 Wend. 545, 30 Am. Dec. 75; Wallace v. Berdell, 97 N. Y. 13; Munoz v. Wilson, 111 N. Y. 295, 18 N. E. Rep. 855; Lawrence v. Farley, 24 Hun, 293; Cusack v. Tweedy, 56 Hun, 617, 11 N. Y. Supp. 16; Rathbun v. Rathbun, 6 Barb. 98; Geissmann v. Wolf, 46 Hun, 289; Knolls v. Barnhart, 71 N. Y. 474. **Ohio**: Mitchell v. Ryan, 3 Ohio St. 377. **Pennsylvania**: Boardman v. Dean, 34 Pa. St. 252; Rigler v. Cloud, 14 Pa. St. 361; Juvenal v. Jackson, 14 Pa. St. 519; Chess v. Chess, 1 P. & W. 32, 21 Am. Dec. 350. **Tennessee**: Swiney v. Swiney, 14 Lea, 316; Thompson v. Jones, 1 Head, 574; Davis v. Garrett, 91 Tenn.

147, 18 S. W. Rep. 113, in which Lurton, J., reviews the cases on this point in Tennessee, and, referring to the case of Mason v. Holman, 10 Lea, 315, relied upon as holding that registration of a deed of gift by the grantor is not sufficient evidence of delivery, says that case goes to the verge of the law, and should be limited to its facts. **Texas**: Luzenburg v. Bexar Bldg. Asso. (Tex. Civ. App.) 29 S. W. Rep. 237.

The presumption of delivery by reason of record has been held to apply even in case the grantor is himself the register of deeds. Fenton v. Miller, 94 Mich. 204, 53 N. W. Rep. 957.

The fact that a deed, which a grantor has kept possession of up to the time of his death, has not been recorded, is said to afford at least *prima facie* evidence of its non-delivery. Bovee v. Hinde, 135 Ill. 137, 25 N. E. Rep. 694.

<sup>1</sup> Stewart v. Redditt, 3 Md. 67.

<sup>2</sup> Powers v. Russell, 13 Pick. 69; Connard v. Colgan, 55 Iowa, 538, 8 N. W. Rep. 351.

<sup>3</sup> Powers v. Russell, 13 Pick. 69; Stevens v. Castel, 63 Mich. 111, 29 N. W. Rep. 828; Metcalfe v. Brandon, 60 Miss. 685.

clearly a part of the *res gestæ*, and is admissible as explaining the character and intent of his act.<sup>1</sup>

1293. There are some cases in which it seems to be claimed that the recording of a deed is sufficient if not conclusive evidence of its delivery,<sup>2</sup> and there are other cases which go so far as to hold that the recording of the deed, standing alone, raises no presumption whatever of delivery. But the authorities in greater number, while holding that the mere act of recording, unaccompanied by other evidence of an intention to deliver the deed, raises no absolute presumption of it, yet if this act be accompanied by other evidence of acts or declarations indicating such intention, attach considerable weight to the recording of the deed; but, on the other hand, they hold if this act be accompanied by evidence of acts or declarations showing that there was no intention to deliver the deed, the recording of it raises no presumption whatever of delivery.<sup>3</sup> Whether registration amounts to a delivery is a question of intention. If it is shown that the grantor directed the recording of the deed, or afterwards assented to it, and paid the register's fees, there is some evidence of an intention to deliver the deed.<sup>4</sup>

1294. Such presumption of delivery as arises from the grantor's recording his deed is readily repelled by evidence of the attendant and subsequent circumstances and declarations of the party.<sup>5</sup> Thus, where the grantee had no knowledge of the existence of the deed, and it was made without his direction, and the property which it purported to convey always remained in the possession of the grantor, the presumption of a delivery arising from record was held to be repelled where it appeared that the grantee was never in possession, and never made any claim under the deed; that the land was valuable for use and occupation, and that the fact of registry was repelled.<sup>6</sup> And so the presumption of de-

<sup>1</sup> *Stevens v. Castel*, 63 Mich. 111, 29 N. W. Rep. 828.

<sup>2</sup> *Compton v. White*, 86 Mich. 33, 48 N. W. Rep. 635; *Cecil v. Beaver*, 28 Iowa, 241; *Gordon v. Trimmier*, 91 Ga. 472, 18 S. E. Rep. 404.

In *Massachusetts* recording is conclusive of delivery. Acts 1892, ch. 256.

<sup>3</sup> *Stevens v. Castel*, 63 Mich. 111, 29 N. W. Rep. 828; *Huse v. Den*, 85 Cal. 390, 24 Pac. Rep. 790.

<sup>4</sup> *Swiney v. Swiney*, 14 Lea, 316; *McEwin v. Troost*, 1 Sneed, 186, 191; *Alexander v. De Kermel*, 81 Ky. 345; *Burk v. Adams*, 80 Mo. 504, 50 Am. Rep. 510.

<sup>5</sup> *Comfort v. Mosser*, 121 Pa. St. 455, 15 Atl. Rep. 612; *Gilbert v. North Am. F. Ins. Co.* 23 Wend. (N. Y.) 43, 35 Am. Dec. 543; *Wilsey v. Dennis*, 44 Barb. 354; *Dwinell v. Bliss*, 58 Vt. 353.

<sup>6</sup> *Younge v. Guilbeau*, 3 Wall. 636.

livery was held to be repelled where it appeared that the grantee was never in possession, and never made any claim under the deed; that the land was valuable for use and occupation, and that the grantor and his heirs remained in possession many years without recognizing any rights under the deed. On the contrary, in such a case a presumption arises that the deed was never delivered.<sup>1</sup> Such presumption is repelled also where it appears that the deed was from a father to his son, and that the latter obtained the key of the box containing the deeds from his father the day before his father's death, unlocked the box, and took out the deed, which he recorded two days later.<sup>2</sup>

Such presumption is also repelled by proof that the grantor directed the register to return the deed to him after recording, and that the grantee never knew anything of the deed till long afterwards.<sup>3</sup> There is no delivery where the recording of the deed occurred through the mistake of the notary, without the authority, knowledge, or consent of the grantor, who retained possession of the deed during his lifetime.<sup>4</sup>

**1295.** There is no delivery of a deed sent by mail to the grantee without any previous arrangement, until the grantee receives and accepts the deed, and until such receipt the land is subject to attachment and levy by the grantor's creditors. Thus, a resident of Iowa, while visiting his father in Vermont, gave him the right to purchase the land if he should see fit. Some time afterwards, without further negotiation or communication, the son executed a deed of the land to his father, had it recorded, and sent it to him by mail. It was held that the delivery did not take place until the actual receipt of the deed by the father in Vermont, and the acceptance of it by him.<sup>5</sup>

**1296.** A delivery of a deed by the grantor to the register of deeds for the use of the grantee, when assented to by the latter, is equivalent to an actual delivery, and the deed will prevail against an attachment made after such assent by a creditor of the grantor.<sup>6</sup> The deed in such case takes effect from the time

<sup>1</sup> *Knolls v. Barnhart*, 71 N. Y. 474.

<sup>4</sup> *Culmore v. Genove* (Tex. Civ. App.), 24 S. W. Rep. 83.

<sup>2</sup> *Jourdan v. Patterson*, 102 Mich. 602, 61 N. W. Rep. 64; *Patrick v. Howard*, 47 Mich. 40, 10 N. W. Rep. 71.

<sup>5</sup> *Deere v. Nelson*, 73 Iowa, 186, 34 N. W. Rep. 809.

<sup>3</sup> *Metcalf v. Brandon*, 60 Miss. 685; *Alexander v. Alexander*, 71 Ala. 295.

<sup>6</sup> *Hedge v. Drew*, 12 Pick. 141, 22 Am. Dec. 416; *Thayer v. Stark*, 6 Cush. 11;



of the delivery to the recording officer.<sup>1</sup> Acceptance by the grantee will ordinarily be inferred from very slight circumstances;<sup>2</sup> but on this point there is naturally considerable difference of opinion between the various courts. While some courts infer an acceptance from proofs of very slight circumstances, other courts rigidly require proof of circumstances which clearly tend to prove such acceptance. The tendency of the most recent decisions, however, seems to be to insist strongly upon the proof of some act of acceptance on the part of the grantee. If the circumstances are such that a delivery to the recorder may be regarded as a delivery to the grantee, of course the property is not afterwards subject to attachment or levy by a creditor of the grantor, or to any disposal of it by the grantor himself; but if the deed has been made without the knowledge of the grantor, and the circumstances do not warrant a finding that the register was authorized to accept the deed in behalf of the grantor, the property is still subject, till acceptance by the grantee, to the disposal of the grantor, or to liens acquired by his creditors.<sup>3</sup>

1297. The intention of the grantor to confer title upon an infant may be inferred from his placing the deed upon record.<sup>4</sup>

Greene v. Conant, 151 Mass. 223, 24 N. E. Rep. 44; Boody v. Davis, 20 N. H. 140, 51 Am. Dec. 210; Derry Bank v. Webster, 44 N. H. 264; Jackson v. Cleveland, 15 Mich. 94, 90 Am. Dec. 266; Welch v. Sackett, 12 Wis. 243; Prettyman v. Goodrich, 23 Ill. 330; Dale v. Lincoln, 62 Ill. 22; Connard v. Colgan, 55 Iowa, 538, 8 N. W. Rep. 351.

<sup>1</sup> Rathbun v. Rathbun, 6 Barb. 98; Elsey v. Metcalf, 1 Denio, 323.

<sup>2</sup> Metcalfe v. Brandon, 60 Miss. 685; Cecil v. Beaver, 28 Iowa, 241, 4 Am. Dec. 174.

<sup>3</sup> Maynard v. Maynard, 10 Mass. 456, 6 Am. Dec. 146; Harrison v. Phillips Academy, 12 Mass. 455, 461; Dole v. Bodman, 3 Met. 139; Oxnard v. Blake, 45 Me. 602.

<sup>4</sup> Masterson v. Cheek, 23 Ill. 72; Folk v. Varn, 9 Rich. Eq. 303; Wall v. Wall, 30 Miss. 91; Compton v. White, 86 Mich. 33, 48 N. W. Rep. 635; Davis v. Davis (Iowa), 60 N. W. Rep. 507; Cecil v. Beaver, 28 Iowa, 241, 4 Am. Rep. 174, per Dillon, C.

J.; Palmer v. Palmer, 62 Iowa, 204; 17 N. W. Rep. 463; Robinson v. Gould, 26 Iowa, 89, 92; Moore v. Giles, 49 Conn. 570; Davis v. Garrett, 91 Tenn. 147, 18 S. W. Rep. 113; Vaughan v. Godman, 94 Ind. 191, 197; Tobin v. Bass, 85 Mo. 654, 55 Am. Rep. 392; Mitchell v. Ryan, 3 Ohio St. 377; Annis v. Wilson, 15 Colo. 236, 25 Pac. Rep. 304; Davis v. Garrett, 91 Tenn. 147, 18 S. W. Rep. 113.

In Colee v. Colee, 122 Ind. 109, 23 N. E. Rep. 687. A married woman, for the purpose of putting her land beyond the reach of her husband, executed a conveyance thereof to her children, all, with one exception, infants. Three of the grantees, including the adult, knew of and assented to the conveyance. After it was signed and acknowledged, the grantor caused the deed to be recorded, and then took possession of it, intending to retain the deed and the land in her possession until her death. It was held that these facts constituted *prima facie* a delivery and acceptance of the deed.

As already noticed, an acceptance of a deed favorable to the interests of an infant may be inferred in his behalf, since the infant is legally incapable of expressing an acceptance. In such cases the delivery to the register is complete from the time of the delivery to him for the grantee's use.<sup>1</sup> But these cases are exceptions to the general rule, and even in such cases the better rule is that it is competent for the grantor to controvert the delivery of the deed to the infant, implied from his having caused the deed to be recorded by showing that he never in fact delivered the deed with the intent to give it effect as a conveyance.<sup>2</sup>

A deed executed by a husband to his wife, and recorded with her consent, is sufficiently delivered.<sup>3</sup>

**1298.** If, after the recording of a deed, the grantee takes possession under it, a delivery and acceptance may be inferred.<sup>4</sup> They may also be inferred from subsequent concurrent acts of the parties recognizing the transfer of the title, as where a deed had been executed and recorded without the knowledge of the grantee, and he subsequently, at the request of the grantor, conveyed the land to a third person; this recognition of the grantee's title under the deed was regarded as sufficient evidence

In *Rivard v. Walker*, 39 Ill. 413, the grantor conveyed his property to his infant children to prevent its being squandered by the wife, and delivered the deed without reservation for record. Afterwards the wife procured a divorce, and the grantor filed a bill praying that the deed might be set aside, and alleging that he had never delivered it. The court held that, in the case of infant children, a filing for record was a delivery, and denied the relief asked, and said: "By directing the deed to be recorded, and by its record, he gave to the public the most solemn assurances in his power that he had transferred his title to his children, and he cannot be permitted to resume it at pleasure because he may have afterwards been inclined to regret the act."

<sup>1</sup> *Bullitt v. Taylor*, 34 Miss. 708. In *Tallman v. Cooke*, 39 Iowa, 402, a father made a deed to his son when he was about four years old, but did not record the deed until about ten years thereafter. The father testified that delivery was in-

tended when the deed was executed, and the court so held.

<sup>2</sup> *Jones v. Loveless*, 99 Ind. 317; *Weber v. Christen*, 121 Ill. 91, 99, 11 N. E. Rep. 893. "From what has already appeared, we are fully satisfied there was no original intention on the part of Christen or his wife to part with the deed or the estate in the land. This is not only shown by his declarations to the father of the grantees and the notary who took the acknowledgment, but also by the fact that he never parted with the custody or control over the deeds during his lifetime. He did not even permit them to remain in the clerk's office but a few days, for the purpose of having them recorded. They were left at the office on the 16th of January, and taken out on the 5th of the following month."

<sup>3</sup> *Frank v. Frank* (Tex. Civ. App.), 25 S. W. Rep. 819.

<sup>4</sup> *Hammell v. Hammell*, 19 Ohio, 17; *Williams v. Williams*, 148 Ill. 426, 36 N. E. Rep. 104.

that at the time of the second transfer the deed had been delivered.<sup>1</sup> The fact that the grantor is in possession of a written contract signed by the grantee, stipulating for a reconveyance of the property to the grantor, is sufficient proof, in connection with the recording of the deed, to show a delivery.<sup>2</sup>

1299. If a deed be handed to a recording officer or other person by the grantor at the request of the grantee, this is a technical delivery which gives effect to the deed.<sup>3</sup> Thus, where there was a covenant for the conveyance of land before a day named, but there was a verbal agreement that the grantor, who resided a long distance from the grantee, should record the deed before sending it to the grantee, but so that it should reach the grantee before the day named, it was held that the depositing of the deed before the day named in the proper registry, to be recorded, was a delivery to the grantee and a performance of the covenant, though in fact the deed did not reach the hands of the grantee until after that day.<sup>4</sup>

1300. The grantee may ratify an unauthorized delivery to a register, but such ratification would not give the deed precedence, from the time of such delivery to the register, over an intervening mortgage or other conveyance or incumbrance in favor of a *bona fide* purchaser or creditor.<sup>5</sup> A delivery of the deed to the grantee after it has been recorded is a good delivery of it, and it need not be again recorded.<sup>6</sup>

1301. Where the grantor's object is to place property beyond reach of his creditors, the recording of a deed by the grantor, and the grantee's assent to it on being informed of the transaction, do not avail to prove a valid delivery, especially if he retained the custody and control of the deed after it was recorded; for in such case it must be inferred that it was not the original intention of the grantor to part with his estate in the land, or to confer any benefit upon the grantee.<sup>7</sup> Thus one who

<sup>1</sup> Gould v. Day, 94 U. S. 405.

<sup>2</sup> Parrott v. Baker, 82 Ga. 364, 9 S. E. Rep. 1068.

<sup>3</sup> Parmelee v. Simpson, 5 Wall. 81, 86, per Davis, J.; Shaw v. Hayward, 7 Cush. 170; Greene v. Conant, 151 Mass. 223, 24 N. E. Rep. 44; Hatch v. Bates, 54 Me. 136; Prignon v. Daussat, 4 Wash. St. 199, 29 Pac. Rep. 1046.

<sup>4</sup> Shaw v. Hayward, 7 Cush. 170.

<sup>5</sup> Parmelee v. Simpson, 5 Wall. 81; Hibberd v. Smith, 67 Cal. 547, 4 Pac. Rep. 473, 8 Pac. Rep. 46, 56 Am. Rep. 726.

<sup>6</sup> Kemp v. Walker, 16 Ohio, 118.

<sup>7</sup> Weber v. Christen, 121 Ill. 91, 11 N. E. Rep. 893; Union Mut. Ins. Co. v. Campbell, 95 Ill. 267, 35 Am. Rep. 166; Byars v. Spencer, 101 Ill. 429, 40 Am.

was threatened with unjust litigation executed a deed of land to his wife, which he left with his attorney, and, after summons was served on him in the threatened action, recorded the deed. The wife did not know of such deed until a long time after it was recorded. The deed reserved in the grantor the control of the land during his life, and he subsequently conveyed it to another. It was held that it was not the grantor's intention that the recording of the deed should constitute a delivery thereof, so as to pass title to the wife.<sup>1</sup>

A person indebted to several creditors executed a deed to one of them without the creditors' knowledge, and took it to the clerk's office to be filed, but directed the clerk not to record it, but to return it to him when he should call for it. By mistake the deed was recorded. The grantor subsequently took the deed away, and soon afterwards it was accidentally destroyed by fire. The grantee never had possession of the deed, and had no knowledge of its existence for several months after it was executed, when the grantor told him it was recorded by mistake. The grantor's purpose in making the deed was to prevent his creditors from attaching his property, and to this end he repeatedly asserted that the grantee owned the land. It was held that there was no such delivery of the deed as was necessary to give it effect as a conveyance.<sup>2</sup>

There are, however, some decisions to the effect that the putting of a deed on record is presumptively a delivery of it, as between grantor and grantee, when the object of the record is to defraud, hinder, or delay creditors.<sup>3</sup>

Rep. 212, per Walker, J.; *Kingsbury v. Burnside*, 58 Ill. 310, 11 Am. Rep. 67; *Krebaum v. Cordell*, 63 Ill. 23; *Jackson v. Phipps*, 12 Johns. 418; *Jackson v. Richards*, 6 Cow. 617.

<sup>1</sup> *Davis v. Davis* (Iowa), 60 N. W. Rep. 507.

<sup>2</sup> *Elmore v. Marks*, 39 Vt. 538. See *Gorham v. Meacham*, 63 Vt. 231, 22 Atl. Rep. 572.

<sup>3</sup> *Sessions v. Sherwood*, 78 Mich. 234, 44 N. W. Rep. 263; *Gage v. Gage*, 36 Mich. 229; *Moore v. Giles*, 49 Conn. 570; *Frank v. Frank* (Tex. Civ. App.), 25 S. W. Rep. 819.

## CHAPTER XXIX.

### DELIVERY IN ESCROW.

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|------------------------------------------------------|------------------------------------------------------------------|
| I. What constitutes a delivery in escrow, 1302-1313. | II. When the title passes under a delivery in escrow, 1314-1327. |
|------------------------------------------------------|------------------------------------------------------------------|

#### I. *What constitutes a Delivery in Escrow.*

1302. An escrow differs from a deed in one particular only, and that is in delivery.<sup>1</sup> "The delivery of a deed as an escrow is said to be where one doth make and seal a deed, and deliver it unto a stranger until certain conditions be performed, and then to be delivered to him to whom the deed is made, to take effect as his deed."<sup>2</sup> If a grantor hands a deed to a third person, with instructions to deliver it presently to the grantee, or after the lapse of a certain time, or upon the happening of some contingency, without designating any condition upon which the delivery is to be made to the grantee, the deed is not an escrow.<sup>3</sup> But if the future delivery to the grantee is made to depend upon the performance of some condition, or the happening of some event, the deed is deemed an escrow.<sup>4</sup> The distinctive feature of an escrow is the delivery of a deed to a third person to await the performance of some condition whereupon the deed is to be delivered to the grantee and the title is to pass.

1303. A delivery of a deed, to operate as an escrow, must be made to a stranger, and not to the grantee. If the delivery be to the party to whom it is made, though upon the express condition, not appearing upon the face of the deed, that it is to take effect only upon certain conditions, whatever may be the form of the words, the delivery is absolute, and the deed takes effect

<sup>1</sup> Fitch v. Bunch, 30 Cal. 208.

<sup>2</sup> Shep. Touchstone, p. 58. See, also, Watkins v. Nash, L. R. 20 Eq. 262.

<sup>3</sup> Ernst v. Reed, 49 Barb. 367.

<sup>4</sup> McCalla v. Bane, 45 Fed. Rep. 828; Foster v. Mansfield, 3 Met. 412, 37 Am.

Dec. 154; Hathaway v. Payne, 34 N. Y.

92; Stanton v. Miller, 58 N. Y. 192;

Schmidt v. Deegan, 69 Wis. 300, 34 N. W.

Rep. 83; Knopf v. Hansen, 37 Minn. 215,

33 N. W. Rep. 781.

immediately.<sup>1</sup> If the deed was delivered to the grantee by the grantor, or with his consent, it is not permissible for him to show

<sup>1</sup> *Thoroughgood's Case*, 9 Coke, 137 a; *Watkins v. Nash*, L. R. 20 Eq. 262; *Moss v. Riddle*, 5 Cranch, 351; *Blewett v. Front Street Ry. Co.* 49 Fed. Rep. 126, affirmed 51 Fed. Rep. 625, 2 C. C. A. 415, 7 U. S. App. 285. **Alabama**: *Cherry v. Herring*, 83 Ala. 458, 3 So. Rep. 667; *Williams v. Higgins*, 69 Ala. 517; *Fireman's Ins. Co. v. McMillan*, 29 Ala. 147, 157; *Shelby v. Tardy*, 84 Ala. 327, 4 So. Rep. 276; *Hargrave v. Melbourne*, 86 Ala. 270, 5 So. Rep. 285. **Arkansas**: *Campbell v. Jones*, 52 Ark. 493, 12 S. W. Rep. 1016. **California**: *Fitch v. Bunch*, 30 Cal. 208. **Connecticut**: *Raymond v. Smith*, 5 Conn. 555. **Florida**: *Loubat v. Kipp*, 9 Fla. 60; *Southern Life Ins. Co. v. Cole*, 4 Fla. 359; *Haworth v. Norris*, 28 Fla. 763, 10 So. Rep. 18. **Georgia**: *Wellborn v. Weaver*, 17 Ga. 267, 63 Am. Dec. 235; *Jordan v. Pollock*, 14 Ga. 145; *Duncan v. Pope*, 47 Ga. 445. **Illinois**: *Stevenson v. Crapnell*, 114 Ill. 19, 28 N. E. Rep. 379; *Weber v. Christen*, 121 Ill. 91, 11 N. E. Rep. 893; *McCann v. Atherton*, 106 Ill. 31. **Indiana**: *Murray v. Kimball*, 10 Ind. App. 141, 184, 37 N. E. Rep. 734, 736; *Stewart v. Anderson*, 59 Ind. 375; *Benoit v. Schneider*, 47 Ind. 13; *Madison, &c. Plank Road Co. v. Stevens*, 10 Ind. 1; *Roche v. Roanoke Classical Seminary*, 56 Ind. 198; *Foley v. Cowgill*, 5 Blackf. 18, 32 Am. Dec. 49; *Berry v. Anderson*, 22 Ind. 36, 39. **Iowa**: *Marshall Co. High School Co. v. Iowa Evangelical Synod*, 28 Iowa, 360. **Kansas**: *Carter v. Moulton*, 51 Kans. 9, 32 Pac. Rep. 633. **Maine**: *Day v. Lacasse*, 85 Me. 242, 27 Atl. Rep. 124; *Hubbard v. Greeley*, 84 Me. 340, 24 Atl. Rep. 799. **Massachusetts**: *Ward v. Lewis*, 4 Pick. 518; *Fairbanks v. Metcalf*, 8 Mass. 230. **Michigan**: *Dawson v. Hall*, 2 Mich. 390; *Beers v. Beers*, 22 Mich. 42. **Mississippi**: *McAllister v. Mitchener*, 68 Miss. 672, 9 So. Rep. 829. **Missouri**: *Jones v. Shaw*, 67 Mo. 667. **Nebraska**: *Brittain v. Work*, 13 Neb. 347, 14 N. W. Rep. 421. **New Jersey**: *Ordinary v. Thatcher*, 41 N. J. L. 403, 32 Am. Rep. 225; *Black v. Shreve*, 13 N. J. Eq. 455. **New York**: *James v. Vanderheyden*, 1 Paige, 385; *Braman v. Bingham*, 26 N. Y. 483; *Worrall v. Munn*, 5 N. Y. 229, 55 Am. Dec. 330; *People v. Bostwick*, 32 N. Y. 445; *Arnold v. Patrick*, 6 Paige Ch. 310; *Lawton v. Sager*, 11 Barb. 349; *Cocks v. Barker*, 49 N. Y. 107, 110. **North Carolina**: *Gibson v. Partee*, 2 Dev. & B. 530. **Ohio**: *Resor v. Ohio & M. R. Co.* 17 Ohio St. 139. In *Cincinnati, W. & Z. R. Co. v. Iliff*, 13 Ohio St. 235, 254, *Brinckerhoff, J.*, said: "The phrase 'a stranger,' used in this definition, or the phrase 'a third person,' which in many of the books is used interchangeably with it, it seems to me can mean no more than this, — a stranger to the deed, as not being a party to it; or, at most, this, — a person so free from any personal or legal identity with the parties to the instrument as to leave him free to discharge his duty as a depositary to both parties, without involving a breach of duty to either." **Oregon**: *Gaston v. Portland*, 16 Oreg. 255, 19 Pac. Rep. 127. **Pennsylvania**: *Simon-ton's Est.* 4 Watts, 180; *Shoenberger v. Hackman*, 37 Pa. St. 87. **Rhode Island**: *Easton v. Driscoll (R. I.)*, 27 Atl. Rep. 445. **Tennessee**: *Brown v. Reynolds*, 5 Sneed, 639; *Johnson v. Branch*, 11 Humph. 521. **Texas**: *East Texas F. Ins. Co. v. Clarke*, 1 Tex. Civ. App. 238, 21 S. W. Rep. 277; *Heffron v. Cunningham*, 76 Tex. 312, 13 S. W. Rep. 259; *Lott v. Kaiser*, 61 Tex. 665. **Virginia**: *Miller v. Fletcher*, 27 Gratt. 403; *Towner v. Lucas*, 13 Gratt. 705; *Watson v. Hurt*, 6 Gratt. 633. **Washington**: *Glenn v. Hill (Wash.)*, 40 Pac. Rep. 141; *Richmond v. Morford*, 4 Wash. 337, 30 Pac. Rep. 241. **Wisconsin**: *Prutsmann v. Baker*, 30 Wis. 644, 11 Am. Rep. 592.

Contrary to the general rule that a delivery to the grantee or his agent cannot be qualified, it was held in *Minah Consolidated Min. Co. v. Briscoe*, 47 Fed. Rep.

that the delivery was not absolute, that it was conditional or qualified. It is a cardinal rule that the operation and effect of written instruments cannot be varied or altered by evidence resting in parol.<sup>1</sup> If the condition or trust upon which a conveyance is delivered to the grantee be in writing, his qualified holding of the property conveyed may be established. Thus, where a conveyance of land is made upon the grantee's agreement to hold it upon trust, and to execute a deed of trust in accordance with a memorandum of its terms made at the time, and the grantee afterwards refuses to execute the declaration of trust and claims to hold the land to his own use, the delivery of the deed is to be regarded as conditional, and the grantee may be compelled in equity to execute the declaration of trust.<sup>2</sup>

1304. A delivery to the grantee's agent is in law a delivery to the grantee, if the agent has authority to receive the deed; and therefore, if a deed be delivered to such agent as a present deed, although the delivery be accompanied by verbal stipulations that the instrument should not operate as a deed unless certain conditions should be first performed, the verbal stipulations in respect

276, that where one under a contract to sell certain mining lands delivered a deed thereof to a third person as an escrow, and later delivered a duplicate deed to an agent of the grantee, which was recorded, it was competent for the grantee to show that such deed was intended only as an escrow, and was given to enable the grantee, by recording it, to apprise subsequent purchasers of his rights in the property. Knowles, J., delivering the opinion, said: "The delivery of a deed is a fact which may be proven by parol, and, while this can be proven, I can see no difficulty in showing all of the facts connected with the delivery, to the end that the intention of the parties to the delivery may be made known. . . . I think the following authorities will be found to sustain this view," — citing *Brackett v. Barney*, 28 N. Y. 333-341; *Gilbert v. Insurance Co.* 23 Wend. 43; *Fairbanks v. Metcalf*, 8 Mass. 230. But these cases do not seem to afford support for this decision.

<sup>1</sup> *Blewett v. Front Street Cable Ry. Co.* 49 Fed. Rep. 126; *Hargrave v. Melbourne*, 86 Ala. 270, 5 So. Rep. 285; *Williams v. Higgins*, 69 Ala. 517, 522, per *Brickell, C. J.* "It is as incumbent on a grantor, who would qualify the delivery of a deed to the grantee, to express the qualification in the deed, or in an accompanying writing, as it is to express in writing any qualification or limitation of the words of grant or covenant found in the deed. In legal contemplation, all parol negotiations or agreements, whatever they may have been, antecedent or contemporaneous, existing at the time of the delivery of the deed, are merged in the delivery, and from that time it is an operative conveyance according to its terms. The delivery of course includes acceptance by the grantees, and neither party can be allowed by parol to qualify the legal effect of his own voluntary and intentional act." To same effect, *Haworth v. Norris*, 28 Fla. 763, 10 So. Rep. 18.

<sup>2</sup> *Wall v. Hickey*, 112 Mass. 171.

to its operation after delivery will amount to nothing.<sup>1</sup> But while such is the effect of the delivery of a completed deed to a known agent of the grantee, acting simply in the character of such grantee, the act of placing a deed in the hands of the same person, not as a present deed, but one to be held by such person as the grantor's agent as an escrow, and to be returned to him in case the stipulated condition is not performed, is quite another thing. There is no such identity between the grantee and his agent as to preclude the latter from becoming the depositary of an escrow. Neither is there any such personal identity between a corporation and its officers as to preclude a delivery of a deed to one of the latter as an escrow, to take effect upon the performance of some condition.<sup>2</sup> The grantor may even make the grantee his agent for the purpose of transmitting the deed to a depositary to hold in escrow. Though the grantee cannot be made the depositary of an escrow, he may be made the agent of the grantor for the purpose of transmitting it to the depositary.<sup>3</sup>

<sup>1</sup> *Worrall v. Munn*, 5 N. Y. 229, 55 Am. Dec. 330; *Cincinnati, W. & Z. R. Co. v. Iliff*, 13 Ohio St. 235; *Duncan v. Pope*, 47 Ga. 445; *Price v. Pittsburgh, Ft. W. & C. R. Co.* 34 Ill. 13; *Pratt v. Holman*, 16 Vt. 530; *Day v. Lacasse*, 85 Me. 242, 27 Atl. Rep. 124; *Hubbard v. Greeley*, 84 Me. 340, 24 Atl. Rep. 799; *Madison, &c. Plank-Road Co. v. Stevens*, 10 Ind. App. 1; *Deardorff v. Foresman*, 24 Ind. 481; *Stewart v. Anderson*, 59 Ind. 375; *Murray v. Kimball*, 10 Ind. 141, 184, 37 N. E. Rep. 734, 736.

In *Cincinnati, W. & Z. R. Co. v. Iliff*, 13 Ohio St. 235, it was said: "The depositary of an escrow must be a third person. But the agent of a grantee is such third person. The incapacity of the grantee to become the depositary of an escrow arises out of his personal identity, but there is no personal identity between the principal and agent; and surely there can be no legal identity between them beyond the legitimate purposes of the particular agency; and if he assumes another agency, whose duties are in no wise inconsistent with those which arise out of the first, there is no incompatibility, and there can be no legal incapacity." Per *Brinker-*

*hoff, J.* In *Watkins v. Nash*, L. R. 20 Eq. 262, 266, *Hall, V. C.*, said: "If upon the whole of the transaction it be clear that the delivery was not intended to be a delivery to the grantee at that time, but it was to be something different, then you must not give effect to the delivery as being a complete delivery, that not being the intent of the persons who executed the instrument. As regards the instrument in question it might very well, under the circumstances, be meant and taken to be a delivery by *Watkins* to *Collins*, to be held by him for the purpose of being delivered over to the grantee when the transaction was complete. I see no difficulty whatever in that view being adopted."

See, however, *Hubbard v. Greeley*, 84 Me. 340, 24 Atl. Rep. 799.

<sup>2</sup> *Watkins v. Nash*, L. R. 20 Eq. 262; *Cincinnati, W. & Z. R. Co. v. Iliff*, 13 Ohio St. 235; *Bank v. Bailhache*, 65 Cal. 327; *Ashford v. Prewitt (Ala.)*, 14 So. Rep. 663; *Price v. Pittsburgh, Ft. W. & C. R. Co.* 34 Ill. 13; *Southern L. Ins. Co. v. Cole*, 4 Fla. 359.

<sup>3</sup> *Fairbanks v. Metcalf*, 8 Mass. 230; *Brown v. Reynolds*, 5 Sneed, 639; *Gil-*



But there can be no delivery in escrow to the agent or attorney of the grantor, because the possession of the grantor's agent or attorney is the grantor's possession, and revocable by him.<sup>1</sup>

1305. If, however, the deed is on its face incomplete when delivered to the grantee, parol evidence is admissible to prove that it was not to take effect until the execution of it should be complete. The rule of law, that a deed cannot be delivered to the grantee to be the deed of the grantor only upon a condition, applies only to the case of a deed which is complete, and requires nothing but delivery to make it effectual.<sup>3</sup> The mere fact, however, that seals have been attached to which there are no signatures does not render the instrument incomplete, unless there is something in the instrument to indicate the necessity or intention that other persons should sign it before it should take effect as to the persons who had signed it.<sup>3</sup> If a deed perfect upon its face, and bearing no evidence that the mortgagor's wife is to join in it, be delivered by the grantor to the grantee, parol evidence is not admissible to show that it was delivered as an escrow, to become operative only on condition that the grantor's wife should join in it.<sup>4</sup>

*bert v. N. A. F. Ins. Co.* 23 Wend. 43, 35 Am. Dec. 543. The proposition that a deed may be handed to the grantee, for the purpose of transmitting it to a third person, is questioned in *Braman v. Bingham*, 26 N. Y. 483, 491, by Selden, J., referring particularly to the case of *Gilbert v. N. A. F. Ins. Co.*, above cited. He says: "The case presented merely the question whether the grantor still retained an insurable interest in the premises described in the deed, the nominal grantee testifying to the terms in which the deed was delivered to him. Limited to its peculiar circumstances, no fault can be found with the decision; but if the grantee had retained the deed, claiming that its delivery to him was absolute, and, in a contest between him and the grantor, parol proof of a conditional delivery had been offered, I think the result would have been different. If I am wrong in this conclusion, the case discloses an avenue for the

overthrow of titles by parol proof, which was supposed to be closed by the rule to which it would seem to form an exception."

<sup>1</sup> *Day v. Lacasse*, 85 Me. 242, 27 Atl. Rep. 124; *Wier v. Batdorf*, 24 Neb. 83, 38 N. W. Rep. 22; *Raymond v. Smith*, 5 Conn. 555. And see *Hubbard v. Greeley*, 84 Me. 340, 24 Atl. Rep. 799. See, however, *Millership v. Brookes*, 5 Hurl. & N. 797.

<sup>2</sup> *Wendlinger v. Smith*, 75 Va. 309, 40 Am. Rep. 727; *Brackett v. Barney*, 28 N. Y. 333; *Shelby v. Tardy*, 84 Ala. 327, 4 So. Rep. 276.

<sup>3</sup> *Nash v. Fugate*, 32 Gratt. 595, 34 Am. Rep. 780; *Wendlinger v. Smith*, 75 Va. 309, 40 Am. Rep. 727.

<sup>4</sup> *Hargrave v. Melbourne*, 86 Ala. 270, 5 So. Rep. 285; *East Tex. F. Ins. Co. v. Clarke*, 1 Tex. Civ. App. 238, 21 S. W. Rep. 277.

1306. Before a deed can be delivered in escrow the contract of sale must be concluded between the parties, and the deed be fully executed for delivery. Therefore, if a deed be deposited with a third person by one of the parties to an exchange of lands, to be delivered to the other party when a question of title to the lands should be settled to the satisfaction of the contracting parties, the deposit does not constitute a delivery in escrow.<sup>1</sup> "The actual contract of sale on the one side, and of purchase on the other, is as essential to constitute the instrument an escrow as that it be executed by the grantor; and until both parties have definitely assented to the contract, the instrument executed by the proposed grantor, though in form a deed, is neither a deed nor an escrow; and it makes no difference whether the instrument remains in the possession of the nominal grantor or is placed in the hands of a third party pending the proposals for the sale or purchase."<sup>2</sup>

1307. A distinction is made between the delivery of an instrument as a deed and the delivery of it as an escrow. If a deed be delivered to a third person as the deed of the grantor, to be delivered over to the grantee on the happening of a future event, it is the deed of the grantor from the time of such delivery to the third person, who is a trustee of it for the party to whom it was made.<sup>3</sup> But if the deed be delivered to a third person as an escrow, to be delivered on some future event or the performance of some condition, it is not the grantor's deed until

<sup>1</sup> *Miller v. Sears*, 91 Cal. 282, 27 Pac. Rep. 589; *Hoyt v. McLagan* (Iowa), 55 N. W. Rep. 18.

<sup>2</sup> *Fitch v. Bunch*, 30 Cal. 208, per Rhodes, J. Also see *Helm v. Kleinschmidt*, 12 Mont. 586, 31 Pac. Rep. 542.

<sup>3</sup> *McCalla v. Bane*, 45 Fed. Rep. 828; *Wheelwright v. Wheelwright*, 2 Mass. 452, 3 Am. Dec. 66; *Fairbanks v. Metcalf*, 8 Mass. 230; *Timothy v. Wright*, 8 Gray, 522; *Regan v. Howe*, 121 Mass. 424; *Owen v. Williams*, 114 Ind. 179, 15 N. E. Rep. 678; *Goodpaster v. Leathers*, 123 Ind. 121, 23 N. E. Rep. 1090; *Smiley v. Smiley*, 114 Ind. 258, 16 N. E. Rep. 585; *Belden v. Carter*, 4 Day, 66, 4 Am. Dec. 185; *Stewart v. Stewart*, 5

Conn. 317; *Jones v. Swayze*, 42 N. J. L. 279; *Jackson v. Sheldon*, 22 Me. 569; *Hannah v. Swarner*, 8 Watts, 9, 34 Am. Dec. 442; *Ruggles v. Lawson*, 13 Johns. 285, 7 Am. Dec. 375; *Hathaway v. Payne*, 34 N. Y. 92; *Clark v. Gifford*, 10 Wend. 310; *Brown v. Austen*, 35 Barb. 341; *Stone v. Duvall*, 77 Ill. 475; *Price v. Pittsburgh, Ft. W. & C. R. Co.* 34 Ill. 13. See, however, *Wellborn v. Weaver*, 17 Ga. 267, 63 Am. Dec. 235; *Williams v. Schatz*, 42 Ohio St. 47; *Crooks v. Crooks*, 34 Ohio St. 610; *Ball v. Foreman*, 37 Ohio St. 132; *Prutsman v. Baker*, 30 Wis. 644, 11 Am. Rep. 592; *Taft v. Taft*, 59 Mich. 185, 26 N. W. Rep. 426, 60 Am. Rep. 291; *Wallace v. Harris*, 32 Mich. 380.

the second delivery.<sup>1</sup> There are some exceptions to this rule, founded on the necessity of considering the instrument the grantor's deed from the time of the first delivery, in order to effectuate the intention of the grantor.<sup>2</sup> By reason of such exceptions it has been said that the distinction between the delivery of an instrument as a deed and as an escrow is often more nominal than real.<sup>3</sup> The distinction is, however, an obvious one, and under some circumstances it may be of legal importance.<sup>4</sup>

1308. It is often a matter of some doubt whether an instrument is delivered as a deed or as an escrow; whether a deed handed to a third person by the grantor at the time of its execution, to be delivered to the grantee at a future time, is to be considered as the deed of the grantor from the time of its execution, or as an escrow to take effect from a second delivery; and which it is depends rather upon the words used and the purpose expressed than upon the name which the parties give to the instrument.<sup>5</sup> Thus, if a deed be deposited by the grantor with a third person to await an examination of the title by the grantee, with instructions to such third person to deliver the deed "upon receipt of the contract price," there is no delivery until the conditions are performed. The delivery is in escrow, and the title does not vest in the grantee till the second delivery, and before such delivery the grantor cannot maintain an action in assumpsit for the price, whatever may be his remedy upon the contract of

<sup>1</sup> *Wheelwright v. Wheelwright*, 2 Mass. 447, 452, 3 Am. Dec. 66; *Perkins*, 143, 144, 3 Co. 35 b, 36 a; *McCalla v. Bane*, 45 Fed. Rep. 828; *Andrews v. Farnham*, 29 Minn. 246, 13 N. W. Rep. 161; *Landon v. Brown*, 160 Pa. St. 538, 28 Atl. Rep. 921.

<sup>2</sup> *Shirley v. Ayres*, 14 Ohio, 307, 45 Am. Dec. 546; *Wheelwright v. Wheelwright*, 2 Mass. 447, 3 Am. Dec. 66; *Shaw v. Hayward*, 7 Cush. 170; *Daggett v. Daggett*, 143 Mass. 516, 10 N. E. Rep. 311; *Doe v. Beeson*, 2 Houst. (Del.) 246; *Jones v. Swayze*, 42 N. J. L. 279; *Stone v. Duvall*, 77 Ill. 475; *Landon v. Brown*, 160 Pa. St. 538, 28 Atl. Rep. 921; *Stephens v. Rinehart*, 72 Pa. St. 434.

<sup>3</sup> *Wheelwright v. Wheelwright*, 2 Mass. 447, 454, 3 Am. Dec. 66, where various illustrations of this exception are given; *Bodwell v. Webster*, 13 Pick. 411, 414; *Shirley v. Ayres*, 14 Ohio, 307, 45 Am. Dec. 546; *Stephens v. Rinehart*, 72 Pa. St. 434; *Harkreader v. Clayton*, 56 Miss. 383, 31 Am. Rep. 369.

<sup>4</sup> *Hatch v. Hatch*, 9 Mass. 307, 6 Am. Dec. 67; *Foster v. Mansfield*, 3 Metc. 412; *Taft v. Taft*, 59 Mich. 185, 194, 26 N. W. Rep. 426, 60 Am. Rep. 291, per *Campbell, C. J.*; *Hathaway v. Payne*, 34 N. Y. 92, 107.

<sup>5</sup> *Hathaway v. Payne*, 34 N. Y. 92; *Andrews v. Farnham*, 29 Minn. 246, 13 N. W. Rep. 161.

sale.<sup>1</sup> "Where the future delivery is to depend upon the payment of money, or the performance of some other condition, it will be deemed an escrow. Where it is merely to await the lapse of time, or the happening of some contingency, and not the performance of any condition, it will be deemed the grantor's deed presently. Still it will not take effect as a deed until the second delivery, but when thus delivered it will take effect, by relation, from the first delivery."<sup>2</sup>

1309. A deed delivered to a third person as the grantor's deed, to be kept until the grantor's death and then delivered to the grantee, who has no knowledge of it until after the grantor's death, when it is delivered to him, is effectually delivered to the use of the grantee, whether it be considered as an escrow or as a deed, at the time of the delivery to the third person, provided the grantor reserved and kept no control of the deed.<sup>3</sup> If it was delivered as an escrow, and not in name as a deed, it is nevertheless to be regarded as a deed from the first delivery, as soon as the grantor's death happens.<sup>4</sup> A delivery to a stranger

<sup>1</sup> Helm v. Kleinschmidt, 12 Mont. 586, 31 Pac. Rep. 542.

<sup>2</sup> Foster v. Mansfield, 3 Metc. 412, 414, 37 Am. Dec. 154, per Shaw, C. J.

<sup>3</sup> Lloyd v. Bennett, 8 C. & P. 124; Doe v. Knight, 5 Barn. & C. 689; Murray v. Stair, 3 D. & R. 278. California: Bostwick v. McEvoy, 62 Cal. 496; Bury v. Young, 98 Cal. 446, 33 Pac. Rep. 338. Indiana: Hockett v. Jones, 70 Ind. 227; Owen v. Williams, 114 Ind. 179, 15 N. E. Rep. 678; Smiley v. Smiley, 114 Ind. 258, 16 N. E. Rep. 585; Jones v. Loveless, 99 Ind. 317; Goodpaster v. Leathers, 123 Ind. 121, 23 N. E. Rep. 1090. Massachusetts: Hatch v. Hatch, 9 Mass. 307, 6 Am. Dec. 67; Foster v. Mansfield, 3 Metc. 412, 37 Am. Dec. 154; O'Kelly v. O'Kelly, 8 Metc. 436. Michigan: Howard v. Patrick, 38 Mich. 795, 805; Wallace v. Harris, 32 Mich. 380. Minnesota: Haeg v. Haeg, 53 Minn. 33, 55 N. W. Rep. 1114. New Hampshire: Cook v. Brown, 34 N. H. 460. New York: Ruggles v. Lawson, 13 Johns. 285, 7 Am. Dec. 375; Hathaway v. Payne, 34 N. Y. 92; Tooley v. Dibble, 2 Hill, 641. North

Carolina: Phillips v. Houston, 5 Jones, 302. Ohio: Williams v. Schatz, 42 Ohio St. 47; Crooks v. Crooks, 34 Ohio St. 610; Ball v. Foreman, 37 Ohio St. 132. Pennsylvania: Stephens v. Rinehart, 72 Pa. St. 434; Stephens v. Huss, 54 Pa. St. 20. Wisconsin: Prutsman v. Baker, 30 Wis. 644, 650.

<sup>4</sup> McCalla v. Bane, 45 Fed. Rep. 828, 837; Hatch v. Hatch, 9 Mass. 307, 6 Am. Dec. 67; Foster v. Mansfield, 3 Metc. 412; Smiley v. Smiley, 114 Ind. 258, 16 N. E. Rep. 585; Owen v. Williams, 114 Ind. 179, 15 N. E. Rep. 678; Goodpaster v. Leathers, 123 Ind. 121, 23 N. E. Rep. 1090; Wheelwright v. Wheelwright, 2 Mass. 447; Levengood v. Bailey, 1 Woodw. Dec. (Pa.) 275, 278. In this case the court say "that the case of Lloyd v. Bennett, 8 Carr. & P. 124, is opposed in principle to the Massachusetts cases; but the English decision was by a single judge at *nisi prius*, and comes from a class of reports whose publication has produced some mischief with very slight compensating advantage. Of course there can be no comparison in the weight of an-

for the use of the grantee has the same effect as a delivery to the grantee himself. When the deed has passed beyond the control of the grantor by his own act, accompanied with the declaration that it was delivered for the use or benefit of the grantee, it has the same effect in the hands of the custodian as if delivered to the party beneficially entitled.<sup>1</sup>

Although the grantor in such deed says, "I convey and warrant after my decease, and not before," the phrase does not make the deed testamentary in character, but operates merely to show that the grantee's use and enjoyment of the lands would not begin until the grantor's death.<sup>2</sup>

1310. It is not necessary that there should be an express declaration that a deed is delivered as an escrow in order to make it such. If an instrument is delivered to a third person to be delivered to the grantee upon the performance of a condition or the happening of a subsequent event, it is an escrow, and not a deed that will take immediate effect. The term "escrow" may more clearly than any other indicate the intention of the parties. But effect will be given to the instrument as an escrow if the intention of the parties that it shall so operate is indicated in any other manner.<sup>3</sup> The declaration of the grantor at the time of his delivery of it to the third person that he delivers it as his deed, strongly indicates his intention that it shall take immediate effect; but such declaration is only a matter of evidence to be

thority between such a judgment and the judgment of the Supreme Court of Massachusetts."

<sup>1</sup> *Eckman v. Eckman*, 55 Pa. St. 269; *Wallace v. Harris*, 32 Mich. 380.

<sup>2</sup> *Owen v. Williams*, 114 Ind. 179, 15 N. E. Rep. 678; *Spencer v. Robbins*, 106 Ind. 580, 5 N. E. Rep. 726.

<sup>3</sup> *Murray v. Stair*, 2 Barn. & C. 82, 87; *Jackson v. Sheldon*, 22 Me. 569; *White v. Bailey*, 14 Conn. 271; *Clark v. Gifford*, 10 Wend. 310; *Jackson v. Catlin*, 2 Johns. 248, 259, 3 Am. Dec. 415; *Webster v. King's County Trust Co.* 145 N. Y. 275, 39 N. E. Rep. 964; *State Bank v. Evans*, 15 N. J. L. 155, 28 Am. Dec. 400; *Gaston v. Portland*, 16 Oreg. 255, 19 Pac. Rep. 127; *Evans v. Gibbs*, 6 Humph. 405; *Harkreader v. Clayton*, 56 Miss. 383, 31

Am. Rep. 369; *Bank v. Bailhache*, 65 Cal. 327, 4 Pac. Rep. 106.

In *Bowker v. Burdekin*, 11 Mees. & W. 128, 147, Baron Parke said: "I take it now to be settled, though the law was otherwise in ancient times as appears by Sheppard's Touchstone, that, in order to constitute the delivery of a writing as an escrow, it is not necessary it should be done by express words, but you are to look at all the facts attending the execution, to all that took place at the time, and to the result of the transaction, and therefore, though it is in form an absolute delivery, if it can be reasonably inferred that it was delivered not to take effect as a deed till a certain condition was performed, it will nevertheless operate as an escrow."

weighed in connection with other circumstances in determining the real character of the transaction.

If a deed to be signed by several parties be delivered before it is signed by all of them, under an agreement that it shall not take effect until it is executed by the other parties, the deed is delivered as an escrow, and not as a present deed.<sup>1</sup> But the agreement or condition in such case must be an express one. A mere understanding that others are to sign the instrument is not sufficient to make the delivery of it an escrow.<sup>2</sup>

That a deed was delivered in escrow may be shown by any competent evidence, such as the grantor's statements to this effect.<sup>3</sup>

**1311. A delivery in escrow must make certain the condition or event upon which the depository is to make final delivery of the deed.** The contract between the grantor and the grantee must be complete. The minds of the parties must have met, the terms must have been agreed upon, and both must have assented to the instrument as a conveyance lacking delivery only for its completion.<sup>4</sup> This delivery they provide for by placing the deed in the hands of a third person to await a future event, or the performance of some condition upon the happening or performance of which the final delivery is to be made. It is essential that the final delivery shall be arranged to take place upon the happening of some definite event, or upon the performance of some specified condition. There is no escrow in case the consent of both parties, or of the grantor, is necessary to authorize a delivery to the grantee.<sup>5</sup> There is no escrow in case the deed is delivered to a third person to be kept by him during the pleasure of the parties, or to await the return of the grantor from a journey, and on that event to be delivered to the grantor, because it is not provided in any event that the depository shall deliver it to the grantee.<sup>6</sup>

It is not necessary that the condition upon which the deed is

<sup>1</sup> *Johnson v. Baker*, 4 Barn. & Ald. 440; *Carrick v. French*, 7 Humph. 459; *State Bank v. Evans*, 15 N. J. L. 155, 28 Am. Dec. 400; *Whitford v. Laidler*, 94 N. Y. 145.

<sup>2</sup> *Carrick v. French*, 7 Humph. 459.

<sup>3</sup> *Brown v. Stutson*, 100 Mich. 574, 59 N. W. Rep. 238; *Minah Consol. Min. Co. v. Briscoe*, 47 Fed. 276.

<sup>4</sup> *Fitch v. Bunch*, 30 Cal. 208; *Evans v. Gibbs*, 6 Humph. 405; *Hubback v. Ross*, 96 Cal. 426, 31 Pac. Rep. 353.

<sup>5</sup> *Fitch v. Bunch*, 30 Cal. 208; *James v. Vanderheyden*, 1 Paige, 385; *Gibson v. Partee*, 2 Dev. & B. 530; *Hicks v. Goode*, 12 Leigh, 479.

<sup>6</sup> *Braman v. Bingham*, 26 N. Y. 483.

delivered in escrow shall be expressed in writing, though this is highly desirable; it may rest in parol, or be partly in writing and partly oral.<sup>1</sup> Though the condition is usually one to be performed by the grantee, it may be something to be performed, not by the grantee, but by a stranger.<sup>2</sup> The condition cannot be one to be performed by the grantor.<sup>3</sup>

1312. It is essential that a delivery in escrow shall be an absolute delivery for the use of the grantee upon the performance of the condition imposed; that is, the deed must pass absolutely out of the grantor's control, so that it is not subject to recall by him unless there is a failure to comply with the condition. Thus, where one had executed a deed of land in due form and placed it in the hands of a third person, with instructions, in case of the grantor's death, to have it recorded and delivered to the grantee, but to retain it subject to the grantor's control until his death, and the bailee in fact held the deed until after the grantor's death, and then had it recorded, and delivered to the grantee; it was held that there was no valid delivery during the grantor's lifetime, and the deed never took effect.<sup>4</sup> When a deed is once absolutely delivered as an escrow, it cannot be revoked by the grantor.<sup>5</sup>

A delivery in escrow is not defeated by the death of the grantor before the condition is performed, but if afterwards the condition is performed the deed takes effect from the first delivery.<sup>6</sup>

1313. To constitute a delivery in escrow the condition must be imposed at the time of the delivery; for if the deed be delivered to any one for the grantee without qualification, the delivery is complete and absolute to the grantee himself, and the grantor cannot afterwards impose any condition upon its delivery to the grantee. If, the next day or the next hour, the grantor directs the person in whose custody he placed the deed not to deliver it until the grantee should pay the purchase-money, his

<sup>1</sup> *Campbell v. Thomas*, 42 Wis. 437, 24 Am. Rep. 427; *Gaston v. Portland*, 16 Oreg. 255, 19 Pac. Rep. 127.

<sup>2</sup> *Mayor v. Moore*, 1 Cranch C. C. 193.

<sup>3</sup> *White v. Williams*, 3 N. J. Eq. 376.

<sup>4</sup> *Pruitsman v. Baker*, 30 Wis. 644, 11 Am. Rep. 592; *Porter v. Woodhouse*, 59 Conn. 568, 22 Atl. Rep. 299, per An-

draws, C. J.; *Martin v. Flaharty*, 13 Mont. 96, 32 Pac. Rep. 287.

<sup>5</sup> *Millett v. Parker*, 2 Metc. (Ky.) 608, 616; *Cannon v. Handley*, 72 Cal. 133, 13 Pac. Rep. 315.

<sup>6</sup> *Shep. Touch.* 59; *Ruggles v. Lawson*, 13 Johns. 285; *Hunter v. Hunter*, 17 Barb. 25.

direction is immaterial, and does not make the delivery to such person a delivery in escrow.<sup>1</sup>

## II. *When the Title passes under a Delivery in Escrow.*

1314. The deed takes effect only upon performance of the condition upon which the depository undertook to deliver it. Even if the deed is delivered to the grantee before the performance of the condition, and the grantee takes it in good faith in ignorance of any condition imposed as to its delivery to him, and pays a valuable consideration, the deed is invalid.<sup>2</sup> An agent with limited powers does not bind his principal when he transcends his powers, and a person dealing with such agent is bound to know the extent of his powers. The legal effect and use of

<sup>1</sup> *Blight v. Schenck*, 10 Pa. St. 285, 51 Am. Dec. 478; *Souverye v. Arden*, 1 Johns. Ch. 240; *Braman v. Bingham*, 26 N. Y. 483; *Worrall v. Munn*, 5 N. Y. 229; *Lawton v. Sager*, 11 Barb. 349.

<sup>2</sup> *Calhoun Co. v. American Emigrant Co.* 93 U. S. 124. **Alabama**: *White Star Line Co. v. Moragne*, 91 Ala. 610, 8 So. Rep. 867. **Arkansas**: *Hayden v. Meeks* (Ark.), 14 S. W. Rep. 864. **California**: *Dyson v. Bradshaw*, 23 Cal. 528; *Cannon v. Handley*, 72 Cal. 133, 13 Pac. Rep. 315. **Colorado**: *Atkinson v. Tabor*, 11 Colo. 277, 17 Pac. Rep. 905. **Illinois**: *Price v. Hudson*, 125 Ill. 284, 17 N. E. Rep. 817; *Stone v. Duvall*, 77 Ill. 475; *Skinner v. Baker*, 79 Ill. 496; *Burnap v. Sharpsteen*, 149 Ill. 225, 36 N. E. Rep. 1008; *Stanley v. Valentine*, 79 Ill. 544; *Mitchell v. Shortt*, 113 Ill. 251, 1 N. E. Rep. 909; *Illinois Cent. R. Co. v. McCullough*, 59 Ill. 166; *Chicago Land Co. v. Peck*, 112 Ill. 408. **Indiana**: *Berry v. Anderson*, 22 Ind. 36; *Robbins v. Magee*, 76 Ind. 381; *Clanin v. Machine Co.* 118 Ind. 372, 21 N. E. Rep. 35; *Murray v. Kimball*, 10 Ind. App. 141, 184, 37 N. E. Rep. 734, 736; *Quick v. Milligan*, 108 Ind. 419, 9 N. E. Rep. 392; *Henry v. Carson*, 96 Ind. 412. **Iowa**: *Haven v. Kramer*, 41 Iowa, 382; *Logsdon v. Newton*, 54 Iowa, 448, 6 N. W. Rep. 715; *Jackson v. Rowley*, 88 Iowa, 184, 55 N. W. Rep. 339. **Maine**: *Jackson v. Sheldon*, 22 Me. 569; *Rhodes v.*

*Gardiner School Dist.* 30 Me. 110. **Massachusetts**: *Daggett v. Daggett*, 143 Mass. 516, 10 N. E. Rep. 311. **Michigan**: *Davis v. Kneale* (Mich.), 61 N. W. Rep. 508; *Taft v. Taft*, 59 Mich. 185, 26 N. W. Rep. 426, 60 Am. Rep. 291; *Cressinger v. Desseburg*, 42 Mich. 580, 4 N. W. Rep. 269. **Minnesota**: *Lindley v. Groff*, 37 Minn. 338, 34 N. W. Rep. 26; *Knopf v. Hansen*, 37 Minn. 215, 33 N. W. Rep. 781. **Mississippi**: *Harkreader v. Clayton*, 55 Miss. 383, 31 Am. Rep. 369. **Nebraska**: *Patrick v. McCormick*, 10 Neb. 1, 4 N. W. Rep. 312. **New Jersey**: *Black v. Shreve*, 13 N. J. Eq. 455; *State Bank v. Evans*, 15 N. J. L. 155; *Titus v. Phillips*, 18 N. J. Eq. 541. **New York**: *Jackson v. Catlin*, 2 Johns. 248, 3 Am. Dec. 415; *People v. Bostwick*, 32 N. Y. 445. **North Carolina**: *Griffith v. Winborne*, 105 N. C. 403, 10 S. E. Rep. 855. **Ohio**: *Ogden v. Ogden*, 4 Ohio, 182; *Shirley v. Ayers*, 14 Ohio, 308. **Oregon**: *Gaston v. City of Portland*, 16 Oreg. 255, 19 Pac. Rep. 127. **Vermont**: *Smith v. South Royalton Bank*, 32 Vt. 341, 76 Am. Dec. 179; *Nichols v. Nichols*, 28 Vt. 228, 67 Am. Dec. 699. **Washington**: *Danforth v. Paxton*, 1 Wash. 6, 23 Pac. Rep. 801. **West Virginia**: *White v. Core*, 20 W. Va. 272. **Wisconsin**: *Everts v. Agnes*, 4 Wis. 343, 65 Am. Dec. 314, 6 Wis. 453; *Schmidt v. Deegan*, 69 Wis. 300, 34 N. W. Rep. 83.



an escrow are well known, and it is incumbent upon the grantee to know that the depositary has authority to deliver the deed.<sup>1</sup> It is not negligence in any legal sense in the grantor to deposit a deed in escrow to be delivered upon the performance of the conditions he has prescribed. The grantor may waive the condition,<sup>2</sup> but the depositary has no authority to waive the performance of the condition attached to the ultimate delivery of the deed.<sup>3</sup> Thus, where a deed to a car company, in consideration that it construct its car-shops on the granted land, was executed to enable the grantee to secure bonds which the company proposed to negotiate, and was delivered by the grantor to the trustee of the bonds on condition that it should not take effect unless the bonds were negotiated, the deed was an escrow, and the fact that the trustee recorded the deed did not constitute a delivery, the bonds not having been in fact negotiated.<sup>4</sup>

**1315. Whether an innocent purchaser from a grantee who wrongfully obtained the deed deposited in escrow, without performing the condition, thereby acquires title to the property, is a question upon which there is much conflict of authority.** The rule that no title vests in the innocent purchaser under such a conveyance<sup>5</sup> rests upon the ground that the grantee in such deed acquires no title by the deed fraudulently obtained from the depositary without performing the condition, and consequently that he can convey no title to another. "To obtain the deed or scroll from the depositary without such compliance is as much against the assent of the grantor as it would be to take it from the desk or drawer where the grantor had deposited it without his knowledge or consent. It would seem, therefore, that there is a fundamental distinction between the case where, by fraudulent representations, a person is induced to execute and deliver a deed,

<sup>1</sup> *Chicago Land Co. v. Peck*, 112 Ill. 408.

<sup>2</sup> *Eggleston v. Pollock*, 38 Neb. 188, 56 N. W. Rep. 805.

<sup>3</sup> *Daggett v. Daggett*, 143 Mass. 546, 10 N. E. Rep. 311.

<sup>4</sup> *Beaumont Car Works v. Beaumont Imp. Co.* 4 Tex. Civ. App. 257, 23 S. W. Rep. 274.

<sup>5</sup> Supported in the following cases: *Everts v. Agnes*, 4 Wis. 343, 6 Wis. 453, 65 Am. Dec. 314; *Tisher v. Beckwith*, 30

Wis. 55, 11 Am. Rep. 546; *Smith v. South Royalton Bank*, 32 Vt. 341; *Southern L. Ins. Co. v. Cole*, 4 Fla. 359; *Fitzgerald v. Goff*, 99 Ind. 28; *Henry v. Carson*, 96 Ind. 412; *Berry v. Anderson*, 22 Ind. 36; *Peter v. Wright*, 6 Ind. 183; *Harkreader v. Clayton*, 56 Miss. 383; *Cotton v. Gregory*, 10 Neb. 125, 4 N. W. Rep. 939; *Gould v. Wise*, 97 Cal. 532, 32 Pac. Rep. 576; *Jackson v. Lynn* (Iowa), 62 N. W. Rep. 704.

and one where the deed or scroll is obtained from a depositary without the knowledge or consent of the depositor, or compliance with the conditions on which the delivery depends. It would seem that where a deed deposited as an escrow is obtained without performance of the conditions by operating upon the fears or credulity of the depositary, or by fraudulent collusion with him, or by other undue means, it bears a closer analogy in principle to the case of a forged or stolen deed than it does to that of a fraud practiced upon the grantor by means of which he is induced to deliver it. In the latter case the legal title passes, and a subsequent *bona fide* purchaser is protected. In the former no title passes whatever, and a subsequent purchaser is not protected. In the one class of cases there is the voluntary assent of the grantor, in the other there is no assent at all.”<sup>1</sup>

1316. The better opinion, however, upon principle, and that supported by the weight of authority, is that a subsequent purchaser in good faith acquires a good title though his grantor had received his deed from a depositary without performing the condition upon which such deed was to be delivered. The depositary of the deed is the agent of the grantor as well as of the grantee.<sup>2</sup> “If a man employs an incompetent or unfaithful agent, he is the cause of the loss so far as an innocent purchaser is concerned, and he ought to bear it, except as against the party who may be equally negligent in omitting to inform himself of the extent of the authority, or may commit a wrong by acting knowingly contrary to that. But this principle must not be extended to a person who has no possible means of protecting himself; who acts on the presumption that the records of the county are not intended to mislead, but speak the truth; that the acts and declarations of the grantor are such as they purport to be. If the grantor is injured by the conduct of his agents, the remedy is against them; surely there is no reason that it should affect an innocent purchaser, who pays his money on the faith that his title is good. Nor is it any answer that he may protect himself by proper

<sup>1</sup> Everts v. Agnes, 4 Wis. 343, 65 Am. Dec. 314, per Smith, J. And see Fitzgerald v. Goff, 99 Ind. 28, per Howk, J.

<sup>2</sup> Bailey v. Crim, 9 Biss. 95; Blight v. Schenck, 10 Pa. St. 285, 51 Am. Dec. 478; Somes v. Brewer, 2 Pick. 183, applicable

in principle; Quick v. Milligan, 108 Ind. 419, 9 N. E. Rep. 392; Simpson v. Bank, 43 Hun, 156, affirmed 120 N. Y. 623; Simpson v. Del Hoyo, 94 N. Y. 189; Hubbard v. Greeley, 84 Me. 340, 24 Atl. Rep. 799.

covenants.”<sup>1</sup> To like effect in a Massachusetts case Chief Justice Parker said: “It is a general and just rule that, when a loss has happened which must fall on one of two innocent persons, it shall be borne by him who is the occasion of the loss, even without any positive fault committed by him, but more especially if there has been any carelessness on his part which caused or contributed to the misfortune. A man can scarcely be cheated out of his property, especially of real estate, in such manner as to give an innocent purchaser a right to hold according to the principles which have been mentioned, without a degree of negligence on his part which should remove all ground of complaint.”<sup>2</sup> This subject is also considered in a well-reasoned and conclusive opinion by Judge Walton in a recent case in Maine. He says: “Escrows are deceptive instruments. They are not what they purport to be. They purport to be instruments which have been delivered, when in fact they have not been delivered. They clothe the grantees with apparent titles which are not real titles. Such deeds are capable of being used to enable the grantees to obtain credit which otherwise they could not obtain. They are capable of being used to deceive innocent purchasers. And the makers of such instruments cannot fail to foresee that they are liable to be so used. And when the maker of such an instrument has voluntarily parted with the possession of it, and delivered it into the care and keeping of a person of his own selection, it seems to us that he ought to be responsible for the use that may in fact be made of it, and that in no other way can the public be protected against the intolerable evil of having our public records incumbered with such false and deceptive instruments.”<sup>3</sup>

1317. Another and conclusive consideration why the title of a bona fide purchaser for value should not be disturbed, by reason that any former owner has obtained possession of his deed wrongfully or fraudulently, is that all titles would thereby be rendered insecure. As declared in the Pennsylvania case above cited, “if a title may be avoided under such circumstances, no purchaser is safe;” or, as said by Judge Walton in the recent decision in Maine, “all titles would be as unstable as sand upon

<sup>1</sup> *Blight v. Schenck*, 10 Pa. St. 285, 293, 51 Am. Dec. 478, per Rogers, J.

<sup>2</sup> *Hubbard v. Greeley*, 84 Me. 340, 24 Atl. Rep. 799.

<sup>3</sup> *Somes v. Brewer*, 2 Pick. 184, 202, 13 Am. Dec. 406.

the seashore." In the Massachusetts case Chief Justice Parker on this point said: "This admission is certainly correct, for there could be no security of title if a purchaser from one actually seised and possessed, with an apparently lawful title existing on the public records, he having no knowledge of a concealed defect in the title of his grantor, should be liable to be defeated of his title by proof of fraudulent acts of his immediate or remote grantor, of the existence of which he had not even a suspicion; and if the principle on which the argument is founded is true, the purchaser would, at least for forty years, hold an estate defeasible by the oral proof of facts to which he was neither a party nor privy, transacted by some anterior parties to the title, perhaps after twenty or more conveyances, all appearing unimpeachable on the records."<sup>1</sup>

1318. The grantor is estopped from questioning the title of a purchaser in good faith from a grantee who has fraudulently obtained possession of the deed from the depositary. Whenever the title reaches the hands of such a purchaser for value, the rights and equities of the defendant owner are cut off. The grantor has by his own act placed the *indicia* of title in the grantee, and, though the latter has fraudulently obtained possession of the deed, the grantor who by his act has invested the grantee with the apparent title should suffer the loss rather than the innocent purchaser who has, trusting in this apparent title, paid value for the property.<sup>2</sup>

<sup>1</sup> *Somes v. Brewer*, 2 Pick. 184, 190, 13 Am. Dec. 406. See to like effect *Miller v. Fletcher*, 27 Gratt. 403, 414, per Staples, J.; *Quick v. Milligan*, 108 Ind. 419, 9 N. E. Rep. 392, per Elliott, C. J.

In *Fletcher v. Peck*, 6 Cranch, 87, 133, the opinion of the court being by Chief Justice Marshall, he said: "If a suit be brought to set aside a conveyance obtained by fraud, and the fraud be clearly proved, the conveyance will be set aside as between the parties. But the rights of third persons, who are purchasers without notice and for a valuable consideration, cannot be disregarded. Titles which, according to every legal test, are perfect, are acquired with that confidence which is inspired by the opinion that the purchaser

is safe. If there be any concealed defect arising from the conduct of those who held the property before he acquired it, of which he had no notice, such concealed defect cannot be set up against him. He has paid his money for a title good at law, and he is innocent whatever may be the guilt of others; and equity will not subject him to the penalties of others' guilt. All titles would be insecure, and the intercourse between man and man very seriously obstructed, if this principle were overturned."

<sup>2</sup> *Simson v. Bank*, 43 Hun, 156, affirmed 120 N. Y. 623; *Simpson v. Del Hoyo*, 94 N. Y. 189; *Quick v. Milligan*, 108 Ind. 419, 9 N. E. Rep. 392.

Of course a subsequent purchaser with notice from one to whom the deed held in escrow has been delivered, without authority, has no greater rights than the grantee.<sup>1</sup>

1319. The performance of the condition must be a literal and absolute one.<sup>2</sup> It is not sufficient that there is a substantial performance. Thus, where a deed was left in escrow to be delivered if the grantee should give to the overseers of the poor a bond to support a third person during life, though the grantee supported such person during life, but did not make or tender a bond in accordance with the condition, it was held that no title passed to the grantee, and that a conveyance by the grantor to another person was valid.<sup>3</sup>

1320. If the condition be not fulfilled, no title passes by the deed as between the original parties.<sup>4</sup> Thus, where a deed was placed in the hands of a banker to be delivered to the grantee if a draft drawn by the latter for the purchase-money should be paid, and the draft was protested for non-payment, it was held that no title passed to the purchaser, and that a lease made by the latter and recorded was a cloud upon the title which a court of equity would remove.<sup>5</sup> And so, where a deed placed in escrow, to be delivered when the grantee had paid certain liens on the land conveyed, was, after the grantor's death, obtained by the grantee without payment of the liens, and by him recorded, the grantee's title was held to be voidable by proof of the facts rebutting the presumption of delivery, but not void.<sup>6</sup>

1321. The title vests in the grantee only upon the delivery to him after performance of the condition. A lien by judg-

<sup>1</sup> *Illinois Cent. R. Co. v. McCullough*, 59 Ill. 166; *Abbott v. Alsdorf*, 19 Mich. 157; *Lewis v. Prather* (Ky.), 21 S. W. Rep. 538.

<sup>2</sup> *Taft v. Taft*, 59 Mich. 185, 194, 26 N. W. Rep. 426, 60 Am. Rep. 291; *Jackson v. Catlin*, 2 Johns. 248, affirmed 8 Johns. 520, 3 Am. Dec. 415; *Artcher v. Whalen*, 1 Wend. 179; *Hinman v. Booth*, 21 Wend. 267; *Dyson v. Bradshaw*, 23 Cal. 528; *Beem v. McKusick*, 10 Cal. 538; *Abbott v. Alsdorf*, 19 Mich. 157; *Skinner v. Baker*, 79 Ill. 496.

<sup>3</sup> *Hinman v. Booth*, 21 Wend. 267.

<sup>4</sup> *Jackson v. Sheldon*, 22 Me. 569; *Jack-*

*son v. Catlin*, 2 Johns. 248, 3 Am. Dec. 415; *Robins v. Bellas*, 2 Watts, 359; *Everts v. Agnes*, 4 Wis. 343, 6 Wis. 453, 65 Am. Dec. 314; *Harkreader v. Clayton*, 56 Miss. 383, 31 Am. Rep. 369; *Robbins v. Magee*, 76 Ind. 381; *Stone v. Duvall*, 77 Ill. 475; *Chicago, &c. Land Co. v. Peck*, 112 Ill. 408, 447; *Stanley v. Valentine*, 79 Ill. 544; *Eichlor v. Holroyd*, 15 Ill. App. 657; *Healey v. Seward*, 5 Wash. St. 319, 31 Pac. Rep. 874; *Smith v. South Royalton Bank*, 32 Vt. 341.

<sup>5</sup> *Skinner v. Baker*, 79 Ill. 496.

<sup>6</sup> *Landon v. Brown*, 160 Pa. St. 538, 28 Atl. Rep. 921.

ment or attachment against the property of the grantor, before the second delivery under a deed delivered in escrow, takes precedence of the grantee's rights under such deed.<sup>1</sup>

It is usual to speak of the deed's taking effect from the time of the delivery to the grantee, and of course his legal title dates from such delivery. The performance of the condition, however, gives him an equitable title and a right to compel a delivery of the deed. Therefore, while in law the title does not vest in the grantee till the second delivery, in equity it vests in him upon the performance of the condition. If this be fulfilled within a reasonable time, the depositary cannot prevent the deed from taking effect by obtaining the deed, whether at the grantor's direction or without it. The grantee may by suit compel the delivery of the deed.<sup>2</sup>

1322. Of course there may be a ratification of a deed fraudulently obtained from the depositary, or delivered by him before the performance of the condition. Where there had been an exchange of lands, and the deed of one grantor was delivered in escrow under a contract that it should not be delivered to the grantee until the discharge by the latter of certain incumbrances on other lands conveyed to the grantor in exchange, he did not, by recording the deed to him and occupying the lands, ratify the grantor's wrongful act in surreptitiously abstracting the deed to him from the depositary, the grantor being entitled under the contract to take immediate possession of the lands taken in exchange.<sup>3</sup>

1323. After performance of the condition, delivery to the grantee may be inferred from slight circumstances. If a deed be left in the hands of the grantor's attorney to be delivered to the grantee upon the performance of certain conditions, evidence that the conditions were fully performed, and that the attorney gave the deed to the grantor upon his requesting it for the purpose of delivering it to the grantee, warrants the finding of a delivery sufficient to pass the title to the grantee, although the grantor never delivered the deed to the grantee, and denied ever

<sup>1</sup> Jackson v. Rowland, 6 Wend. 666; 19 Pac. Rep. 629; Cannon v. Handley, 72 Demesmey v. Gravelin, 56 Ill. 93; Taft Cal. 133, 13 Pac. Rep. 315; Shirley v. Taft, 59 Mich. 185, 196, 26 N. W. Rep. Ayres, 14 Ohio, 307.

426, 60 Am. Rep. 291.

<sup>3</sup> Jackson v. Lynn (Iowa), 62 N. W.

<sup>2</sup> Hughes v. Thistlewood, 40 Kans. 232, Rep. 704.

having made the deed. The significance of the acts and declarations of the grantor is greatly strengthened by the performance of the conditions upon which the delivery was to be completed.<sup>1</sup>

1324. A relation back to the first delivery is allowed only in cases of necessity, to avoid the effect of events happening between the first and second delivery which would otherwise prevent the operation of the deed as intended.<sup>2</sup> In such cases the deed is given effect by relation from the first delivery, in order that the operation of the deed may not be frustrated by events transpiring after the first delivery and before the second has taken place.<sup>3</sup> Thus, in case the grantor dies before the happening of the event upon which the second delivery is to be made, it may be necessary to resort to the doctrine of relation to give the deed effect.<sup>4</sup>

It is a well-settled rule that if either of the parties die before the condition is performed, and afterwards the condition is performed, the deed is good, and will take effect from the first delivery.<sup>5</sup> If the grantee die after the first delivery of the deed, and before the final one, the trustee holding it may deliver it to the grantee's heirs; and it will be held, ordinarily, to have taken effect in the ancestor, so as to transmute title through him to the heirs by inheritance, where nothing intervenes to prevent.<sup>6</sup> The purchaser is entitled to demand a conveyance from the grantor's heirs, especially in case the depositary holds the deed to await the payment of a balance of purchase-money. The title in such case descends

<sup>1</sup> *Regan v. Howe*, 121 Mass. 424.

<sup>2</sup> *Taft v. Taft*, 59 Mich. 185, 194, 26 N. W. Rep. 426, 60 Am. Rep. 291; *Cook v. Brown*, 34 N. H. 460; *Harkreader v. Clayton*, 56 Miss. 383, 31 Am. Rep. 369; *Whitfield v. Harris*, 48 Miss. 710; *Loubatt v. Kipp*, 9 Fla. 60; *Frost v. Beekman*, 1 Johns. Ch. 288, 297, 18 Johns. 544, 9 Am. Dec. 246; *Cagger v. Lansing*, 57 Barb. 421, 427; *Shirley v. Ayres*, 14 Ohio, 307, 14 Am. Dec. 546; *Price v. Pittsburgh, Ft. W. & C. R. Co.* 34 Ill. 13; *Stanley v. Valentine*, 79 Ill. 544.

<sup>3</sup> *Lindley v. Groff*, 37 Minn. 338, 34 N. W. Rep. 26; *Taft v. Taft*, 59 Mich. 185, 194, 26 N. W. Rep. 426, 60 Am. Rep. 291; *Wellborn v. Weaver*, 17 Ga. 267, 63 Am. Dec. 235.

<sup>4</sup> *Brown v. Austen*, 35 Barb. 341; *Hunter v. Hunter*, 17 Barb. 22; *Harkreader v. Clayton*, 56 Miss. 383, 31 Am. Rep. 369; *Simpson v. McGlathery*, 52 Miss. 723; *Haeg v. Haeg*, 53 Minn. 33, 55 N. W. Rep. 1114.

<sup>5</sup> *Shep. Touch.* p. 59; *Ruggles v. Lawson*, 13 Johns. 285, 7 Am. Dec. 375; *Webster v. King's Co. Trust Co.* 145 N. Y. 275, 39 N. E. Rep. 964, affirming 30 N. Y. Supp. 357; *Lindley v. Groff*, 37 Minn. 338, 34 N. W. Rep. 26; *Stone v. Duvall*, 77 Ill. 475; *Bostwick v. McEvoy*, 62 Cal. 496.

<sup>6</sup> *Stone v. Duvall*, 77 Ill. 475; *Jones v. Jones*, 6 Conn. 111, 16 Am. Dec. 35, 40, 41, note; *Prewitt v. Ashford*, 90 Ala. 294, 7 So. Rep. 831.

to the grantor's heirs, subject to the equitable rights of the purchaser. If the heirs convey the title, the purchase-money belongs to them, and not to the administrator of the grantor's estate.<sup>1</sup>

1325. Intermediate rights are valid as against the second delivery. The doctrine of relation, being but a fiction of law, cannot be applied to the prejudice of the intervening rights of third parties. Until the second delivery the grantor's title may be levied on, sold on execution, or otherwise dealt with so as to cut off the escrow.<sup>2</sup> Attachments upon the land in suits against the grantor, made while the deed is awaiting a second delivery, have priority over the deed, although the attorney of the attaching creditors had knowledge of the negotiation for the sale of the land. "He knew of the negotiation, but not of a completed transaction. His clients had as much right to endeavor to obtain prior attachments as the other party had to obtain a prior deed."<sup>3</sup>

Inasmuch as the title does not ordinarily pass until the second delivery, the grantor may in the mean time make a valid conveyance of the same property, and a purchaser for value in good faith will obtain a title which will prevail as against the grantee in the deed held in escrow.<sup>4</sup> But a purchaser with knowledge of the delivery in escrow will take no title as against the grantee in the latter deed.<sup>5</sup>

1326. A court of equity will grant relief where by a mistake of fact a delivery has been made to the grantee by the depositary, or it has been fraudulently obtained without requiring the performance of a condition upon which such delivery was to be made. An action at law would in many cases afford an inadequate remedy, as legal damages would be too uncertain to constitute an adequate compensation.<sup>6</sup> Thus, where the depositary was instructed not to deliver the deed until the grantee had signed an obligation for the payment of part of the consideration, and he delivered it without requiring the signing of such

<sup>1</sup> *Teneick v. Flagg*, 29 N. J. L. 25.

Fed. Rep. 539; *Davis v. Cross*, 14 Lea, 637, 52 Am. Rep. 177.

<sup>2</sup> *Brown v. Austen*, 35 Barb. 341, per Sutherland, J.; *Taft v. Taft*, 59 Mich. 185, 194, 26 N. W. Rep. 426, 60 Am. Rep. 291.

<sup>5</sup> *Lewis v. Prather* (Ky.), 21 S. W. Rep. 538.

<sup>3</sup> *Stevens v. King*, 84 Me. 291, 24 Atl. Rep. 850.

<sup>6</sup> 3 Pam. Eq. Jur. 1402; *Danforth v. Paxton*, 1 Wash. 6, 23 Pac. Rep. 801, 805, per Scott, J.

<sup>4</sup> *Blair v. St. Louis, &c. R. R. Co.* 24



obligation, a court of equity may require the grantee either to pay the amount of such obligation with interest, or to reconvey the property on being allowed for any permanent improvements he has made, less the rents and profits he has received.<sup>1</sup>

In a suit in equity to set aside and cancel a deed which was delivered in escrow, and fraudulently abstracted from the depository by the grantee, the grantor is not bound to tender back land conveyed to him by the grantee in exchange, which was to be forfeited on the grantee's failure to perform the contract on which his deed was to be delivered to him by the depository.<sup>2</sup>

The court may order the return of the deed to the depository from whom the grantee has fraudulently obtained it without performance of the condition.<sup>3</sup>

1327. The grantee's remedy to establish his right to a deed held in escrow, after performance of the condition, is by a bill in equity against the grantor.<sup>4</sup> A mandamus to compel the person who holds the deed to deliver it is not a suitable remedy.<sup>5</sup> If the grantor has surreptitiously obtained possession of his deed from the depository, and has then conveyed the land to a third person who has knowledge of the facts, a decree setting aside the latter deed and establishing the former is proper.<sup>6</sup>

<sup>1</sup> *Titus v. Phillips*, 18 N. J. Eq. 541.

65 Barb. 58; *Knopf v. Hansen*, 37 Minn.

<sup>2</sup> *Jackson v. Lynn* (Iowa), 62 N. W. Rep. 704.

215, 33 N. W. Rep. 781.

<sup>5</sup> *Austin v. Register of Deeds*, 41 Mich.

<sup>3</sup> *Danforth v. Paxton*, 1 Wash. 6, 23 Pac. Rep. 801, 805.

723, 49 N. W. Rep. 923.

<sup>4</sup> *Mills v. Gore*, 20 Pick. 28; *Regan v.*

<sup>6</sup> *Lewis v. Prather* (Ky.), 21 S. W. Rep.

538.

*Howe*, 121 Mass. 424; *Stanton v. Miller*,

## CHAPTER XXX.

### FILLING BLANKS AND MAKING ALTERATIONS AFTER EXECUTION.

I. Filling blanks, 1328-1337.  
II. Making alterations, 1338-1358.

III. Burden of proof, 1359-1367.

#### I. *Filling Blanks.*

1328. The general rule is that a deed must be complete in all its material parts before its delivery. Blanks, the filling of which is essential to the validity of the deed, can be filled up, after the signing of the instrument, only by the signer himself, or by some one in his presence and by his direction.<sup>1</sup> A third person cannot in the absence of the signer make any material addition to the instrument, except by virtue of a power of attorney under seal, if the instrument itself is required to be under seal. The common-law doctrine, as stated by Sheppard in his *Touchstone of Common Assurances*,<sup>2</sup> is, that "every deed well made must be written; *i. e.* the agreement must be all written before the sealing and delivery of it; for if a man seal and deliver an empty piece of paper or parchment, albeit he do therewithal give commandment that an obligation or other matter shall be written in it, and this be done accordingly, yet this is no good deed." This remains the doctrine in England, and is adopted in many American States.<sup>3</sup> In a case in Massachusetts where a deed was

<sup>1</sup> *Lockwood v. Bassett*, 49 Mich. 546, 14 N. W. Rep. 492; *Duncan v. Hodges*, 4 McCord, 239.

<sup>2</sup> P. 54.

<sup>3</sup> *Blanks cannot be filled under parol authority.* *Hibblewhite v. M'Morine*, 6 M. & W. 200, overruling *Texira v. Evans*, cited and stated by Wilson, J., in *Master v. Miller*, 1 Anstr. 225; *Davidson v. Cooper*, 11 M. & W. 778, 793; *Re BARNED'S BANKING CO.* L. R. 3 Ch. 105; *Humble v. Langston*, 7 M. & W. 517. **Arkansas:** *Adamson v. Hartman*, 40 Ark. 58;

*Cross v. State Bank*, 5 Ark. 525. **California:** *Wunderlin v. Cadogan*, 50 Cal. 613; *Upton v. Archer*, 41 Cal. 85, 10 Am. Rep. 266; *Arguello v. Bours*, 67 Cal. 447, 8 Pac. Rep. 49. **Delaware:** *Clendaniel v. Hastings*, 5 Harr. 408. **Georgia:** *Ingram v. Little*, 14 Ga. 173, 58 Am. Dec. 549. **Illinois:** *People v. Organ*, 27 Ill. 27, 79 Am. Dec. 391; *Chase v. Palmer*, 29 Ill. 306; *Whitaker v. Miller*, 83 Ill. 381; *Wilson v. South Park Commissioners*, 70 Ill. 46; *McNab v. Young*, 81 Ill. 11.

signed in blank and afterwards filled up by a third person, in the signer's absence, by writing in the names of the parties, the description of the land, and other essential parts, the Supreme Court said: "The filling of the blanks created the substantial parts of the instrument itself, as much so as the signing and sealing. If such an act can be done under a parol agreement, in the absence of the grantor, its effect must be to overthrow the doctrine that an authority to make a deed must be given by deed. We do not think such a change of the ancient common law has been made in this Commonwealth, or that the policy of our legislation favors it, or that sound policy would dictate such a change. Our statutes, which provide for the conveyance of real estate by deed acknowledged and recorded, and for the acknowledgment and recording of powers of attorney for making deeds, are evidently based on the ancient doctrines of the common law respecting the execution of deeds; and a valuable and important purpose which these doctrines still serve is to guard against mistakes which are likely to arise out of verbal arrangements, from misunderstanding and defect of memory, even where there is no fraud. . . . If this method of executing deeds is sanctioned, it will fol-

See, however, *Chicago v. Gage*, 95 Ill. 593, 615, repudiating the doctrine declared in *People v. Organ*, 27 Ill. 27, and other cases following that case. Mr. Justice Sheldon, delivering the opinion of the court, said: "The old technical rule of the common law upon which that decision was based has become overborne in operation in this respect, at least, of filling blanks in official bonds, by the application of the doctrine of estoppel *in pais*, a principle, at least in its present broadness of scope, of modern growth. The first distinctive enunciation in England of the branch of estoppel, known as estoppel by conduct, is said to have been in *Pickard v. Sears*, 6 Ad. & E. 469, and in this country in *Welland Canal Co. v. Hathaway*, 8 Wend. 480."

**Indiana**: *Richmond Manuf. Co. v. Davis*, 7 Blackf. 412. See, however, *State v. Pepper*, 31 Ind. 76, relating to the filling of a blank in a bond. **Kansas**: *Ayres v. Probasco*, 14 Kans. 175; *State v. Matthews*,

44 Kans. 596, 25 Pac. Rep. 36. **Kentucky**: *Cummins v. Cassily*, 5 B. Mon. 74; *Lockart v. Roberts*, 3 Bibb, 361. **Maryland**: *Byers v. McClanahan*, 6 Gill & J. 250. **Massachusetts**: *Burns v. Lynde*, 6 Allen, 305; *Basford v. Pearson*, 9 Allen, 387, 85 Am. Dec. 764. **Michigan**: *Lindsley v. Lamb*, 34 Mich. 509; *Lockwood v. Bassett*, 49 Mich. 546, 14 N. W. Rep. 492; *Stebbins v. Watson*, 71 Mich. 467, 39 N. W. Rep. 721. **Mississippi**: *Williams v. Crutcher*, 6 Miss. 71, 35 Am. Dec. 422. **New Jersey**: *Bell v. Quick*, 13 N. J. L. 312. **North Carolina**: *Graham v. Holt*, 3 Ired. 300, 40 Am. Dec. 408; *Davenport v. Sleight*, 2 Dev. & B. L. 381, 13 Am. Dec. 420. **Ohio**: *Ayres v. Harness*, 1 Ohio, 368, 13 Am. Dec. 629. **Tennessee**: *Gilbert v. Anthony*, 1 Yerg. 69, 24 Am. Dec. 439; *Mosby v. Arkansas*, 4 Sneed, 324; *Smith v. Dickinson*, 6 Humph. 261. **Virginia**: *United States v. Nelson*, 2 Brock. 64, per Chief Justice Marshall; *Preston v. Hull*, 23 Gratt. 600, 14 Am. Rep. 153.

low that, though one has a regularly executed deed, yet it remains to be settled by parol evidence whether he ought to have been the grantee; what land should have been described; whether the deed should have been absolute or conditional, and, if conditional, what the terms of the condition should have been. To leave titles to real estate subject to such disputes would subject them to great and needless insecurity.”<sup>1</sup>

1329. Where this rule prevails, a deed executed with the name of the grantee in blank is void, and it is not made valid by the subsequent filling in of the name by the grantor's agent under parol authority.<sup>2</sup> The execution of a deed in this manner is invalid, although the reason for not filling in the grantee's name was that it was unknown to the grantor, and he delivered the deed to an agent with verbal directions to fill in the name when it should be ascertained.<sup>3</sup> The fact that the grantee whose name has been filled in after the execution of the deed enters into possession and pays the purchase-price does not make the deed effectual to pass the legal title.<sup>4</sup>

The date, not being a material part of a deed, may be filled in by the grantee or by a third person, after its execution, without invalidating it.<sup>5</sup>

1330. Under this rule, where there is more than one grantor in a deed, it may be valid as to one and void as to the other. A deed executed by one grantor when it was fully filled in is not,

<sup>1</sup> Burns v. Lynde, 6 Allen, 305, per Chapman, J., followed by the same court in Basford v. Pearson, 9 Allen, 387, 85 Am. Dec. 764. In the latter case it appeared that a married woman and her husband signed and sealed a deed in which the name of the grantee was left blank. The wife delivered the deed to her husband, and he in her absence inserted the name of the grantee, changed the qualified covenant of warranty into a general one, and delivered the deed to the grantee. These changes were made with the parol authority of the wife and with the knowledge of the grantee. The deed was held to be invalid as to the wife, and it was declared to be immaterial that a description of the occupation of the contemplated grantee was inserted in the deed before it was signed and sealed.

Such description of the grantee does not sufficiently indicate any particular grantee, and the husband might have filled in any name he might choose to select from a very large class of persons. The fact that he was a joint grantor with his wife did not enlarge his authority in respect to the filling of blanks or the alteration of covenants.

<sup>2</sup> Allen v. Withrow, 110 U. S. 119, 3 S. Ct. Rep. 517; Chase v. Palmer, 29 Ill. 306; Whitaker v. Miller, 83 Ill. 381; Upton v. Archer, 41 Cal. 85, 10 Am. Rep. 266; Preston v. Hull, 23 Gratt. 600.

<sup>3</sup> Davenport v. Sleight, 2 Dev. & B. 381, 31 Am. Dec. 420.

<sup>4</sup> Arguello v. Bours, 67 Cal. 447, 8 Pac. Rep. 49.

<sup>5</sup> Whiting v. Daniel, 1 Hen. & M. 391.

as to such grantor, rendered invalid by the fact that another grantor signed it before the description and other parts had been written, so that the deed is invalid as to such other grantor.<sup>1</sup>

1331. But some courts hold that the instrument may be filled up after it is executed, either in the presence or absence of the grantor, and either under his written or parol instructions.<sup>2</sup>

<sup>1</sup> *Furnas v. Durgin*, 119 Mass. 500, 20 Am. Rep. 341.

<sup>2</sup> *Parol authority to fill blanks is sufficient.* *Allen v. Withrow*, 110 U. S. 119, 128, 3 S. Ct. Rep. 517; *Drury v. Foster*, 2 Wall. 24; *Speake v. United States*, 9 Cranch, 28. **Connecticut**: *Bridgeport Bank v. New York & N. H. R. Co.* 30 Conn. 231, 274, where it was held that a blank assignment of a power of attorney, though under seal, might be filled under parol authority. **Iowa**: *Owen v. Perry*, 25 Iowa, 412, 96 Am. Dec. 49; *Devin v. Himer*, 29 Iowa, 297; *Clark v. Allen*, 34 Iowa, 190; *Swartz v. Ballou*, 47 Iowa, 188, 29 Am. Rep. 470; *McClain v. McClain*, 52 Iowa, 272, 3 N. W. Rep. 60; *McCleery v. Wakefield*, 76 Iowa, 529, 41 N. W. Rep. 210. These cases overruled *Simms v. Hervey*, 19 Iowa, 273. They attach importance to the statute of the State which declares that a deed shall not be invalid for want of a seal. **Maine**: *South Berwick v. Huntress*, 53 Me. 89, 87 Am. Dec. 535. This decision is upon the ground that a party executing a bond or a deed, and delivering it knowing that there are blanks in it to be filled in order to make it a perfect instrument, must be considered as agreeing that the blanks may be filled after he has executed it. See *Cooper v. Page*, 62 Me. 192. **Minnesota**: *McClung v. Steen*, 32 Fed. Rep. 373; *Pence v. Arbuckle*, 22 Minn. 417; *State v. Young*, 23 Minn. 551. But where a guardian was authorized, by order of court, to appoint an attorney to convey land of the ward, and executed a blank power, no person being named as attorney, and another person inserted a name in the blank left for the name of the attorney, the instrument was held to be invalid as a power of attorney. The court

said: "There is no element of estoppel in the case such as there was in *Pence v. Arbuckle*, 22 Minn. 417. The guardian could not estop her ward by setting afloat the blank paper claimed as a power." *Cox v. Manvel*, 50 Minn. 87, 52 N. W. Rep. 273. **Missouri**: *Field v. Stagg*, 52 Mo. 534, 14 Am. Rep. 435; *McQuie v. Peay*, 58 Mo. 56; *Burnside v. Wayman*, 49 Mo. 356; *Otis v. Browning*, 59 Mo. App. 326. **Nebraska**: *Garland v. Wells*, 15 Neb. 298. **New York**: *Knapp v. Maltby*, 13 Wend. 587; *Commercial Bank v. Kortright*, 22 Wend. 348; *Wooley v. Constant*, 4 Johns. 54, 4 Am. Dec. 246; *Ex parte Kerwin*, 8 Cow. 118; *Chauncey v. Arnold*, 24 N. Y. 330; and although the doctrine of *Texira v. Evans* is spoken of by Mr. Justice Smith as the settled doctrine in that State, yet Mr. Justice Denio speaks with apparent approval of the English cases overruling the "looser doctrines" of that case. In the case before the court the question, whether the mortgagee's name could be filled in by one acting for the mortgagor under parol authority, was left undecided; for in that case the name of the lender was not filled in at all, and it was held that the mortgage was ineffectual as security in the hands of one who had advanced money upon it in that condition. And see *Burnett v. Wright*, 135 N. Y. 543, 32 N. E. Rep. 253. **Oregon**: *Jennings v. Jennings*, 24 Oreg. 447, 34 Pac. Rep. 21; *Cribben v. Deal*, 21 Oreg. 211, 27 Pac. Rep. 1046, 28 Am. St. Rep. 746. See, however, *Shirley v. Burch*, 16 Oreg. 83, 18 Pac. Rep. 351, 8 Am. St. Rep. 273. **Pennsylvania**: *Wiley v. Moor*, 17 S. & R. 438, 17 Am. Dec. 696. But in *Wallace v. Harmstad*, 15 Pa. St. 462, 53 Am. Dec. 603, Chief Justice Gibson said that

This doctrine is founded upon the overruled case of *Texira v. Evans*, which was as follows:<sup>1</sup> Evans wanted to borrow £400, or so much of it as his credit should be able to raise; for this purpose he executed a bond, with blanks for the name and sum, and sent an agent to raise money on the bond; Texira lent £200 on it, and the agent accordingly filled up the blanks with that sum and Texira's name, and delivered the bond to him. On *non est factum*, Lord Mansfield held it a good deed.

1332. But this rule does not apply in case a married woman is required to acknowledge her deed on a separate examination, for under such a requirement she cannot make a valid conveyance by an attorney. On the same principle, she cannot delegate to another the filling in of material parts of her deed after she has executed it. If, therefore, a married woman executes a mortgage deed of her separate estate, her husband joining, in which blanks are left for the insertion of the mortgagee's name and the sum borrowed, and the blanks are filled in by the husband after both husband and wife have signed and acknowledged the deed, the mortgage is not valid, although the mortgagee advanced the money upon it in good faith and without knowledge of the irregularity of execution. The mortgage, when acknowledged by the wife, had no legal effect more than a blank piece of paper. There could be no acknowledgment of it within the meaning of the statute until the blanks were filled, and an officer could not properly take the acknowledgment of the instrument in this incomplete condition.<sup>2</sup>

1333. It is held by all the courts that an instrument filled

*Texira v. Evans* could only be sustained on the ground that the obligor had estopped himself by an act *in pais*; which is in effect to wholly discard the doctrine of the case. South Carolina: *Duncan v. Hodges*, 4 McCord, 239, 17 Am. Dec. 734; *Gourdin v. Commander*, 6 Rich. 497. See, however, *Permitter v. McDaniel*, 1 Hill, 267, 26 Am. Dec. 179. South Dakota: *Ellis v. Wait*, 4 S. D. 454, 38 Cent. L. J. 227. Texas: *Ragsdale v. Robinson*, 48 Tex. 379; *Runge v. Schleicher* (Tex. Civ. App.), 21 S. W. Rep. 423. This is upon the ground of estoppel. In the earlier cases of *Viser v. Rice*, 33 Tex. 139, and *McCown v.*

*Wheeler*, 20 Tex. 372, it was held that, while a deed executed in blank as to the name of the grantee and filled up after the acknowledgment does not operate as a deed, it is admissible evidence of a contract sale. Wisconsin: *Van Etta v. Evenson*, 28 Wis. 33, 9 Am. Rep. 486; *Schintz v. McManamy*, 33 Wis. 299; *Vliet v. Camp*, 13 Wis. 198; *Nelson v. McDonald*, 80 Wis. 605, 50 N. W. Rep. 893, 27 Am. St. Rep. 71.

<sup>1</sup> Cited and stated in *Master v. Miller*, 1 Anstr. 225, 228.

<sup>2</sup> *Drury v. Foster*, 2 Wall. 24; *McQuie v. Peay*, 58 Mo. 56.

up with the grantee's name contrary to the directions of the maker, and with knowledge of such unauthorized act by the substituted grantee, is void as to such grantee and any one claiming under him with notice of the fraud.<sup>1</sup> Thus, if a deed has been executed with the grantee's name in blank, and the grantor has authorized his agent to fill the blank with the name of a particular person as grantee, and the agent at the suggestion of such intended grantee fills the blank with the name of another person and delivers the deed to him, it is void in his hands.<sup>2</sup> The grantor has an undoubted right to determine for himself to whom he will convey his land. He may be willing to convey to one person, but not to another.

**1334.** An agent's authority to fill a blank in a deed after its execution must be pursued strictly. If the agent exceeds his authority, the deed, as between the grantor and the grantee taking the conveyance with knowledge that it was executed with an unfilled blank which was filled by the agent, is void. Thus, where a mortgage was executed by husband and wife upon their homestead, with the amount secured left blank, the wife authorizing her husband to fill the blank with the sum of one thousand dollars, and he without her knowledge filled the blank with the sum of fifteen hundred dollars in the presence of the mortgagee, the mortgage was invalid in the hands of such mortgagee as against the wife and the homestead property.<sup>3</sup>

<sup>1</sup> *Cooper v. Page*, 62 Me. 192; *State v. Matthews*, 44 Kans. 596, 25 Pac. Rep. 36; *Ayres v. Probasco*, 14 Kans. 175; *Schintz v. McManamy*, 33 Wis. 299; *Up-ton v. Archer*, 41 Cal. 85, 10 Am. Rep. 266. See, also, *Drury v. Foster*, 2 Wall. 24; *Whitaker v. Miller*, 83 Ill. 381; *Simms v. Hervey*, 19 Iowa, 274.

<sup>2</sup> *Schintz v. McManamy*, 33 Wis. 299.

<sup>3</sup> *Schintz v. McManamy*, 33 Wis. 299; *Cooper v. Page*, 62 Me. 192; *Ellis v. Wait*, 4 S. D. 454, 38 Cent. L. J. 227. *Corson, J.*, said: "Such mortgagee, taking the mortgage with notice that it was so executed in blank and is filled up by an agent, takes it with full knowledge that it was an imperfect mortgage as it came from the hands of the maker, and that, unless the same is filled up by the agent strictly in pursuance of the authority con-

ferred, the maker is not bound by it, and that it is not his mortgage. If, having notice of the defect in the mortgage, the mortgagee chooses to take it and rely upon the good faith of the agent in filling the blank, without requiring the mortgage to be re-acknowledged after the blank is filled up, he assumes the risk that it is filled up in accordance with the authority conferred upon the agent, and, if it is not so done, the mortgage will be void as to the party whose instructions have not been followed. We think there is no injustice in requiring a mortgagee dealing with an agent, under the circumstances disclosed in the case at bar, to ascertain the extent of the agent's authority to fill the blank, and requiring him to assume the risk of the agent exceeding his authority."

In like manner, where a married woman and her husband executed a mortgage on the homestead, in blank as to the amount to be secured by it and as to the name of the mortgagee, with the understanding that it was to be made to a certain person, and it was intrusted to an agent to fill up the blanks, and he filled them up for a larger sum and a larger rate of interest and to a different mortgagee, with the consent of the husband only, it was held that the mortgage so filled up was not the mortgage of the wife, and was void as to her.<sup>1</sup>

Where a tax-sale certificate was taken by an agent for the protection of his principal, a mortgagee of the land, and afterwards, upon the assurance of the owner of the land that he wanted the certificate for the purpose of cancelling the tax against the land, the agent delivered the certificate to him indorsed in blank, and the owner, without the consent or knowledge of the mortgagee or his agent, wrote an assignment of the certificate to a third person over the agent's signature, it was held that the assignment was void.<sup>2</sup>

1335. It is generally held that a bona fide purchaser for value will be protected in his title if he claims under a deed which has been filled up in accordance with the grantor's instructions, whether written or oral, either in his presence or absence, and whether before or after delivery.<sup>3</sup> This is upon the familiar principle that, whenever one of two innocent persons must suffer loss on account of the wrongful acts of a third person, he who has enabled the third person to occasion the loss is the person who must suffer the loss.<sup>4</sup>

Even if the substitution of the name of a person not intended to be the grantee has been procured by fraud of such a character that it amounts to a criminal offence, a subsequent *bona fide* pur-

<sup>1</sup> Ayres v. Probasco, 14 Kans. 175.

<sup>2</sup> Beardsley v. Day, 52 Minn. 451, 55 N. W. Rep. 46.

<sup>3</sup> State v. Matthews, 44 Kans. 596, 25 Pac. Rep. 36; Chapman v. Veach, 32 Kans. 167, 4 Pac. Rep. 100; Knaggs v. Mastin, 9 Kans. 532; Clark v. Allen, 34 Iowa, 190; McClain v. McClain, 52 Iowa, 272, 3 N. W. Rep. 60; Swartz v. Ballou, 47 Iowa, 188, 29 Am. Rep. 470; Field v. Stagg, 52 Mo. 534, 14 Am. Rep. 435; Ragsdale v. Robinson, 48 Tex. 379;

Van Etta v. Evenson, 28 Wis. 33, 9 Am. Rep. 486; Schintz v. McManamy, 33 Wis. 299; Tisher v. Beckwith, 30 Wis. 55; Pence v. Arbuckle, 22 Minn. 417; Garland v. Wells, 15 Neb. 298, 18 N. W. Rep. 132; Wallace v. Harmstad, 15 Pa. St. 462, 53 Am. Dec. 603; South Berwick v. Huntress, 53 Me. 89, 87 Am. Dec. 535.

<sup>4</sup> Jordan v. McNeil, 25 Kans. 459; State v. Matthews, 44 Kans. 596, 25 Pac. Rep. 36.



chaser may enforce the instrument against the maker, although he is also an innocent person. Thus, if such a deed has been recorded, and the substituted and fraudulent grantee procures a loan of money on a mortgage of the land so conveyed from an innocent person who makes the loan on the strength of the apparent title of the borrower, the mortgage is valid. In such a case the maker would be estopped from claiming that the instrument was void as against the innocent *bona fide* holder.<sup>1</sup>

1336. This doctrine is applied even as against a married woman who has executed and acknowledged a deed of conveyance of real property which was at the time incomplete, it being without the name of the grantee, and has allowed her husband to take it away for delivery to the purchaser: she is estopped, as against the purchaser, to assert that the deed was invalid because no grantee was named in it when she executed it, or because she did not know that the land described in the deed was her own, and not her husband's land, she not having read the deed. The deed having been delivered, as the wife intended it should be, to a purchaser who in good faith paid the consideration for the conveyance, she cannot be allowed to defeat the title by reason of her husband's subsequent filling in of the purchaser's name.<sup>2</sup>

1337. The grantor may be estopped by his acts from claim-

<sup>1</sup> *State v. Matthews*, 44 Kans. 596, 26 Pac. Rep. 36, per Valentine, J.; *Jordan v. McNeil*, 25 Kans. 459; *Ort v. Fowler*, 31 Kans. 478, 2 Pac. Rep. 580; *Chapman v. Veach*, 32 Kans. 167, 4 Pac. Rep. 100; *Deputy v. Stapleford*, 19 Cal. 302; *McNab v. Young*, 81 Ill. 11; *Tisher v. Beckwith*, 30 Wis. 55; *Cook v. Moore*, 39 Tex. 255.

<sup>2</sup> *Dobbin v. Cordiner*, 41 Minn. 165, 42 N. W. Rep. 870. "It is immaterial, in our view of the case, whether or not there was an express authorization of the husband to fill in the name of the grantee. It is enough that the plaintiff intended the instrument to have effect as a conveyance, and that she allowed her husband to take it, after she had executed it, for the purpose of delivering it to the purchaser as a deed of conveyance executed by her. That the plaintiff supposed that her husband was to deliver this deed to

the purchaser is shown by her own testimony. The extent of the proof on the part of the plaintiff, as to the misrepresentation of her husband, was that he said to her, when he asked her to execute the deed, that he would like to sell a lot. Without considering what might have been the effect of fraudulent misrepresentations of the husband in a case where the wife was not chargeable with negligence in the transaction, we regard this evidence as wholly insufficient to justify the granting of relief as against an innocent purchaser. With regard to the rights of purchasers, it was culpable negligence on the part of the plaintiff to execute the conveyance unless she is to be bound by it." Per Dickinson, J.

And so *Nelson v. McDonald*, 80 Wis. 605, 50 N. W. Rep. 893, 27 Am. St. Rep. 71, where the description of the property was filled in.

ing that material blanks were filled after he executed and delivered the deed. Such was the case where a grantor, who had executed a deed without filling the name of the grantee, afterwards, when applied to for information about the title by a person about to purchase the land, stated that the grantee whose name then appeared in the deed was the owner, and upon this assurance the purchase was made.<sup>1</sup> To permit the grantor in such case to contradict his statement would work fraud and injustice to the purchaser, and therefore the grantor is precluded from showing that his statement was not true. Even if the blank is filled up after delivery, if the grantor claims the benefit of accompanying and related contracts, he thereby makes the deed as completed his own, and precludes himself from objecting to its validity.<sup>2</sup>

In like manner, where the name of the grantee was not written in the deed before delivery, but the grantee to whom the deed was delivered afterwards filled in his own name, it was held that the grantor ratified the deed by bringing a suit against such grantee for the consideration agreed to be paid for the deed.<sup>3</sup>

If a deed is executed and acknowledged without naming a grantee, but the name is inserted before delivery and the deed is delivered by the grantor himself or by his direction, he thereby adopts the deed as completed.<sup>4</sup>

The objection that a deed was executed with the name of the grantee in blank, and that it was inserted after delivery, cannot be made by one claiming through or in the right of the grantor.<sup>5</sup>

## II. *Making Alterations.*

1338. Anciently an alteration of a deed by the grantee, or even by a stranger without the consent of the grantor, rendered the deed void, whether the alteration was a material one or not.<sup>6</sup> "If the alteration," says Sheperd, "be made by the

<sup>1</sup> *Wade v. Bunn*, 84 Ill. 117.

<sup>2</sup> *Lockwood v. Bassett*, 49 Mich. 546, 14 N. W. Rep. 492; *Duncan v. Hodges*, 4 McCord, 239, 17 Am. Dec. 734.

<sup>3</sup> *Devin v. Himer*, 29 Iowa, 297; *Simms v. Hervey*, 19 Iowa, 273, per Dillon, J.

<sup>4</sup> *Lockwood v. Bassett*, 49 Mich. 546, 14 N. W. Rep. 492.

<sup>5</sup> *McNab v. Young*, 81 Ill. 11.

<sup>6</sup> *Pigot's Case*, 11 Co. 26 b; *Shep. Touchstone*, 69. Also, *Hunt v. Adams*,

6 Mass. 519, 521, per Parsons, C. J.; *Hatch v. Hatch*, 9 Mass. 307, 6 Am. Dec. 67; *Adams v. Frye*, 3 Met. 103, per Dewey, J.; *Cutts v. United States*, 1 Gall. 69, 71, per Story, J.; *Letcher v. Bates*, 6 J. J. Marsh. 524, 22 Am. Dec. 92; *Hunt v. Gray*, 35 N. J. L. 227, 10 Am. Rep. 232.

The decision in *Pigot's Case* was treated with respect in the English courts so late as the case of *Davidson v. Cooper*, 11 M. & W. 778, and 13 M. & W. 342, decided

party himself that owneth the deed, albeit it be in a place not material, and that it tend to the advantage of the other party and his own disadvantage, yet the deed is hereby become void."

So much of the ancient doctrine in relation to alterations as declares that an alteration by a stranger avoids the instrument has, with much of the rest of it, given place in recent times to a more reasonable view, and as a general rule an alteration by a stranger no longer invalidates the deed for any purpose.<sup>1</sup>

A material alteration of a deed by a trustee who holds the legal title for others, who are entitled to the enjoyment of the beneficial interest, does not invalidate the deed; for the trustee is not a party within a rule that a material alteration by a party to a deed, with a view to increase the benefit which he may take under it, renders it void.<sup>2</sup>

An alteration or erasure in a deed made before the execution and delivery of it does not invalidate it.<sup>3</sup>

**1339.** If an alteration in a deed was made while it was in the possession of the grantee, there is a presumption that it was made by him, and it devolves upon him to show that the alteration was not made with his knowledge or consent.<sup>4</sup> In any case of an alteration made after delivery, the presumption must be that it was made by the grantee, or by some one in privity with him.<sup>5</sup>

in the years 1843, 1844. But the case is not followed in later decisions. *Aldous v. Cornwell*, L. R. 3 Q. B. 573; *Lord St. Leonards*, Sugden on Powers, 8th ed. p. 603, who says, "The true ground of the rule is the fraud of the party interested;" citing *Henfree v. Bromley*, 6 East, 309.

<sup>1</sup> *Cutts v. United States*, 1 Gall. 69. **Alabama**: *Winter v. Pool*, 100 Ala. 503, 14 So. Rep. 411, 16 So. Rep. 543; *Anderson v. Bellenger*, 87 Ala. 334, 6 So. Rep. 82. **Connecticut**: *Nichols v. Johnson*, 10 Conn. 192. **Florida**: *Orlando v. Gooding*, 34 Fla. 244, 15 So. Rep. 770. **Indiana**: *John v. Hatfield*, 84 Ind. 75. **Kentucky**: *Lee v. Alexander*, 9 B. Mon. 25. **Missouri**: *Moore v. Ivers*, 83 Mo. 29; *Lubbering v. Kohlbrecher*, 22 Mo. 596; *Medlin v. Platte Co.* 8 Mo. 235, 40 Am. Dec. 135. **New York**: *Martin v. Tradesmen's Ins. Co.* 101 N. Y. 498, 5 N. E. Rep.

338; *Jackson v. Malin*, 15 Johns. 293; *Cassini v. Jerome*, 58 N. Y. 315, 321; *Marcy v. Dunlap*, 5 Lans. 365, per Johnson, J.; *Gleason v. Hamilton*, 19 N. Y. Supp. 103, 45 N. Y. St. Rep. 491; *Rees v. Overbaugh*, 6 Cow. 746; *Lewis v. Payn*, 8 Cow. 71, 18 Am. Dec. 427; *Malin v. Malin*, 1 Wend. 625; *Van Brunt v. Van Brunt*, 3 Ed. Ch. 14; *Waring v. Smyth*, 2 Barb. Ch. 119, 47 Am. Dec. 299. **Pennsylvania**: *Robertson v. Hay*, 91 Pa. St. 242; *Barrington v. Bank*, 14 S. & R. 405; *Rhoads v. Frederick*, 8 Watts, 448. **Vermont**: *Bigelow v. Stilphen*, 35 Vt. 521.

<sup>2</sup> *Flinn v. Brown*, 6 S. C. 209.

<sup>3</sup> *Cairo & St. L. R. R. Co. v. Parrott*, 92 Ill. 194.

<sup>4</sup> *Bowser v. Cole*, 74 Tex. 222, 11 S. W. Rep. 1131.

<sup>5</sup> *Jones v. Crowley* (N. J. L.), 30 Atl. Rep. 871, per Depue, J.

1340. By the modern law, only a material alteration, and one made by the grantee, invalidates the deed. An immaterial alteration does not invalidate the deed in any way, though made by the party claiming under it.<sup>1</sup>

In North Carolina, however, registration is necessary to perfect a title by deed, though the vendor parts with all control over it upon delivery. It is accordingly held that, before registration, a deed may be altered or cancelled in any way that may be agreed upon between the parties so far as it affects them.<sup>2</sup> But if the alteration be made by the grantee before registration for the purpose of putting the title beyond the reach of his creditors, by erasing his own name and inserting that of his wife as grantee, though the grantor assents to the alteration after the registration, the deed is rendered inoperative, and the grantee cannot invoke the equitable aid of the court to have it restored to its original form and registered,<sup>3</sup> though as between the parties it seems that the legal title passes.<sup>4</sup>

1341. The reasons given for the rule that a material alteration of a deed avoids it are, first, that on grounds of public policy no one shall be permitted to take the chance of committing

<sup>1</sup> **Alabama**: *Winter v. Pool*, 100 Ala. 503, 14 So. Rep. 411. **Connecticut**: *Nichols v. Johnson*, 10 Conn. 192; *Murray v. Klinzing*, 64 Conn. 78. **Illinois**: *McKibben v. Newell*, 41 Ill. 461; *Gardiner v. Harback*, 21 Ill. 129. **Indiana**: *Brooks v. Allen*, 62 Ind. 401. **Massachusetts**: *Vose v. Dolan*, 108 Mass. 155, 11 Am. Rep. 331; *Nickerson v. Swett*, 135 Mass. 514; *Commonwealth v. Emigrant Sav. Bank*, 98 Mass. 12, 93 Am. Dec. 126; *Chessman v. Whittemore*, 23 Pick. 231; *Hunt v. Adams*, 6 Mass. 519; *Brown v. Pinkham*, 18 Pick. 172; *Adams v. Frye*, 3 Met. 103. **Michigan**: *Moote v. Scriven*, 33 Mich. 500, 505. **Mississippi**: *Gordon v. Sizer*, 39 Miss. 805; *Bridges v. Winters*, 42 Miss. 135, 2 Am. Rep. 598. **Missouri**: *Woods v. Hilderbrand*, 46 Mo. 284, 2 Am. Rep. 513; *State v. Dean*, 40 Mo. 464; *Western Building Asso. v. Fitzmaurice*, 7 Mo. App. 283. **Nebraska**: *Fisher v. Hutton* (Neb.), 62 N. W. Rep. 488. **New Hampshire**: *Burnham v. Ayer*, 35 N. H. 351. **New**

**York**: *Herrick v. Malin*, 22 Wend. 388; *People v. Muzzy*, 1 Den. 239; *Casoni v. Jerome*, 58 N. Y. 315, 321; *Smith v. Kidd*, 68 N. Y. 130, 141, 23 Am. Rep. 157; *Martin v. Tradesmen's Ins. Co.* 101 N. Y. 498, 5 N. E. Rep. 338; *Solon v. Williamsburgh Sav. Bank*, 144 N. Y. 119, 122, 134; *Gleason v. Hamilton*, 138 N. Y. 353, 34 N. E. Rep. 283, 19 N. Y. Supp. 103. **Pennsylvania**: *Robertson v. Hay*, 91 Pa. St. 242. **Texas**: *Stanley v. Epperson*, 45 Tex. 644. **Vermont**: *Bigelow v. Stilphen*, 35 Vt. 521. **Virginia**: *Whiting v. Daniel*, 1 Hen. & M. 390. **Wisconsin**: *Krouskop v. Shontz*, 51 Wis. 204, 8 N. W. 241, 37 Am. Rep. 817.

Otherwise in **New Jersey** and **South Carolina**: see § 1348.

<sup>2</sup> *Respass v. Jones*, 102 N. C. 5, 8 S. E. Rep. 770; *Davis v. Inscoe*, 84 N. C. 396; *Hare v. Jernigan*, 76 N. C. 471.

<sup>3</sup> *Respass v. Jones*, 102 N. C. 5, 8 S. E. Rep. 770.

<sup>4</sup> *York v. Merritt*, 80 N. C. 285.

a fraud without running any risk of losing by the event; and, second, that the identity of the instrument is destroyed.<sup>1</sup> The same reasons were formerly given for the discarded rule that an immaterial alteration, if made with a fraudulent intent, avoids a deed.<sup>2</sup>

**1342.** Thus it becomes a matter of importance to inquire whether an alteration is a material one or not. In general, it may be said that any alteration which changes the meaning of the instrument, and the rights and obligations of the parties to it, is material.<sup>3</sup> Thus, if the description be changed so as to include additional land,<sup>4</sup> or the condition of a mortgage be changed so as to secure an additional debt,<sup>5</sup> the change is a material one which avoids the deed.

An alteration is immaterial when it merely expresses something which would be implied in the deed as it was before the alteration.<sup>6</sup> An alteration which does not change the meaning or legal effect of a deed is immaterial.<sup>7</sup>

**1343.** An alteration of the date of a deed is an immaterial alteration, because the date is not a material part of the deed. The middle initial of the name of the grantor in a deed being immaterial, an alteration of this initial is immaterial.<sup>8</sup>

**1344.** An alteration of a deed by changing the amount of

<sup>1</sup> *Master v. Miller*, 4 T. R. 320, 329; *Commonwealth v. Emigrant Sav. Bank*, 98 Mass. 12, 16, 93 Am. Dec. 126, per Hoar, J.

<sup>2</sup> *Master v. Miller*, 4 T. R. 320; *Suffell v. Bank of England*, 7 Q. B. D. 270, 9 Q. B. D. 555; *Caldwell v. Parker*, 3 Ir. Rep. Eq. 519.

<sup>3</sup> *Pereau v. Frederick*, 17 Neb. 117, 22 N. W. Rep. 235.

<sup>4</sup> *Johnson v. Moore*, 33 Kans. 90, 5 Pac. Rep. 406.

In *Collins v. Collins*, 51 Miss. 311, 24 Am. Rep. 632, the attempt to make the mortgage secure an additional sum was made by consent of all the parties, and of course the alteration did not destroy the instrument as a security for the sum originally written in it.

<sup>5</sup> *Sanderson v. Symonds*, 1 Brod. & B. 426; *Aldous v. Cornwell*, L. R. 3 Q. B. 573, 9 Best & S. 607; *Burnham v. Ayer*,

35 N. H. 351, 355; *Goodenow v. Curtis*, 33 Mich. 505; *Kline v. Raymond*, 70 Ind. 271; *Derby v. Thrall*, 44 Vt. 413, 8 Am. Rep. 389; *Fisherdict v. Hutton* (Neb.), 62 N. W. Rep. 488.

<sup>6</sup> *Shelton v. Deering*, 10 B. Mon. 405; *Gordon v. Sizer*, 39 Miss. 805; *Morrill v. Otis*, 12 N. H. 466; *Commonwealth v. Emigrant Sav. Bank*, 98 Mass. 129, 93 Am. Dec. 126; *Hatch v. Hatch*, 9 Mass. 307, 6 Am. Dec. 67; *Smith v. Crooker*, 5 Mass. 538; *Hunt v. Adams*, 6 Mass. 519; *Pardee v. Lindley*, 31 Ill. 174, 83 Am. Dec. 219; *Oliver v. Hawley*, 5 Neb. 439; *Fisherdict v. Hutton* (Neb.), 62 N. W. Rep. 488; *Murray v. Klinzing*, 64 Conn. 78, 29 Atl. Rep. 244.

<sup>7</sup> *Keane v. Smallbone*, 17 C. B. 179; *Adsetts v. Hives*, 33 Beav. 52; *Whiting v. Daniel*, 1 Hen. & M. 390; *Keen v. Monroe*, 75 Va. 424.

<sup>8</sup> *Banks v. Lee*, 73 Ga. 25.

the consideration, or by inserting the amount where the amount is left blank before the word "dollars," is immaterial;<sup>1</sup> for the word "dollars" alone expresses a sufficient consideration to rebut a resulting trust, which is the only legal effect of expressing any consideration; and in many States a deed is good though no consideration be recited.<sup>2</sup>

1345. Whether an alteration is material or not is a question of law for the court, and should never be submitted to the jury as a question of fact.<sup>3</sup> The legal effect of an alteration in a deed is a question for the court.<sup>4</sup> Whether the alteration was made before or after the execution of the deed is a question of fact for the jury.<sup>5</sup>

1346. A material alteration made by the grantee does not divest him of the title and revest the title in the grantor, if the grantee's title has taken effect in possession.<sup>6</sup> The deed after delivery is an executed instrument, by virtue of which the title has vested in the grantee. "There is a well-recognized distinction in this connection between this class of instruments and those which merely evidence a completed and fully executed transaction, and even between those parts of the same instrument which are as to some matters executory and as to others executed, in the sense of being a mere memorial of an accomplished and

<sup>1</sup> *Murray v. Klinzing*, 64 Conn. 78, 29 Atl. Rep. 244; *Belden v. Seymour*, 8 Conn. 304, 21 Am. Dec. 661; *Vose v. Dolan*, 108 Mass. 155, 11 Am. Rep. 331; *Cheek v. Nall*, 112 N. C. 370, 17 S. E. Rep. 80.

<sup>2</sup> *Cheek v. Nall*, 112 N. C. 370, 17 S. E. Rep. 80; *Love v. Harbin*, 87 N. C. 249; *Mosely v. Mosely*, 87 N. C. 69.

<sup>3</sup> *Fisherick v. Hutton* (Neb.), 62 N. W. Rep. 488; *Steele v. Spencer*, 1 Pet. 552; *Burnham v. Ayer*, 35 N. H. 351; *Stephens v. Graham*, 7 Serg. & R. 505, 10 Am. Dec. 485; *Keen v. Monroe*, 75 Va. 424.

<sup>4</sup> *Jones v. Crowley* (N. J. L.), 30 Atl. Rep. 871.

<sup>5</sup> *Jones v. Crowley* (N. J. L.), 30 Atl. Rep. 871.

<sup>6</sup> *Henfree v. Bromley*, 6 East, 309, per Lord Ellenborough; *Kendall v. Kendall*, 12 Allen, 92; *Hatch v. Hatch*, 9 Mass.

307, 6 Am. Dec. 67; *Dana v. Newhall*, 13 Mass. 498; *Chessman v. Whittemore*, 23 Pick. 231; *Barrett v. Thorndike*, 1 Me. 73; *Lewis v. Payn*, 8 Cow. 71, 18 Am. Dec. 427; *Jackson v. Jacoby*, 9 Cow. 125; *Herrick v. Malin*, 22 Wend. 388; *Jackson v. Gould*, 7 Wend. 364; *Smith v. McGowan*, 3 Barb. 404; *Withers v. Atkinson*, 1 Watts, 236; *Rifener v. Bowman*, 53 Pa. St. 313; *Miller v. Gilleland*, 19 Pa. St. 119; *Wallace v. Harmstad*, 44 Pa. St. 492; *McIntyre v. Velte*, 153 Pa. St. 350, 25 Atl. Rep. 739; *Alexander v. Hickox*, 34 Mo. 496, 86 Am. Dec. 118; *Woods v. Hilderbrand*, 46 Mo. 284, 2 Am. Rep. 513; *Burnett v. McCluey*, 78 Mo. 676; *Bliss v. McIntyre*, 18 Vt. 466, 46 Am. Dec. 165; *Coit v. Starkweather*, 8 Conn. 289; *Fletcher v. Mansur*, 5 Ind. 267; *Ransier v. Vanorsdol*, 50 Iowa, 130.

existing fact. The distinction, so far as it has been fully recognized and established, goes only to this extent: Where the right is executory, and the instrument securing and evidencing it is thus altered, not only is the paper, as evidence of the right, destroyed, but the right itself is also destroyed; while, on the other hand, where the instrument merely evidences an executed transaction and is a memorial of it, the rights which vested by virtue of that transaction in the person who spoliates the instrument are not thereby destroyed or divested, whatever may be the effect of the spoliation upon the memorial itself.”<sup>1</sup>

To like effect Lord Campbell, C. J., says: “There is no ground for saying that, if a deed be altered in a material part, it is rendered void from the beginning. It ceases to have any new operation, and no action can be brought in respect of any pending obligation which would have arisen from it had it remained entire; but it may still be given in evidence to prove a right or title created by its having been executed, or to prove any collateral fact.”<sup>2</sup> Elphinstone states the general rule very clearly, saying:<sup>3</sup> “There is a distinction between those deeds, or clauses of a deed, which have a continuing effect or are executory, such as a covenant to pay a sum of money, and those which produce their full effect at the instant of execution, such as a conveyance of land. No case can be found in which a deed or clause of the latter nature has been prevented from taking effect because the deed was altered after execution; so that an altered deed may be given in evidence to prove any effect produced by it at the instant of execution, or of any right which existed *aliunde*, and of which it is evidence.”

1347. The title to the estate which was vested in the grantee by a genuine and valid conveyance remains in him though he destroys or makes void the deed itself by a forgery, or by a voluntary cancelment of the conveyance which created that

<sup>1</sup> Alabama State Land Co. v. Thompson (Ala.), 16 So. Rep. 440, per McClellan, J. See, also, Ransier v. Vanorsdol, 50 Iowa, 130.

<sup>2</sup> Agricultural Cattle Ins. Co. v. Fitzgerald, 16 Q. B. 432, 440. See, also, Pat-  
tinson v. Luckley, L. R. 10 Exch. 330;  
Davidson v. Cooper, 11 Mees. & W. 778;  
Ward v. Lumley, 5 Hurl. & N. 87; Lit-

tleham v. St. Leonards, 11 Coke, 27 a,  
note b; Hutchins v. Scott, 2 Mees. & W.  
809, 816, per Lord Abinger, C. B.

<sup>3</sup> Interpretation of Deeds, p. 19; Wood-  
ward v. Aston, 1 Vent. 296; Lady Hud-  
son's Case, 2 Vern. 476; Leech v. Leech,  
2 Rep. Ch. 100; Doe v. Bingham, 4 B.  
& Ald. 672; Bolton v. Bishop of Carlisle,  
2 H. Bl. 259, 263.

title.<sup>1</sup> "When a person has become the legal owner of real estate he cannot transfer it, or part with his title, except in some of the forms prescribed by law. The grantee may destroy his deed, but not his estate. He may deprive himself of his remedies upon the covenants, but not of his right to hold the property. This distinction has existed from the earliest times."<sup>2</sup>

1348. There are a few decisions, however, which declare that an alteration of a deed, even in an immaterial part, renders it null as a conveyance.<sup>3</sup> "The reasons for this rule are obvious, and of the most solid character. In its absence the inducement to fraud would be very strong, and public policy requires that, in the language of Lord Kenyon, 'no man shall be permitted to take the chance of committing a fraud without running any risk of losing by the event when it is detected.' Even immaterial alterations are fatal, as the rule, to be efficacious, cannot permit a person to tamper in any degree with the written contract of another in his possession."<sup>4</sup>

1349. But a material alteration of a deed, fraudulently made by a grantee, disables him from maintaining an action upon its covenants,<sup>5</sup> and, according to some authorities, even from using it in evidence to sustain the title created by it.<sup>6</sup>

<sup>1</sup> *Waring v. Smyth*, 2 Barb. Ch. 119, 133, per Walworth, Ch.

<sup>2</sup> *Chessman v. Whittemore*, 23 Pick. 231, 234, per Morton, J.

<sup>3</sup> *New Jersey*: It was so decided in this State as early as the year 1824, in *Den v. Wright*, 7 N. J. L. 175, 11 Am. Dec. 546. This decision was approved in 1833 in *Vanauken v. Hornbeck*, 14 N. J. L. 178, 25 Am. Dec. 509, and more recently, in 1871, in *Hunt v. Gray*, 35 N. J. L. 227, 10 Am. Rep. 232; and again in 1845 in *Jones v. Crowley* (N. J. L.), 30 Atl. Rep. 871. *South Carolina*: It is declared that the fraudulent alteration of any instrument in writing renders the whole instrument void. *Powell v. Pearlstone* (S. C.), 21 S. E. Rep. 328, a case relating to a mortgage, but the court did not distinguish it from a deed absolute on this account. *Mills v. Starr*, 2 Bailey, 359, and *Burton v. Pressly*, Cheves Eq. 1, citing *Vaughan v. Fowler*, 14 S. C. 355, 37 Am. Rep. 731; *Kennedy v. Moore*, 17 S. C.

464; *Plyler v. Elliott*, 19 S. C. 257, "all of which sustain the above proposition."

<sup>4</sup> *Jones v. Crowley* (N. J. L.), 30 Atl. Rep. 871.

<sup>5</sup> *Herrick v. Malin*, 22 Wend. 388; *Bliss v. McIntyre*, 18 Vt. 466, 46 Am. Dec. 165; *Basford v. Pearson*, 9 Allen, 387, 85 Am. Dec. 764; *Woods v. Hilderbrand*, 46 Mo. 284, 2 Am. Rep. 513; *Briggs v. Glenn*, 7 Mo. 572; *Withers v. Atkinson*, 1 Watts, 236; *Arrison v. Harmstead*, 2 Pa. St. 191; *Wallace v. Harmstad*, 15 Pa. St. 462, 53 Am. Dec. 603; *McIntyre v. Velte*, 153 Pa. St. 350, 25 Atl. Rep. 739; *Hollingsworth v. Holbrook*, 80 Iowa, 151, 45 N. W. Rep. 561; *Sherwood v. Merritt*, 83 Wis. 233, 53 N. W. Rep. 512.

<sup>6</sup> *Withers v. Atkinson*, 1 Watts, 236; *Wallace v. Harmstad*, 44 Pa. St. 492; *Babb v. Clemson*, 10 S. & R. 419, 13 Am. Dec. 684; *Chesley v. Frost*, 1 N. H. 145; *Bliss v. McIntyre*, 18 Vt. 466, 46 Am. Dec. 165; *Newell v. Mayberry*, 3 Leigh, 250, 23 Am.



The alteration destroys the deed so far as to prevent any affirmative use of it by the grantee or any one claiming under him.<sup>1</sup>

In like manner, it is held that no affirmative defence can be maintained upon a deed, which has been fraudulently altered, by the party who made the alteration.<sup>2</sup>

1350. This rule does not apply to an alteration of a mortgage; for a mortgage, though in form a conveyance of title, is in reality, both at law and in equity, only a security for the payment of money, and any material alteration of it by the mortgagee renders it absolutely void. "There is no analogy between this case and that of a grantee of land who alters or destroys his title-deed. In such case his title to the land is not gone, because the estate vested in him by virtue of his deed, and can only pass from him by some mode of conveyance known to the law. The instrument is avoided but not the estate."<sup>3</sup> A mortgage is a lien only, and remains executory until foreclosure.<sup>4</sup>

A mortgage is rendered void as between the parties by a fraudulent alteration by the mortgagee, after execution, making it more to the advantage of the mortgagee and to the disadvantage of the mortgagor without the consent of the mortgagor, and cannot be enforced as security for the actual debt it was given to secure.<sup>5</sup> Neither can any one claiming under such mortgagee enforce the mortgage in a court of equity against the mortgaged property in the hands of the mortgagor, or of any one claiming under him.<sup>6</sup> The mortgagee cannot even recover upon the original consideration.<sup>7</sup>

Dec. 261; *Batchelder v. White*, 80 Va. 103; *Alexander v. Hickox*, 34 Mo. 496, 86 Am. Dec. 118. But in *Doe v. Hirst*, 3 Stark, 60, and *Jackson v. Gould*, 7 Wend. 364, an altered deed was allowed to be read in evidence to sustain the title created by it. And see *Lewis v. Payn*, 8 Cow. 71.

<sup>1</sup> *Wallace v. Harmstad*, 15 Pa. St. 462, 53 Am. Dec. 603; *Stoner v. Ellis*, 6 Ind. 152; *Burnham v. Ayer*, 35 N. H. 351.

<sup>2</sup> *Robbins v. Magee*, 76 Ind. 381.

<sup>3</sup> *McIntyre v. Velte*, 153 Pa. St. 350, 25 Atl. Rep. 739; *Pereau v. Frederick*, 17 Neb. 117, 22 N. W. Rep. 235.

<sup>4</sup> *Russell v. Reed*, 36 Minn. 376, 31 N. W. Rep. 452.

<sup>5</sup> *Jones on Mortg.* § 94; *Johnson v.*

*Moore*, 33 Kans. 90, 5 Pac. Rep. 406; *Russell v. Reed*, 36 Minn. 376, 31 N. W. Rep. 452; *Pereau v. Frederick*, 17 Neb. 117, 22 N. W. Rep. 235; *Lemay v. Johnson*, 35 Ark. 225; *Elbert v. McClelland*, 8 Bush, 577; *Cutler v. Rose*, 35 Iowa, 456; *Anderson v. Bellenger*, 87 Ala. 334; *McRaven v. Crisler*, 53 Miss. 542; *Marcy v. Dunlap*, 5 Lans. 365; *Meyer v. Huneke*, 55 N. Y. 412; *Bowser v. Cole*, 74 Tex. 222, 11 S. W. Rep. 1131; *Powell v. Pearlstine* (S. C.), 21 S. E. Rep. 328.

<sup>6</sup> *Waring v. Smyth*, 2 Barb. Ch. 119, 47 Am. Dec. 299; *Pereau v. Frederick*, 17 Neb. 117, 22 N. W. Rep. 235.

<sup>7</sup> *Meyer v. Huneke*, 55 N. Y. 412. See, however, *Kendall v. Kendall*, 12 Allen,

1351. But an alteration of a mortgage by a mortgagor does not invalidate the lien as against him. If a husband alters a mortgage after its execution by his wife without her knowledge and consent, by inserting additional property, it is a valid lien upon the property therein described before the alteration was made; and against the husband it is a valid lien upon the property embraced in the alteration made by him, unless the added lot is the homestead of the grantors, and could not be conveyed except by the husband and wife joining in the mortgage, and in that case the alteration would have no effect as to either husband or wife.<sup>1</sup> Where a husband, after the execution of a mortgage by himself and his wife, inserted the homestead, which had been omitted from the description by mistake and contrary to the intention of the parties, it was held that the mortgage, though rendered invalid as to the homestead, remained valid as to the other lands.<sup>2</sup>

A bond secured by mortgage made by a husband and wife, the amount of which was changed by the husband from two hundred to four hundred dollars before delivery to the mortgagee, and without his knowledge, was thereby rendered void as to the wife. But a like change of the consideration of the mortgage upon the land of the wife, which described the debt secured as a certain bond of even date, did not render the mortgage void, inasmuch as the alteration of the consideration of a deed is immaterial, and therefore the mortgage may be enforced for the amount of the debt originally secured by the mortgage,<sup>3</sup> notwithstanding the invalidity of the bond. In like manner the alteration of a note without fraudulent intent by increasing the rate of interest and making it joint instead of several, while it avoids the note, does not affect the mortgage given to secure the debt represented by the note.<sup>4</sup>

92, where a mortgage was held not to be invalidated by a fraudulent addition by the grantee, because in Massachusetts a mortgage is regarded as a conveyance of the legal estate, and even a destruction of the mortgage deed does not defeat the conveyance.

<sup>1</sup> Van Horn v. Bell, 11 Iowa, 465, 59 Am. Dec. 506. And see Prettyman v. Goodrich, 23 Ill. 320.

<sup>2</sup> Foote v. Hambrick, 70 Miss. 157, 11

So. Rep. 567. In Wisconsin, however, it is held that where a married woman signs and delivers to her husband a mortgage with a blank as to description, and he inserts a description of the homestead, she is bound by his act. Nelson v. McDonald, 80 Wis. 605, 50 N. W. Rep. 893, 27 Am. St. Rep. 71.

<sup>3</sup> Cheek v. Nall, 112 N. C. 370, 17 So. Rep. 80.

<sup>4</sup> Heath v. Blake, 28 S. C. 406, 15 S. E. Rep. 842.

A husband and wife executed a mortgage upon their homestead to secure their note, and the husband, when about to deliver the papers to the mortgagee, fraudulently changed both so as to affect the interest payable upon the loan. Being detected in the act of changing the note, he changed it back so as to read as it was originally written. But the mortgagee accepted the mortgage without noticing the change. It was held that, the mortgage being fraudulently altered without the knowledge of the mortgagee or of the wife, the mortgagee was entitled to recover, and that the alteration would not defeat the foreclosure.<sup>1</sup>

**1352.** An alteration made without fraudulent intent, but merely for the purpose of correcting a mistake, does not avoid the instrument. Thus, an alteration of the description in a mortgage by the husband of the mortgagor, with the mortgagee's consent, in good faith, in an honest effort to correct a mistake, and to make it conform to the intention of the parties at the time of its execution, does not render the mortgage void, but it is operative as to the land actually described in the original deed.<sup>2</sup>

Where the description in a deed was altered after its delivery so as to describe the land intended to be conveyed, the grantor, many years after the deed was made and to his knowledge recorded, cannot insist that it is void on account of such alteration.<sup>3</sup>

**1353.** If the person having custody of a deed erases and alters it by changing the name of the grantee, so that it shows a conveyance to himself, the erasure and alteration amount to a forgery, and the legal and equitable title of the real grantee is not affected thereby, even as against subsequent purchasers without notice. The real grantee is entitled to maintain a bill in equity to set aside the conveyance under the forged deed, as a cloud upon the title, and to restore the evidence of his own title.<sup>4</sup>

The grantor, by leaving a deed before delivery in the hands of a third person, does not authorize him to change the name of the

<sup>1</sup> *Osborne v. Andrees*, 37 Kans. 301, 15 Pac. Rep. 153.

<sup>2</sup> *Bates v. Grabham*, Salk. 444; *Cole v. Parkin*, 12 East, 471; *Harding v. Des Moines Nat. Bank*, 81 Iowa, 499, 46 N. W. Rep. 1071; *Des Moines Nat. Bank v. Harding*, 86 Iowa, 153, 53 N. W. Rep. 99; *Foote v. Hambrick*, 70 Miss. 157, 11

So. Rep. 567; *McRaven v. Crisler*, 53 Miss. 542. And see *Adams v. Frye*, 3 Met. 103, per Dewey, J.

<sup>3</sup> *Mohlis v. Trauffer* (Iowa), 60 N. W. Rep. 521.

<sup>4</sup> *Pry v. Pry*, 109 Ill. 466. And see *Hollis v. Harris*, 96 Ala. 288, 11 So. Rep. 377.

grantee and deliver the deed to another than the grantee named in the deed. The deed so altered does not bind the grantor.<sup>1</sup> The legal identity of the deed is destroyed by the alteration.<sup>2</sup> The grantor is not estopped, in favor of a person whose name was substituted for the name of the grantee without the grantor's consent, to claim the invalidity of the deed.<sup>3</sup> In equity, however, such a deed might be regarded as an agreement to convey, if the consideration was paid to the grantor, and relief granted by enforcing a conveyance.<sup>4</sup>

1354. A material alteration of a deed may be made with the consent of the parties if there is a delivery afterwards. "A deed takes effect when it is delivered, and there is no rule of law prescribing to the grantor the order in which the several acts necessary to complete it shall be performed. He may sign and seal a blank and fill it up afterwards, or he may fill the blank first and then sign and seal it; and, if a deed once completed and delivered is surrendered for the purpose, he may as well alter it over for the purpose of making a new deed as to use a new blank; and if, when a new deed is thus made by altering an old one, it is again delivered with intent that it shall take effect and become operative as an instrument of conveyance, the law will give it such effect."<sup>5</sup> Whether the alteration was made with the grantor's consent is a question for the jury.<sup>6</sup>

1355. After a material alteration of a deed there must be a re-delivery of it, or something that amounts to a re-delivery. "An alteration in the description of property embraced in a deed, so as to make the instrument cover property different from that originally embraced, whether or not it destroys the validity of the instrument as a conveyance of the property originally described, certainly does not give it validity as a conveyance of the property of which the new description is inserted. The old execution and acknowledgment are not continued in existence as to the new property. To give effect to the deed as one of the newly de-

<sup>1</sup> *Hollis v. Harris*, 96 Ala. 288, 11 So. Rep. 377.

*v. Hansell*, 66 Ala. 151; *Jenkins v. Harrison*, 66 Ala. 345.

<sup>2</sup> *Schintz v. McManamy*, 33 Wis. 299; *Montgomery v. Crossthwait*, 90 Ala. 553, 8 So. Rep. 498.

<sup>5</sup> *Bassett v. Bassett*, 55 Me. 127, 131, per *Walton, J.*

<sup>3</sup> *Hollis v. Harris*, 96 Ala. 288, 11 So. Rep. 377.

<sup>6</sup> *Richmond Manuf. Co. v. Davis*, 7 Blackf. 412; *Jacobs v. Gilreath*, 41 S. C. 143, 22 S. E. Rep. 757.

<sup>4</sup> *Roney v. Moss*, 74 Ala. 390; *Goodlett*

scribed property, it should have been re-executed, re-acknowledged, and re-delivered. In other words, a new conveyance should have been made.”<sup>1</sup>

Where a grantor after the execution of a deed, with the consent of the grantee and in the presence of one of the two subscribing witnesses, two attesting witnesses being required by statute,—inserted at the end of the deed a reservation of timber on the granted premises, such reservation being in accordance with the original understanding of the parties, and the deed was recorded as altered, it was held that this alteration did not re-invest the grantor with the title to the timber which had passed to the grantee by the execution of the deed.<sup>2</sup>

1356. Circumstances may also warrant the presumption of a re-delivery of the deed.<sup>3</sup> If an alteration is made with the consent of the parties, and the grantor assents that the grantee shall retain the deed in its altered form, such assent amounts to a re-delivery, or warrants the jury in finding as a fact that there was a re-delivery.<sup>4</sup> In such case the altered deed takes effect from the time of the alteration.

But such an alteration made after a deed has been recorded cannot take effect and be in force as to subsequent purchasers without notice whose deeds are already recorded, but as to them the alteration is void.<sup>5</sup>

1357. If the deed has been acknowledged before the alterations are made, it should be acknowledged anew. Under a

<sup>1</sup> *Moelle v. Sherwood*, 148 U. S. 21, 13 Sup. Ct. Rep. 421, per Field, J.

<sup>2</sup> *Booker v. Stivender*, 13 Rich. 85, 91. “The grantee here has not assented in any written form by himself, or an agent authorized in writing, as required by the statute of frauds, to transfer to the grantor any interest in the land which the latter had previously conveyed. The procuring of the deed to be submitted to probate, and to be recorded, are not substitutes for his conveyance or agreement to convey, and merely afford additional proof of that which is otherwise plain, that he assented to the alteration of the deed. It is loosely said in some of our cases that the acceptance of a deed as much estops a party as the making of a deed; but this is true

only where the grantee, by indenture or other writing, has committed himself.” Per Wardlaw, J.

<sup>3</sup> *Speake v. United States*, 9 Cranch, 28; *Cutts v. United States*, 1 Gall. 69; *Stiles v. Probst*, 69 Ill. 382; *Barrington v. Bank*, 14 S. & R. 405; *Wooley v. Constant*, 4 Johns. 54, 4 Am. Dec. 246; *Penny v. Corwithe*, 18 Johns. 499.

<sup>4</sup> *Hudson v. Revett*, 5 Bing. 368; *Speake v. United States*, 9 Cranch, 28; *Penny v. Corwithe*, 18 Johns. 499. See *Collins v. Collins*, 51 Miss. 311, 24 Am. Rep. 632, for a case where the court say the presumption of delivery was not warranted.

<sup>5</sup> *Moelle v. Sherwood*, 148 U. S. 21, 13 Sup. Ct. Rep. 426.

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statute which makes both delivery and acknowledgment necessary to give effect and operation to a deed, alterations or interlineations made, by the grantor after acknowledgment, but before delivery, are inoperative without a new acknowledgment, when their effect is to enlarge the estate or property conveyed; but when their effect is to limit or restrict the estate or property conveyed, and they are made by the grantor in pursuance of an intention expressed at the time of the signature and acknowledgment, they take effect from the subsequent delivery of the deed, and a second acknowledgment is not necessary.<sup>1</sup> But where acknowledgment is not necessary to give effect to a deed, but only to authorize the recording of it, an alteration after acknowledgment, such as writing in the name of the grantee by the grantor, does not invalidate the instrument as between the parties.<sup>2</sup> The alteration in such case would affect only the validity of the acknowledgment and the record.

Where an error in a conveyance by a husband and wife was pointed out to the husband before acknowledgment by them, and the husband promised to have it corrected, and it was corrected before the delivery of the deed by the husband, in the absence of evidence to the contrary it is presumed that the correction was made prior to the acknowledgment by the wife.<sup>3</sup>

1358. An alteration of a deed may be ratified by the grantor. In the case of a mortgage, ratification may be inferred from a payment of part of it, and a request for time in which to pay the balance, if the mortgagor at the time knew of the alteration.<sup>4</sup> Ratification must be pleaded in order to be of any avail.<sup>5</sup>

### III. *Burden of Proof.*

1359. The common-law rule was that an alteration appearing upon a deed should be presumed to have been made before delivery, in the absence of any evidence to the contrary.<sup>6</sup> "This

<sup>1</sup> Webb v. Mullins, 78 Ala. 111; Sharpe v. Orme, 61 Ala. 263.

<sup>2</sup> Vought v. Vought, 50 N. J. Eq. 177, 180, 27 Atl. Rep. 489, where the grantor seems to have written the name of the grantee after the deed was acknowledged, and this was regarded as completing the execution of the deed as between the grantor and grantee.

<sup>3</sup> Houston v. Jordan, 82 Tex. 352, 18 S. W. Rep. 702.

<sup>4</sup> Dickson v. Bamberger (Ala.), 18 So. Rep. 290, relating to a bond; Evans v. Foreman, 60 Mo. 449, note; Jacobs v. Gilreath (S. C.), 22 S. E. Rep. 757.

<sup>5</sup> Erickson v. First Nat. Bank (Neb.), 62 N. W. Rep. 1078.

<sup>6</sup> Trowel v. Castle, 1 Keble, 21 (1661),

doctrine seems to us," say the Court of the Queen's Bench,<sup>1</sup> "to be based upon principle. A deed cannot be altered, after it is executed, without fraud or wrong; and the presumption is against fraud or wrong." Coke says that "of ancient time, if the deed appeared to be rased or interlined in places material, the judges adjudged, upon their view, the deed to be void. But of latter time the judges have left that to the jurors to try whether the rasing or interlining were before the delivery."<sup>2</sup>

This doctrine is followed to some extent in this country,<sup>3</sup> but the presumption in favor of the alteration seems to be confined to cases where there is a mere interlineation or erasure in the deed, without anything to excite suspicion that it was not made at the time the deed was executed. In such cases it has been frequently held that there is a presumption that such alteration was made prior to or at the time of the execution of the deed, and that the burden of overcoming this presumption is upon the party who attacks the instrument on account of the alteration.<sup>4</sup>

where it is said: "In evidence to a jury it was observed . . . an interlineation, without anything appearing against it, will be presumed to be at the time of the making of the deed, and not after." Also, see *Fitzgerald v. Fauconberge*, *Fitzgibbon's Rep.* 207, 214.

<sup>1</sup> *Doe v. Catomore*, 16 Ad. & El. (N. S.) 745, per Lord Campbell, C. J. To like effect, see *Williams v. Ashton*, 1 J. & H. 115, 118; *Simmons v. Rudall*, 1 Sim. N. S. 115, 136, per Lord Cranworth, V. C.

<sup>2</sup> *Co. Litt.* 225 b (1628).

<sup>3</sup> *Little v. Herndon*, 10 Wall. 26. In the court below, the question was left to the jury, and the Supreme Court remarked that this was quite as favorable a ruling as the defendant could ask. *McCormick v. Fitzmorris*, 39 Mo. 24; *Wolf-erman v. Bell*, 6 Wash. 84, 32 Pac. Rep. 1017; *Yakima Nat. Bank v. Knipe*, 6 Wash. 348, 33 Pac. Rep. 834; *Fairhaven v. Cowgill*, 8 Wash. 686, 36 Pac. Rep. 1093; *Kleeb v. Bard* (Wash.), 40 Pac. Rep. 733.

<sup>4</sup> *North Riv. Meadow Co. v. Shrewsbury Church*, 22 N. J. L. 424, 53 Am. Dec. 258; *Beaman v. Russell*, 20 Vt. 205, 49 Am. Dec. 775; *Boothby v. Stanley*, 34 Me. 515; *Huntington v. Finch*, 3 Ohio St.

445; *Gooch v. Bryant*, 13 Me. 386; *Zimmerman v. Camp*, 155 Pa. St. 152, 25 Atl. Rep. 1086; *Munroe v. Eastman*, 31 Mich. 283; *Sirrine v. Briggs*, 31 Mich. 443; *Paramore v. Lindsey*, 63 Mo. 63; *Burnett v. McCluey*, 78 Mo. 676; *Matthews v. Coalter*, 9 Mo. 696; *Lubbering v. Kohlbrecher*, 22 Mo. 596; *Banks v. Lee*, 73 Ga. 25; *French v. State*, 12 Ind. 670, 74 Am. Dec. 229; *Stoner v. Ellis*, 6 Ind. 152. In this case the court said: "We are of the opinion that where the alteration is of such a character as to defeat entirely the operation of the instrument for any purpose, as in the case of the erasure of the signature and seal to a deed or other instrument, so that, admitting all to be true that appears upon the instrument, when produced, it would be void in law, it should be explained in the first instance before it should be permitted to go to the jury. In other cases the instrument should be given in evidence, and should go to the jury upon the ordinary proof of its execution, although an alteration may appear in it, leaving the parties to such explanatory evidence as they may choose to offer. But if there is neither intrinsic nor extrinsic evidence as to when

1360. The grounds for the presumption that an apparent alteration was made before delivery are well stated by Mr Justice Mitchell in a recent decision of the Supreme Court of Minnesota: "The doctrine that the presumption of law is that the alteration was made after delivery, and that the burden is on the holder in the first instance to explain it, seems to us to be unsound as well as harsh. Presumptions of law, if indulged in, should be in favor of innocence rather than guilt. Moreover, all disputable presumptions of law are based upon the experienced course of human conduct and affairs, and are but the result of the general experience of a connection between certain facts, the one being usually found to be the companion or effect of the other. Hence such presumptions ought to be conformable to the experience of mankind, and the inferences which, in the light of that experience, men would naturally draw from a given state of facts. . . . The mere existence of an interlineation or erasure in an instrument would not naturally or ordinarily produce an inference in the minds of men that it had been fraudulently altered after execution. Indeed, unless the alteration was of such a suspicious character as to furnish intrinsic evidence to the contrary, we think the natural inference would be that it was a legitimate part of the instrument, and was made at or before its execution. We are therefore of opinion that the correct rule is that the burden is upon the maker to show that the alteration was made after delivery; or, perhaps, to state the proposition with more precision, the proof or admission of a signature of a party to an instrument is *prima facie* evidence that the instrument written over it is his act; and this *prima facie* evidence will stand as binding proof, unless the maker can rebut it by showing by evidence that the alteration was made after delivery, and that the question when, by whom, and with what intent, the alteration was made, is one of fact, to be submitted to the jury upon the whole evidence, intrinsic and extrinsic." <sup>1</sup>

1361. If there is any ground of suspicion apparent on the face of the instrument, as, for instance, that the alteration was not made with the same pen and ink, or by the same person who wrote the deed, the law will presume nothing, but will leave the

the alteration was made, the presumption of law is, that it was made before or at the execution of the instrument." <sup>1</sup> Wilson v. Hayes, 40 Minn. 531, 536, 42 N. W. Rep. 467.



question as to the time when the alteration was made to be found upon proof to be adduced by the party who offers the deed in evidence.<sup>1</sup> Whether there is anything suspicious on the face of the instrument is, in the first instance, a preliminary question for the court to determine by inspection.<sup>2</sup>

So, if it appears in any way that an alteration of a deed was made after delivery, it is incumbent upon the grantee or person claiming under the deed to explain the circumstances under which the change was made.<sup>3</sup>

In Oregon it is provided by statute that a party producing a writing which appears to have been altered after execution shall account for such alteration or appearance of alteration.<sup>4</sup> The statute does not apply to any instrument altered before its execution.<sup>5</sup>

1362. In case the original deed has been lost, a certified copy from the record cannot be impeached on the ground of an alteration of the original before it was recorded, except upon clear and convincing evidence. In the absence of such proof it will be presumed that the copy is a precise transcript of the original as it was executed and recorded.<sup>6</sup>

1363. An interlineation in the same ink and handwriting as the body of the deed does not ordinarily require any explanation before the admission of the deed in evidence, for it was manifestly made at the time the deed was drawn.<sup>7</sup> In such case, there being no marks of alteration, the burden is upon the maker of the instrument to show that it was altered after its execution.<sup>8</sup>

<sup>1</sup> *Milliken v. Marlin*, 66 Ill. 13; *Reed v. Kemp*, 16 Ill. 445; *Pyle v. Oustatt*, 92 Ill. 209; *Jackson v. Jacoby*, 9 Cow. 125; *Jackson v. Osborn*, 2 Wend. 555, 20 Am. Dec. 649; *Herrick v. Malin*, 22 Wend. 388; *Robinson v. Myers*, 67 Pa. St. 9; *Jordan v. Stewart*, 23 Pa. St. 244; *Wilde v. Armsby*, 6 Cush. 314; *Gettysburg Nat. Bank v. Chisolm* (Pa. St.), 32 Atl. Rep. 730; *Paramore v. Lindsey*, 63 Mo. 63; *Montgomery v. Crossthwait*, 90 Ala. 553, 8 So. Rep. 498; *Alabama State Land Co. v. Thompson* (Ala.), 16 So. Rep. 440.

<sup>2</sup> *Paramore v. Lindsey*, 63 Mo. 63; *Stillwell v. Patton*, 108 Mo. 352, 18 S. W. Rep. 1075.

<sup>3</sup> *Van Horn v. Bell*, 11 Iowa, 465, 79 Am. Dec. 506.

<sup>4</sup> *Hill's Annot. Laws*, § 788.

<sup>5</sup> *Nickum v. Danvers* (Oreg.), 42 Pac. Rep. 130.

<sup>6</sup> *Blasey v. Delius*, 86 Ill. 558.

<sup>7</sup> *Little v. Herndon*, 10 Wall. 26; *Lee v. Newland*, 164 Pa. St. 360, 30 Atl. Rep. 258.

<sup>8</sup> *Sharpe v. Orme*, 61 Ala. 263; *Montgomery v. Crossthwait*, 90 Ala. 553, 8 So. Rep. 498; *Russell v. Peyton*, 4 Ill. App. 473; *Davis v. Jenney*, 1 Met. 221; *Stoner v. Ellis*, 6 Ind. 152, 161.

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It is competent for the party offering an instrument in evidence having erasures or alterations to adduce evidence explanatory of them, showing that they were made in good faith before or at the time of their execution.<sup>1</sup>

1364. Erasures and interlineations noted in the attestation of a deed, or under the Spanish law, at the foot of the deed, need not be explained. The burden of accounting for the change in such cases is not upon the party offering the instrument.<sup>2</sup> If it is claimed that such erasures and interlineations were made after the execution and delivery of the deed, the burden of proof rests upon the party making such claim.<sup>3</sup>

An erasure in a deed is presumed to have been made before its execution, and one who asserts the contrary has the burden of proof.<sup>4</sup>

This presumption is declared by some courts in case the instrument is an ancient one. Such an instrument, though bearing upon its face a material alteration, such as the erasure of a name and the writing in of another in its place, is admissible in evidence without explanation; and its genuineness may afterwards be attacked and the question submitted to the jury for its determination.<sup>5</sup>

Interlineations in a deed made in the handwriting of the officer who attested it are presumed to have been made before its delivery.<sup>6</sup>

1365. Some courts hold that when material alterations appear on the face of an instrument beneficial to the party claiming under it, the burden is upon him to remove or explain the suspicious circumstance; as by showing that the alterations were made by a stranger, without the knowledge or consent of such party, or were made before the completion of the instru-

<sup>1</sup> *Connally v. Spragins*, 66 Ala. 258; *Roberts v. Unger*, 30 Cal. 676.

<sup>2</sup> *Britton v. Stanley*, 4 Whart. (Pa.) 114; *Howell v. Hanrick* (Tex.), 29 S. W. Rep. 762 (Tex. Civ. App.), 24 S. W. Rep. 823.

<sup>3</sup> *Thompson v. Thompson*, 12 Tex. 327; *Howell v. Hanrick* (Tex.), 29 S. W. Rep. 762.

<sup>4</sup> *Burnett v. McCluey*, 78 Mo. 676; *McCormick v. Fitzmorris*, 39 Mo. 24; *Banks v. Lee*, 73 Ga. 25.

<sup>5</sup> *McCelvey v. Cryer* (Tex. Civ. App.), 28 S. W. Rep. 691, citing *Stribling v. Atkinson*, 79 Tex. 162, 14 S. W. Rep. 1054; *Holt v. Maverick* (Tex. Civ. App.), 23 S. W. Rep. 751; *Beaumont Pasture Co. v. Preston*, 65 Tex. 448; *Warren v. Fredericks*, 76 Tex. 647, 652, 13 S. W. Rep. 643; *Ammons v. Dwyer*, 78 Tex. 639, 15 S. W. Rep. 1049.

<sup>6</sup> *Bedgood v. McLain*, 89 Ga. 793, 15 S. E. Rep. 670.

ment, or were made with the consent of the party bound by the instrument.<sup>1</sup>

If the grantee admits that he made the alterations after the execution of the deed, but alleges that he did so with the knowledge and consent of the grantor, the burden of proof rests upon the grantee.<sup>2</sup>

This rule does not apply where the alteration is evidently against the interest of the party producing the deed.<sup>3</sup>

But the filling of a blank, which appears to have been originally left in the description of the land, may well be presumed to have been made before the execution of the deed, for until it was filled the deed would not appear to be perfect.<sup>4</sup>

1366. Attempts have been made to reconcile the cases which are in conflict as to the burden of proof or presumption as to alterations. Instead of an absolute presumption, one way or the other, that the alteration was authorized or unauthorized, the presumption has been made to depend upon the circumstance whether the alteration is suspicious or not, or whether it is a reasonable and proper one or not. Thus, Judge McCrary said: "I think one rule governs all these cases, and it is this: If the interlineation is in itself suspicious, as if it appears to be contrary to the probable meaning of the instrument as it stood before the insertion of the interlined words; or if it is in a handwriting different from the body of the instrument, or appears to have been written with different ink, — in all such cases, if the court considers the interlineation suspicious on its face, the presumption

<sup>1</sup> *Henman v. Dickinson*, 5 Bing. 183; *United States v. Linn*, 1 How. 104; *Morris v. Vanderen*, 1 Dallas, 64, 67. **Alabama**: *Hill v. Nelms*, 86 Ala. 442, 5 So. Rep. 796; *Winter v. Pool*, 100 Ala. 503, 14 So. Rep. 411. **California**: *Galland v. Jackman*, 26 Cal. 79. **Illinois**: *Montag v. Linn*, 23 Ill. 551; *Sisson v. Pearson*, 44 Ill. App. 81; *Hodge v. Gilman*, 20 Ill. 437; *McAllister v. Avery*, 17 Ill. App. 568; *Pyle v. Onstatt*, 92 Ill. 209. **Iowa**: *Van Horn v. Bell*, 11 Iowa, 465. **Minnesota**: *Wilson v. Hayes*, 40 Minn. 531, 42 N. W. Rep. 467. **New Hampshire**: *Dow v. Jewell*, 18 N. H. 340, 45 Am. Dec. 371; *Burnham v. Ayer*, 35 N. H. 351; *Chesley v. Frost*, 1 N. H. 145. **New**

**Jersey**: *Havens v. Osborn*, 36 N. J. Eq. 426. **New York**: *Acker v. Ledyard*, 8 Barb. 514; *Solon v. Williamsburgh Sav. Bank*, 114 N. Y. 122, 135. **Pennsylvania**: *Burgwin v. Bishop*, 91 Pa. St. 336; *Jordan v. Stewart*, 23 Pa. St. 244.

<sup>2</sup> *Havens v. Osborn*, 36 N. J. Eq. 426.

<sup>3</sup> *Coulson v. Walton*, 9 Pet. 62; *Den v. Farlee*, 21 N. J. L. 279; *Bailey v. Taylor*, 11 Conn. 531; *Zimmerman v. Camp*, 155 Pa. St. 152, 25 Atl. Rep. 1086.

<sup>4</sup> *Dow v. Jewell*, 18 N. H. 340, 45 Am. Dec. 371; *Harding v. Des Moines Nat. Bank*, 81 Iowa, 499, 46 N. W. Rep. 1071; *Des Moines Nat. Bank v. Harding*, 86 Iowa, 153, 53 N. W. Rep. 99.

will be that it was an unauthorized alteration after execution. On the other hand, if the interlineation appears in the same handwriting with the original instrument, and bears no evidence on its face of having been made subsequent to the execution of the instrument, and especially if it only makes clear what was the evident intention of the parties, the law will presume that it was made in good faith and before execution.”<sup>1</sup>

1367. Accordingly, some courts reject all presumptions, either one way or the other, and make it a question of fact for the jury whether the alteration was made before or after the delivery of the deed. This is the rule in Massachusetts, where the Supreme Court say:<sup>2</sup> “The burden is on the party offering the instrument to prove the genuineness of the instrument, and that the alterations apparent on the same were honestly and properly made. To what extent he shall be required to introduce evidence will depend upon the peculiar circumstances of each case. The alterations may be of such a character that he may safely rely upon the paper itself, and the subject-matter, as authorizing the inference that the alteration was made before the execution, or he may introduce some very slight evidence to account for the apparent interlineations. But there is no presumption of law either that the interlineations apparent on the face of a deed were made prior to the execution of the instrument, or that they were made subsequently. That question is to be settled by the jury, upon all the evidence in the case offered by the parties and the surrounding circumstances, including, of course, the character of the alterations and the appearance of the instrument alleged to have been altered.”

This is a safer and better rule than that declaring a presumption that the alteration was made either before or after delivery, and is the rule adopted in several States.<sup>3</sup>

<sup>1</sup> *Cox v. Palmer*, 1 McCrary, 431. And see *Sharpe v. Orme*, 61 Ala. 263.

<sup>2</sup> *Ely v. Ely*, 6 Gray, 439.

<sup>3</sup> *Connecticut*: *Bailey v. Taylor*, 11 Conn. 531, 541, 29 Am. Dec. 321. The court say: “The result to which we have arrived is, that where there is an erasure or alteration in an instrument under which a party derives his title, and the adverse party claims that such erasure or alteration was improperly made, the jury

are, from all the circumstances before them, to determine whether the instrument is thereby rendered invalid. Circumstances may be such as may require this explanation on the part of the plaintiff, or, on the other hand, may arise where it would be absurd to require it.” Followed in *Hayden v. Goodnow*, 39 Conn. 164. *Georgia*: *Printup v. Mitchell*, 17 Ga. 558, 564, 63 Am. Dec. 258. *Kansas*: *Neil v. Case*, 25 Kans. 510, 37 Am. Rep. 259.

Massachusetts: *Ely v. Ely*, 6 Gray, 439; *Wilde v. Armsby*, 6 Cush. 314, 319, where Metcalf, J., says: "We are not prepared to decide that a material alteration, manifest on the face of the instrument, is, in all cases whatsoever, such a suspicious circumstance as throws the burden of proof on the party claiming under the instrument. The effect of such a rule of law would be, that if no evidence is given by a party claiming under such an instrument, the issue must always be found against him, — this being the meaning of the 'burden of proof.'" See *Newcomb v. Presbrey*, 8 Met. 406. New Jersey: *Hunt v. Gray*, 35 N. J. L. 227; *Den v. Wright*, 7 N. J. L. 175; Cumberland Bank *v. Hall*, 6 N. J. L. 215. New York: *Acker v. Ledyard*, 8 Barb. 514; *Smith v. McGowan*, 3 Barb. 404; *Jackson v. Malin*, 15 Johns. 293; *Herrick v. Malin*, 22 Wend. 388; *Jackson v. Osborn*, 2 Wend. 555, 20 Am. Dec. 649; *Maybee v. Sniffen*, 2 E. D. Smith, 1. Pennsylvania: *Jordan v. Stewart*, 23 Pa. St. 244, 249; *Barrington v. Bank*, 14 S. & R. 405, 422; *Smith v. Weld*, 2 Pa. St. 54; *Heffelfinger v. Shutz*, 16 S. & R. 44; *Robinson v. Myers*, 67 Pa. St. 9. South Carolina: *Wicker v. Pope*, 12 Rich. 387, 75 Am. Dec. 732. Vermont: *Beaman v. Russell*, 20 Vt. 205, 49 Am. Dec. 775.

## CHAPTER XXXI.

### RECORDING.

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### *I. Nature and Application of the Recording Acts.*

**1368. In general.** — In this country every conveyance of real estate by deed or mortgage is subject to recording laws, by which its priority as respects other conveyances depends for the most part upon priority of record. These laws in substance provide that all conveyances of real estate shall be void as against subsequent purchasers in good faith without notice, unless they are recorded in the registry of deeds for the county where the land lies.<sup>1</sup> Every subsequent purchaser is bound to take notice of a

<sup>1</sup> **Alabama:** Code 1886, §§ 1810, 1811. **Arizona:** T. R. S. 1887, §§ 2601-2603. **Arkansas:** Dig. of Stats. 1894, §§ 727, 728. **California:** Civ. Code, §§ 1214, 1215, Stats. 1895, ch. 48. **Colorado:** G. S. 1883, § 215; Annot. Stats. 1891, § 446. **Connecticut:** in the town, G. S. 1888, § 2961. **Delaware:** R. Code 1893, p. 628, §§ 14-17. **District of Columbia:** R. S. 1874, §§ 446, 447, amended 20 Stats. at Large, ch. 69. **Florida:** R. S. 1892, § 1972. **Georgia:** Code 1882, §§ 2705, 1956-1960. **Idaho:** R. S. 1887, §§ 3001, 3002. **Illinois:** R. S. 1889, ch. 30, §§ 28-30, ch. 95, § 4. **Indiana:** R. S. 1888, §§ 2926, 2931. **Iowa:** Code 1888, § 3112. **Kansas:** G. S. 1889, §§ 1128-1130, 3885. **Kentucky:** G. S. 1894, §§ 494-497. **Louisiana:** R. Civ. Code 1889, §§ 2264-2266; unless recorded, utterly null and void except between the parties. **Maine:** R. S. 1883, ch. 73, § 8. **Maryland:** R. Code 1888, art. 21, §§ 13-16. **Massachusetts:** P. S. 1882, ch. 120, § 4. **Michigan:** Annot. Stats. 1882, §§ 5683-5689. **Minnesota:** G. S. 1894, § 4180. **Mississippi:** G. S. 1892, §§ 2457-2459. **Missouri:** R. S. 1889, §§ 2419, 2420. **Montana:** Civ. Code 1895, §§ 1640-1644. **Nebraska:** Comp. Stats. 1895, ch. 73, § 4108. **Nevada:** G. S. 1885, §§ 2593-2995. **New Hampshire:** P. S. 1891, ch. 136, §§ 4, 5. **New Jer-**

recorded deed in the line of title previously recorded, although he has no actual notice of it. If he has relied upon the representations of his grantor in regard to the title to the premises without consulting the record, which is always open to his inspection, he has done so at his peril; and although he may in such case be an innocent purchaser in fact, he is not regarded as such in law.<sup>1</sup>

Systems of registration of land titles, more or less complete, have for a long time prevailed in Germany, France, and Scotland, and perhaps in other European states. Yet no general system of registration has ever been adopted in England. In America, however, registry laws were enacted in the several colonies very soon after their settlement. In Massachusetts, as early as 1641, "for the avoiding of fraudulent conveyances, and that every man may know what estate or interest other men may have in any houses, lands, or other hereditaments they are to deal in," it was enacted that "no mortgage, bargain, sale, or grant made of any houses or lands, rents, or other hereditaments, where the grantor remains in possession, shall be of any force against other persons, except the grantor and his heirs, unless the same be acknowledged before some magistrate and recorded." In the Plymouth Colony, conveyances of land, including mortgages, were required to be recorded by a law enacted five years before that of Massachusetts Bay.

**1369. Title deeds.** — The English law in regard to the possession of title deeds has generally no application in this country, on account of the prevalence here of a general system of registry. Under our registry laws, the record being notice to all the world,

sey: Rev. 1877, p. 155; Supp. 1888, pp. 133–135. **New Mexico:** Laws 1887, ch. 10. **New York:** R. S. 8th ed. 1889, pt. 2, ch. 3, § 1. **North Carolina:** Laws 1885, ch. 147, § 1. **North Dakota:** Comp. Laws 1887, § 3293. **Ohio:** 1 R. S. 1890, § 4134. **Oregon:** Annot. Laws 1887, § 3027; Laws 1889, p. 86. **Pennsylvania:** Brightly's Purdon's Dig. 1894, pp. 646, 647. **Rhode Island:** In the town, P. S. 1882, ch. 173, §§ 3, 4. **Oklahoma T.:** Comp. Stats. 1893, §§ 6106, 6127. **South Carolina:** G. S. 1882, § 1776. **South Dakota:** Comp. Laws, § 3293. **Tennessee:** Code 1884, §§ 2811,

2837, 2843, 2887–2890. **Texas:** Rev. Civ. Stats. 1889, §§ 4332–4334. **Utah:** Comp. Laws 1888, §§ 2610–2613. **Vermont:** in town, Stats. 1894, §§ 2213–2223. **Virginia:** Code 1887, §§ 2464–2467. **Washington:** G. S. 1891, § 1439. **West Virginia:** Code 1891, ch. 74. **Wisconsin:** Annot. Stats. 1889, §§ 2241–2244. **Wyoming:** R. S. 1887, §§ 15–25.

<sup>1</sup> *Buchanan v. International Bank*, 78 Ill. 500; *Acer v. Westcott*, 46 N. Y. 384, 7 Am. Rep. 355; *Cambridge Valley Bank v. Delano*, 48 N. Y. 326.

it is not necessary that the grantee should have possession of the title papers.<sup>1</sup> Still an equitable mortgage may be created by the deposit of title deeds,<sup>2</sup> though under the registry laws the title and security under such a mortgage is very uncertain and hardly worth the taking. Without the protection of such laws, the possession of the title deeds becomes an important badge of title; and it is said that the old rule in English chancery was, that if a person took a mortgage and voluntarily left the title deeds with the mortgagor, he should be postponed to a subsequent mortgagee without notice to whom the title deeds were delivered; but the later English doctrine is, that the mere circumstance of leaving the title deeds with the mortgagor is not of itself sufficient to produce this result. There must be something like a voluntary and unwarrantable concurrence of the first mortgagee in the mortgagor's retaining the title deeds, so that he really concurs in a fraud or is grossly negligent, to defeat his mortgage.<sup>3</sup>

1370. The acts of the different States are alike in their purpose and in their most important features, but differ in minor matters and in details. Their purpose is by registration to impart constructive notice of deeds and other instruments affecting the title to real property, and to establish priority of title in accordance with priority of registration. In general, registration is equivalent to actual notice, and actual notice is equivalent to registration.

But the record imparts constructive notice only of such instruments as the statutes require or authorize the recording of. And though the recording of the instrument is authorized, if entries are made in the reception-book or in the index, which are not required or authorized to be made, purchasers are not charged with constructive notice of such entries.<sup>4</sup>

1371. The recording acts generally specify the instruments which are entitled to their protection. The recording of an instrument not authorized by statute to be recorded does not operate as constructive notice.<sup>5</sup> Moreover, the recording of a

<sup>1</sup> *Evans v. Jones*, 1 Yeates (Pa.), 172, 174.

<sup>2</sup> *Jones on Mort.* §§ 179, 186; *Jarvis v. Dutcher*, 16 Wis. 307; *Hutzler v. Phillips*, 26 S. C. 136, 1 S. E. Rep. 502; *Gale v. Morris*, 29 N. J. Eq. 222.

<sup>3</sup> *Berry v. Mut. Ins. Co.* 2 Johns. Ch. 603.

<sup>4</sup> *Ahern v. Freeman*, 46 Minn. 156, 48 N. W. Rep. 677, 24 Am. St. Rep. 206.

<sup>5</sup> 1 *Story's Eq. Jur.* § 404; *Morton v. Smith*, 2 Dill. 316; *Mouroe v. Hamilton*,



deed not in the line of the chain of title is not notice to persons claiming under such title. It is notice only to those claiming under the same grantor, or through one who is the common source of title.<sup>1</sup>

The record of an instrument authorized to be recorded does not necessarily operate as constructive notice of every provision or clause of such instrument, if such provision or clause relates to some other matter, and is one which by itself as a separate instrument would not be entitled to record.<sup>2</sup> Thus the record of a mortgage of land which also includes a transfer of personal property does not operate as notice of the transfer of the personal property when the recording of mortgages of such property is otherwise provided for.<sup>3</sup>

And thus, also, the record of a conveyance by one partner to his copartner of his entire interest in the partnership property is not constructive notice to third persons of a provision in such conveyance restraining or limiting the authority of the mortgagor as a partner.<sup>4</sup>

An agreement between tenants in common for a division of the proceeds of sales of their lands, when made with an authority to one of them to take entire control and management of certain sales, is not a conveyance of land nor a contract to convey land.<sup>5</sup>

60 Ala. 226; *Lowry v. Harris*, 12 Minn. 255; *Parret v. Shaubhut*, 5 Minn. 323, 80 Am. Dec. 424; *Pringle v. Dunn*, 37 Wis. 449, 19 Am. Rep. 772; *Prentice v. Duluth Storage Co.* 58 Fed. Rep. 437; *Greenwood v. Jenswold*, 69 Iowa, 53, 28 N. W. Rep. 433; *Ely v. Wilcox*, 20 Wis. 523, 556, 91 Am. Dec. 436; *Carlisle v. Jumper*, 81 Ky. 282. Where there was no authority for recording a headright certificate of Texas land, the record thereof does not operate as constructive notice that the deed in fact covered the lands upon which the final location of the certificate was made. *Baylor v. Scottish-American Mortg. Co.* 66 Fed. Rep. 631.

<sup>1</sup> *Tarbell v. West*, 86 N. Y. 280; *Kerfoot v. Cronin*, 105 Ill. 609; *Chicago v. Witt*, 75 Ill. 211; *Wallace v. Silsby*, 42 N. J. L. 1; *Losey v. Simpson*, 11 N. J. Eq. 246; *Holmes v. Buckner*, 67 Tex. 107, 2 S. W. Rep. 452; *Roberts v. Rich-*

*ards*, 84 Me. 1, 24 Atl. Rep. 425; *Tilton v. Hunter*, 24 Me. 29; *Spofford v. Weston*, 29 Me. 140; *Roberts v. Bourne*, 23 Me. 165, 169, 39 Am. Dec. 614; *Veazie v. Parker*, 23 Me. 170; *Little v. Megquier*, 2 Me. 176, 178. Said Wilde, J.: "To hold the proprietors of land to take notice of the records of deeds, to determine whether some stranger has without right made conveyance of their land, would be a most dangerous doctrine, and cannot be sustained with any color of reason or authority." *Bates v. Norcross*, 14 Pick. 224, 231.

<sup>2</sup> *Monroe v. Hamilton*, 60 Ala. 226; *Kerfoot v. Cronin*, 105 Ill. 609; *Stumpf v. Osterhage*, 94 Ill. 115, 119, *Odle v. Odle*, 73 Mo. 289.

<sup>3</sup> *Pitcher v. Barrows*, 17 Pick. 361, 28 Am. Dec. 306.

<sup>4</sup> *Monroe v. Hamilton*, 60 Ala. 226.

<sup>5</sup> *Lenoir v. Valley River M. Co.* 113 N. C. 513, 18 S. E. Rep. 73.

1372. In most of the States, mortgages are recorded in the same manner and with the same effect as unconditional conveyances of real property.<sup>1</sup> In general, the statutes provide that

<sup>1</sup> *Alabama*: Code 1886, §§ 1810, 1811. *Arizona* T.: R. S. 1887, §§ 2601, 2602. *Arkansas*: Dig. of Stats. 1894, § 5091; *Fry v. Martin*, 33 Ark. 203; *Dodd v. Parker*, 40 Ark. 536. *California*: Civ. Code, §§ 1169-1171, 1214, 2950, 2952. *Colorado*: G. S. 1883, ch. 18, §§ 215-217; Annot. Stats. 1891, § 446. *Connecticut*: G. S. 1888, § 2961. *Delaware*: R. Code 1893, p. 629. *District of Columbia*: R. S. 1874, §§ 446, 447, as amended Apr. 29, 1878, 20 Stats. at Large, ch. 69. *Florida*: R. S. 1892, § 1972. *Georgia*: Code 1882, §§ 1956-1960, 2705. *Idaho*: R. S. 1887, §§ 2997-3004. *Illinois*: R. S. 1889, ch. 30, §§ 29-32, ch. 95, § 4. *Indiana*: R. S. 1888, §§ 2926, 2931. *Iowa*: R. Code 1888, § 3112. *Kansas*: G. S. 1889, §§ 1128-1130, 3885. *Kentucky*: G. S. 1894, § 496. *Louisiana*: R. Code 1889, §§ 2264-2266. In this State the registry preserves the evidence of a mortgage during ten years, reckoning from the day of its date; its effect ceases, even against the contracting parties, if the inscriptions have not been renewed, before the expiration of this time, in the manner in which they were first made. As to necessity of reinscription, see *Batey v. Woolfolk*, 20 La. Ann. 385; *Kohn v. McHatton*, 20 La. Ann. 223; *Levy v. Mentz*, 23 La. Ann. 261; *Adams v. Daunis*, 29 La. Ann. 315; *Watson v. Bondurant*, 30 La. Ann. 1; *Succession of Gayle*, 30 La. Ann. 351; *Patterson v. De la Ronde*, 8 Wall. 292; *Bondurant v. Watson*, 103 U. S. 281. Neither inscription nor reinscription necessary as against the parties or their heirs. *Cucullu v. Hernandez*, 103 U. S. 105. Omission to reinscribe does not destroy the lien. Its rank only is affected. *Norres v. Hays*, 44 La. Ann. 907, 11 So. Rep. 462; *Shepherd v. Cotton Press Co.* 2 La. Ann. 100. A new act of mortgage does away with the necessity of a reinscription. *Hart v. Caffery*, 39 La. Ann. 894, 2 So. Rep. 788. Notice is not equivalent to registry.

*Boyer v. Joffrion*, 40 La. Ann. 657, 4 So. Rep. 872. The pendency of a suit to foreclose the mortgage does not supply the omission to reinscribe. *Pickett v. Foster*, 149 U. S. 505, 13 Sup. Ct. Rep. 998. The object of the reinscription is to obviate the necessity of searching for mortgages more than ten years back. To effect it, a new description of the property is necessary; and a mere reference to the previous mortgage is not sufficient. *Shepherd v. Orleans Cotton Press Co.* 2 La. Ann. 100; *Hyde v. Bennett*, 2 La. Ann. 799; *Poutz v. Reggio*, 25 La. Ann. 637. *Maine*: R. S. 1883, ch. 73, §§ 8, 9. *Massachusetts*: P. S. 1882, ch. 120, § 14. *Minnesota*: G. S. 1891, § 4131. *Maryland*: R. Code 1888, art. 24, §§ 13-16. *Michigan*: Annot. Stats. 1882, §§ 5683-5689. *Mississippi*: G. S. 1892, §§ 2457, 2458; *Mississippi Valley Co. v. Chicago*, St. L. & N. O. R. R. Co. 58 Miss. 896, 38 Am. Rep. 348. *Missouri*: 1 R. S. 1889, § 2418. *Montana*: Civ. Code 1895, § 1641. *Nebraska*: Comp. Stats. 1895, § 4108. *Nevada*: G. S. 1885, §§ 2593-2595; *Grellet v. Heilshorn*, 4 Nev. 526. *New Hampshire*: P. S. 1891, ch. 136, § 4. *New Jersey*: Rev. 1877, pp. 155, 705, 706; Supp. 1886, pp. 133, 135. And see *Den v. Wade*, 20 N. J. L. 291. The Mortgage Registry Act does not apply to mortgages of leasehold estates. *Hutchinson v. Bramhall*, 42 N. J. Eq. 372, 7 Atl. Rep. 873, reversing *Deane v. Hutchinson*, 40 N. J. Eq. 83, 2 Atl. Rep. 292. Subsequently a statute was enacted requiring mortgages of leasehold estates to be recorded, and making the recording acts applicable thereto. Laws 1887, ch. 161. The registry act applies as against the State. *Clement v. Bartlett*, 33 N. J. Eq. 43. *New Mexico* T.: Comp. Laws 1884, §§ 429, 2761, 2762; Laws 1887, ch. 10. *New York*: 4 R. S. 8th ed. 1889, pp. 2469, 2470. *North Carolina*: Laws 1885, ch. 147. *North Dakota*: Comp. Laws 1887, § 3293. *Ohio*:

such conveyances shall not be valid as against persons other than the grantor, his heirs and devisees, and persons having notice thereof, unless they are recorded in the registry of deeds for the county in which the land is situated. In somewhat different terms, but with like effect, the statutes of some States provide that conveyances shall be void as to subsequent purchasers and creditors in good faith and for a valuable consideration without notice, until and except they are recorded and left for record in the proper registry of deeds. Everywhere a record properly made is constructive and absolute notice of the conveyance as recorded.

**1373.** Priority of record, as a general rule, gives priority of title; and this priority dates from the time the instrument is delivered to the recorder for record. A mortgage is a conveyance with a condition, and the mortgagee is a purchaser; and in most of the States there are no special provisions in relation to recording mortgages, but the general provisions as to recording apply as well to mortgages.

**1374.** The registration of a contract for the sale of land is notice, if the registry act authorizes it, but not otherwise.<sup>1</sup> Of course the law may authorize the recording of such a contract in general terms without specifically naming it. Thus a statute providing for the record of instruments conveying lands, or "affecting the title thereto in law or equity," applies to assignments of swamp-land certificates, and deeds of the lands represented thereby, although the naked legal title is still in the state.<sup>2</sup> But such a statute applies only to instruments in writing affecting

1 R. S. 1892, §§ 1143, 4132-4135. **Oklahoma** T.: Comp. Stats. 1893, §§ 6127, 6128. **Oregon**: 2 Annot. Stats. 1887, § 3027. **Pennsylvania**: Brightly's Purdon's Dig. 1894, pp. 646, 647. **Rhode Island**: P. S. 1882, ch. 173, §§ 3, 4. But this statute does not make an unacknowledged deed void as to others having actual notice of its existence. *Westerly Sav. Bank v. Stillman Manuf. Co.* 16 R. I. 497, 17 Atl. Rep. 918. **South Carolina**: G. S. 1882, § 1776. **South Dakota**: Comp. Laws 1887, § 2393. **Tennessee**: Code 1884, §§ 2811, 2837, 2843, 2887-2890. **Texas**: 2 Rev. Civ. Stats. 1889, arts. 4332-4334. **Utah**: Comp. Laws 1888, §§ 2610-2613;

*Neslin v. Wells*, 104 U. S. 428. **Vermont**: Stats. 1894, §§ 2213-2217. **Virginia**: Code 1887, ch. 109, §§ 2465-2467; *McCormack v. James*, 36 Fed. Rep. 14. **Washington**: G. S. 1891, § 1439. **West Virginia**: Code 1891, ch. 74. **Wisconsin**: Annot. Stats. 1889, §§ 2241-2244. **Wyoming**: R. S. 1887, §§ 15-25.

<sup>1</sup> *Mesick v. Sunderland*, 6 Cal. 297.

<sup>2</sup> *Memphis Land Co. v. Ford*, 58 Fed. Rep. 452; *Digman v. McCollum*, 47 Mo. 372; *United States Insurance Co. v. Shriver*, 3 Md. Ch. 381; *Bellas v. M'Carthy*, 10 Watts, 13; *Doyle v. Teas*, 5 Ill. 202, 252; *Powell v. Jeffries*, 5 Ill. 387, 390; *Bishop v. Newton*, 20 Ill. 175, 181.

real estate, and not to equitable rights therein which exist only in parol.<sup>1</sup>

A writing authenticated as a deed, which recites that there is due from the maker of the instrument an interest in certain lands, is entitled to record.<sup>2</sup>

An instrument executed and attested as a deed conveying property, with a reservation to the grantor of power of sale on certain conditions, is entitled to record as a deed.<sup>3</sup>

A contract for water to irrigate land, creating a lien upon it for annual payments, when acknowledged by the land-owner, may be recorded, and the record imparts notice to subsequent purchasers.<sup>4</sup>

**1375.** The registry laws apply to sales and mortgages of growing trees, or to an agreement constituting a lien upon them, for they are a part of the realty.<sup>5</sup> A verbal agreement, or an agreement in writing not recorded, whereby the crop is pledged by a tenant of land to the owner as security for advances, is of no validity as against a mortgage of it afterwards made and duly recorded.<sup>6</sup>

A contract for the sale of growing trees to be cut and removed from the land is ordinarily a contract for the sale of a chattel interest, though the trees are a part of the realty so long as they remain standing. Therefore, to insure protection against a sale or mortgage of the land before the trees are severed, it is desirable that the sale be recorded. If the owner of land which is mortgaged sells growing trees, and the purchaser cuts and removes the trees without knowledge of the mortgage, which is not recorded, the mortgagee has no title to the timber as against such purchaser, and cannot maintain replevin for it.<sup>7</sup> The filing of a mortgage of standing timber as a chattel mortgage is notice to no one.<sup>8</sup>

<sup>1</sup> *Tennant v. Watson*, 58 Ark. 252, 24 S. W. Rep. 495.

<sup>2</sup> *Chamberlain v. Boon*, 74 Tex. 659, 12 S. W. Rep. 727.

<sup>3</sup> *First Nat. Bank v. Cody*, 93 Ga. 127, 19 S. E. Rep. 831.

<sup>4</sup> *Fresno Canal, &c. Co. v. Rowell*, 80 Cal. 114, 22 Pac. Rep. 53.

<sup>5</sup> *Mee v. Benedict*, 98 Mich. 260, 57 N. W. Rep. 175. In *Pennsylvania* this is provided for by statute. Laws 1895, p. 173.

<sup>6</sup> *Jones v. Chamberlin*, 5 Heisk. 210. This case is distinguished from *Tedford*

*v. Wilson*, 3 Head, 311, where it was agreed that the proceeds of a farm should be liable for the wages of a person who entered into possession of it and carried it on for the owner. Being in possession, he was held to be entitled to apply the crops to the satisfaction of his claim for wages as against a creditor of the owner, and that the registration act did not apply. As to mortgages of crops, see *Jones on Chattel Mortgages*, §§ 142-146.

<sup>7</sup> *Banton v. Shorey*, 77 Me. 48.

<sup>8</sup> *Williams v. Hyde*, 98 Mich. 152, 57 N. W. Rep. 98.

**1376.** A certified copy of a deed may be recorded, and it will be notice if the registration of such a copy is authorized by statute, but not otherwise.<sup>1</sup> Thus, in Texas copies of deeds or of other written evidence of title which have been filed in the general land office, when duly certified, may be admitted to record in any county in which the land lies. When a certified copy of such record has been registered in the county wherein the land was situated, a certified copy of the county records is admissible in evidence.<sup>2</sup>

**1377.** A patent from the United States for land need not be delivered or recorded. Title by patent from the United States is title by record; and though it is usual to deliver a patent to the claimant, as in case of deeds, yet delivery of it is not necessary. "The acts of Congress provide for the record of all patents for land in an office, and in books kept for that purpose. An officer called the 'recorder' is appointed to make and to keep these records. He is required to record every patent before it is issued, and to countersign the instrument to be delivered to the grantee. This, then, is the final record of the transaction,—the legally prescribed act which completes what Blackstone calls 'title by record,'—and when this is done the grantee is invested with that title."<sup>3</sup>

**1378.** The statutes in regard to recording do not apply to conveyances by a State. Such conveyances may be recorded, and generally are, but their effect as vesting title and affording notice is not dependent upon their being recorded. A statute authorizing the recording of such conveyances without acknowledgment is permissive only.<sup>4</sup>

**1379.** Of course a forged deed is not entitled to record, and if such a deed is recorded it cannot affect the title to the land.<sup>5</sup>

**1380.** As between the parties themselves, registration is generally unnecessary and without effect.<sup>6</sup> It is not necessary

<sup>1</sup> Laws of New York, 1893, ch. 182; *Sayward v. Thompson* (Wash.), 40 Pac. Stevens v. Brown, 3 Vt. 420, 23 Am. Dec. Rep. 379.

215; *Oatman v. Fowler*, 43 Vt. 462; St. <sup>4</sup> *Patterson v. Langston*, 69 Miss. 400, 11 So. Rep. 932.

*John v. Conger*, 40 Ill. 535; *Lewis v. Baird*, 3 McLean, 56; *Pollard v. Lively*, <sup>5</sup> *Pry v. Pry*, 109 Ill. 466; *Tefft v. Munson*, 57 N. Y. 97, 101; *McGinn v. Tobey*, 62 Mich. 252, 28 N. W. Rep. 818, 4 Am. St. Rep. 848.

<sup>2</sup> R. S. art. 4330; *Tevis v. Collier*, 84 Tex. 638, 19 S. W. Rep. 801.

<sup>3</sup> *United States v. Schurz*, 102 U. S. 378; *Marbury v. Madison*, 1 Cranch, 137; <sup>6</sup> *De Lane v. Moore*, 14 How. 253; *Levinz v. Will*, 1 Dall. 430. **Alabama:**

as against the grantor's heirs on whom the law casts the property, and who are mere volunteers in accepting it;<sup>1</sup> or as against his devisees; or as against creditors other than judgment creditors;<sup>2</sup> and even in those States where it is provided by statute that a conveyance shall be recorded within a stipulated time, it is still valid between the parties without registration. The grantee by an unrecorded deed will be protected by a court of equity, so far as this can be done without infringing upon the rights of subsequent purchasers, or third persons who have in the mean time acquired liens of record upon the property.<sup>3</sup> It is for their protection, however, that a record is provided for. As between the parties themselves, there is no occasion for a public record to give notice. Although it has sometimes been said that the delivery of a conveyance for record is a part of the execution of the instrument, this is not true except so far as the expression has reference to its effect upon those who are not parties to it.<sup>4</sup>

Even the destruction of the deed before the recording of it,

*Smith v. Branch Bank*, 21 Ala. 125; *Andrews v. Burns*, 11 Ala. 691. **California**: Civ. Code, § 1217; *Warnock v. Harlow*, 96 Cal. 298, 31 Pac. Rep. 166, 31 Am. St. Rep. 209. **District of Columbia**: *Fitzgerald v. Wynne*, 1 D. C. App. 107. **Florida**: *Snow v. Lake*, 20 Fla. 656, 51 Am. Rep. 625; *Christy v. Burch*, 25 Fla. 942, 2 So. Rep. 258; *Stewart v. Mathews*, 19 Fla. 752. **Illinois**: *Semple v. Miles*, 3 Ill. 315; *Seaver v. Spink*, 65 Ill. 441; *Roane v. Baker*, 120 Ill. 308, 11 N. E. Rep. 246. **Indiana**: *Kirkpatrick v. Caldwell*, 32 Ind. 299; *Shirk v. Thomas*, 121 Ind. 147, 16 Am. St. Rep. 381; *Perdue v. Aldridge*, 19 Ind. 290. **Iowa**: *Carleton v. Byington*, 18 Iowa, 482; *Davis v. Lutkiewicz*, 72 Iowa, 254, 33 N. W. Rep. 670. **Kentucky**: *Taylor v. McDonald*, 2 Bibb, 420. **Maryland**: Even under a statute that "no deed shall be valid for the purpose of passing title unless acknowledged and recorded." **Massachusetts**: *Howard Mut. Loan & Fund Asso. v. McIntyre*, 3 Allen, 571; *McMechan v. Griffing*, 3 Pick. 149, 15 Am. Dec. 198; *Pray v. Pierce*, 7 Mass. 381, 5 Am. Dec. 59. **Michigan**: *Van Huse v. Heames*, 96 Mich. 504, 56 N. W. Rep. 22. **Missouri**: *Stevens v. Hampton*, 46 Mo. 404. **New Hampshire**: *Stevens v. Morse*, 47 N. H. 532. **New York**: *Wood v. Chapin*, 13 N. Y. 509, 67 Am. Dec. 62; *St. Marks F. Ins. Co. v. Harris*, 13 How. Pr. 95; *Jackson v. Colden*, 4 Cow. 266; *Jackson v. West*, 10 Johns. 466. **North Carolina**: *Brem v. Lockhart*, 93 N. C. 191; *Leggett v. Bullock*, Busb. 283; *Ray v. Wilcoxon*, 107 N. C. 514, 12 S. E. Rep. 443. **Ohio**: *Fosdick v. Barr*, 3 Ohio St. 471; *Sidle v. Maxwell*, 4 Ohio St. 236. **Oregon**: *Moore v. Thomas*, 1 Oreg. 201. **South Dakota**: *Betts v. Letcher*, 1 S. D. 182, 46 N. W. Rep. 193.

*McLaughlin v. Ihmsen*, 85 Pa. St. 364; *Tryon v. Munson*, 77 Pa. St. 250; *Westervelt v. Voorhis*, 42 N. J. Eq. 179, 6 Atl. Rep. 665; *Hoes v. Boyer*, 108 Ind. 494, 9 N. E. Rep. 427; *Building Asso. v. Clark*, 43 Ohio St. 427, 2 N. E. Rep. 846.

<sup>2</sup> *Ohio Life Ins. & T. Co. v. Ledyard*, 8 Ala. 866; *Daniel v. Sorrells*, 9 Ala. 436; *Center v. P. & M. Bank*, 22 Ala. 743.

<sup>3</sup> *Wynn v. Carter*, 20 Wis. 107; *Kirkpatrick v. Caldwell*, 32 Ind. 299.

<sup>4</sup> *Sidle v. Maxwell*, 4 Ohio St. 236, limiting *Holliday v. Franklin Bank*, 16 Ohio, 533.

whether by accident or by the wrongful act of a third person, does not annihilate the title or lien as between the parties and all others claiming with notice.<sup>1</sup> The legal title passes as between the parties, and the interest of the grantee may be levied upon and sold under execution.<sup>2</sup> If the grantor makes another deed of the same land to another person whose deed is first recorded, the latter becomes vested with the legal title, and, in a contest between him and a claimant under the destroyed deed, the burden is upon such claimant to show that the subsequent purchaser had notice of the prior conveyance, or did not pay a valuable consideration for the land.<sup>3</sup>

1381. The assignee of a bankrupt has no greater rights in respect to unrecorded deeds made by the debtor than he himself would have. The same is true as regards an assignee for the benefit of creditors.<sup>4</sup> He therefore takes the bankrupt's estate subject to any conveyances he has made, although they remain unrecorded. But one who purchases of the assignee, without notice of an unrecorded mortgage, takes the property unincumbered by it.<sup>5</sup> So if an administrator of an insolvent estate, having no knowledge of an unrecorded mortgage of certain real estate of the deceased, sells it under order of court to a purchaser who is also ignorant of the mortgage, and therefore acquires a title unaffected by it, the mortgagee is entitled to be reimbursed from the proceeds of the land in preference to the general creditors.<sup>6</sup>

In Ohio, however, it is held that a mortgage of real property, which has not been deposited for record with the recorder of the proper county, before an assignment of the property by the mort-

<sup>1</sup> *Sloan v. Holcomb*, 29 Mich. 153; *Lampe v. Kennedy*, 56 Wis. 249, 14 N. W. Rep. 43. The rule was otherwise in *North Carolina* prior to statute of 1885, because there registration is necessary to pass a complete legal title. The surrender or destruction of an unregistered deed, therefore, restores the title. *Fortune v. Watkins*, 94 N. C. 304.

<sup>2</sup> *Newsom v. Kurtz*, 86 Ky. 277, 5 S. W. Rep. 575. On the other hand, it has been provided by statute that an unrecorded conveyance shall be void as to a judgment against the person in whose name the title appears of record in the registry of the county in which the land

is situated. *Minnesota*: G. S. 1878, ch. 40, § 21; *Lebanon Sav. Bank v. Hollenbeck*, 29 Minn. 322, 13 N. W. Rep. 145; *Coles v. Berryhill*, 37 Minn. 56, 33 N. W. Rep. 213.

<sup>3</sup> *Lampe v. Kennedy*, 56 Wis. 249, 14 N. W. Rep. 43.

<sup>4</sup> *Haug v. Third Nat. Bank*, 95 Mich. 249, 54 N. W. Rep. 888; *Cutler v. Steele*, 93 Mich. 204, 53 N. W. Rep. 521; *Griffin v. Marquardt*, 17 N. Y. 28; *Campbell Printing Press Co. v. Walker*, 22 Fla. 412, 1 So. Rep. 59.

<sup>5</sup> *Hodgen v. Guttery*, 58 Ill. 431.

<sup>6</sup> *Kirkpatrick v. Caldwell*, 32 Ind. 299.

gagor for the benefit of his creditors takes effect, is not a valid lien upon the property as against the assignee or the creditors; nor does it become so by being subsequently recorded.<sup>1</sup>

1382. In a few instances the validity of conveyances or the passing of the title has been made dependent upon registration. Thus in Maryland it is declared that no deed of real property shall be valid for the purpose of passing the title unless it is acknowledged and recorded.<sup>2</sup> "The recording is the final and complete act which passes the title; until this is accomplished everything else is unavailing. As the recording is necessary to the passing of the title, it must follow as a matter of course that until the recording takes place the title remains in the grantor."<sup>3</sup>

In North Carolina an unrecorded deed is a legal conveyance as between the parties, though it cannot be read in evidence until recorded. The land conveyed is subject to execution.<sup>4</sup> Prior to the statute of 1885 an unrecorded deed passed an equitable title, and an inchoate legal title which registration made complete.<sup>5</sup>

Where, however, recording is made essential to the validity of the deed of a married woman, no title passes by her conveyance until the instrument is recorded.<sup>6</sup> But a provision that the property of a wife shall only be conveyed by the joint deed of the husband and wife duly attested, authenticated, and admitted to record, according to the laws regulating conveyances of real property, does invalidate a deed as between the parties thereto, because it is not recorded.<sup>7</sup>

1383. It is as against subsequent purchasers for value without notice that recording is necessary; and as against such purchasers recording is necessary to protect any title or interest in the land, though this be a mere easement, such as a right of way.<sup>8</sup> Though recording is not necessary as against the

<sup>1</sup> Betz v. Snyder, 48 Ohio St. 492, 28 N. E. Rep. 234, 13 L. R. A. 235; Kemper v. Campbell, 44 Ohio St. 210, 6 N. E. Rep. 566.

<sup>2</sup> R. Code 1888, art. 21, § 15.

<sup>3</sup> Nickel v. Brown, 75 Md. 172, 186, 23 Atl. Rep. 736.

<sup>4</sup> Ray v. Wilcoxon, 107 N. C. 514, 12 S. E. Rep. 443.

<sup>5</sup> Austin v. King, 91 N. C. 286; Phillips v. Hodges, 109 N. C. 248, 13 S. E.

Rep. 769; Respass v. Jones, 102 N. C. 5, 8 S. E. Rep. 770.

<sup>6</sup> Sewall v. Haymaker, 127 U. S. 719, 8 Sup. Ct. Rep. 1348; Rorer v. Roanoke Nat. Bank, 83 Va. 589, 4 S. E. Rep. 820.

<sup>7</sup> Christy v. Burch, 25 Fla. 942, 2 So. Rep. 258.

<sup>8</sup> Prescott v. Beyer, 34 Minn. 493, 26 N. W. Rep. 732; Russell v. Nall, 2 Tex. Civ. App. 60, 23 S. W. Rep. 901; Merriman



grantor's heirs, it is necessary as against a purchaser from such heirs having no notice of the prior conveyance.<sup>1</sup> There are, however, a few cases in which it has been held that the protection afforded by the registration laws against unrecorded conveyances extends only to purchasers from the grantor himself, and not to purchasers from his heirs or devisees.<sup>2</sup> These decisions are in conflict with the general purpose of these laws, and are undoubtedly wrong in principle.

1384. A statute which forbids the recording of deeds unless the taxes upon the land have been paid, and the certificate of the county treasurer or other proper officer is presented to the register of deeds showing whether there are any tax liens or titles held by the State, or any individual, against the land described in the instrument, and that all taxes due thereon have been paid for the five years preceding the date of such instrument, is not unconstitutional as constituting an unwarrantable infringement of property rights. "The State may enact stringent measures to enforce the collection of the public revenue. The law provides ample remedies for the property-owner to contest the validity of the tax assessed against him. He may pay the tax under protest, and at once bring suit to recover it back. He may appear in court when the State brings suit to foreclose its lien, and there contest its validity. The register of deeds is a constitutional officer, but the conditions under which deeds are entitled to record are entirely within the discretion of the legislature, and the court

*v. Hyde*, 9 Neb. 113, 2 N. W. Rep. 218; *Warnock v. Harlow*, 96 Cal. 298, 31 Pac. Rep. 166, 31 Am. St. Rep. 209.

<sup>1</sup> *Welch v. Ketchum*, 48 Minn. 241, 51 N. W. Rep. 113; *Lyon v. Gleason*, 40 Minn. 434, 42 N. W. Rep. 286; *Earle v. Fiske*, 103 Mass. 491; *Youngblood v. Vastine*, 46 Mo. 239, 2 Am. Rep. 509; *Kennedy v. Northup*, 15 Ill. 148; *Powers v. M'Ferran*, 2 S. & R. 44.

<sup>2</sup> This is the rule adopted in a Connecticut case, in which it was held that an unrecorded deed is valid after the death of the grantor, as against a purchaser from the grantor's heirs without notice of the former deed. *Hill v. Meeker*, 24 Conn. 211, Waite, C. J., dissenting, and saying that "this is the first case in the whole history of our jurisprudence in which it

has ever been holden that an unrecorded deed shall defeat the title of a *bona fide* purchaser or mortgagee having no knowledge of the existence of such deed." This rule also formerly prevailed in Kentucky: *Ralls v. Graham*, 4 T. B. Mon. 120; *Hancock v. Beverly*, 6 B. Mon. 531. In the case of *Harlan v. Seaton*, 18 B. Mon. 312, the court, while following the earlier decisions because they had become a settled rule of property, say that, if the question were a new one, they should be strongly inclined to give to the statute a construction which would make it operate as a remedy for the whole evil which it was intended to guard against. Later still purchasers from the heirs of the grantor were protected by statute. Act of 1858, *Dozier v. Barnett*, 13 Bush, 457.

cannot declare them void because they are harsh. Besides, the recording of the deed is not necessary to pass title.”<sup>1</sup>

A similar statute in Minnesota was held valid, the court by Berry, J., saying: “It cannot be doubted that it is competent for the legislature, in the exercise of its general legislative authority, to provide for the manner of transferring title to real estate, and for the registration of conveyances thereof. . . . To this end it may provide what instruments shall be recorded, and how they shall be executed and authenticated, by acknowledgment or otherwise, to entitle them to record; and because the Constitution imposes no restriction upon the authority of the legislature in the matter, we can see no reason why it is not competent for the legislature to prescribe any other rule, regulation, or condition with reference to the registration of conveyances of real estate, which, in its wisdom, it may see fit to enact, provided only that such its action is legislative.”<sup>2</sup>

In the State of Washington, however, a statute substantially like those of Michigan and Minnesota above referred to was declared unconstitutional as interfering with the right to acquire and dispose of property, and as taking property without due process or compensation.<sup>3</sup> Mr. Justice Scott, delivering the opinion of the court, said: “Such laws as this, which interfere with the citizen in the transaction of ordinary business, are not necessary to enforce the collection of any lawful demand due the State. If they could be so directed as only to operate against the person on whom the obligation to make the payment rested, no objection could be urged against them. These, however, are matters for legislative consideration and action, but within, of course, constitutional limits. While this law would only compel the payment of just demands in probably the majority of instances, the fact that it would also compel the payment of illegal claims in some cases, thus resulting in the greatest injustice, condemns it. In nothing is the State more vitally interested than in the complete fulfilment of the constitutional guaranty of protection to the life, liberty, and property of the citizen.”

<sup>1</sup> Van Huse v. Heames, 96 Mich. 504,  
56 N. W. Rep. 22, per Grant, J.

<sup>2</sup> State v. Register of Deeds, 26 Minn.  
521, 525, 6 N. W. Rep. 337, per Berry, J.

<sup>3</sup> State v. Moore, 7 Wash. 173, 177, 34  
Pac. Rep. 461.

II. *Who are Purchasers within the Terms of the Recording Acts.*

1385. The purchaser protected by the recording acts has in some instances been defined by such acts to mean the person to whom any estate or interest in land is conveyed, or to whom any mortgage, lease, or other conditional estate is assigned. This definition is concerned wholly with the estate or interest conveyed.<sup>1</sup> The registry acts very generally define the purchaser who is protected against an unrecorded conveyance as "a purchaser in good faith and for a valuable consideration."

The term "subsequent purchaser" does not include a purchaser from an apparent stranger to the title of the grantor, but it does include, not only the purchaser from the grantor himself, but every subsequent purchaser from one who appears from the records to be the owner of, or to be authorized to convey, the title and interest that the grantor had.<sup>2</sup>

1386. The courts define such a bona fide purchaser to be one who has in good faith paid a valuable consideration without notice of the adverse rights in another. In other words, he must be a *bona fide* purchaser for value without notice.<sup>3</sup> A purchaser must have paid a valuable consideration in order to acquire protection under the registry acts as against prior unrecorded conveyances.<sup>4</sup> But one who has paid the purchase-money in full, and is entitled to receive a conveyance of the legal title upon demand without doing more, is entitled to protection as a *bona fide* purchaser for value without notice, though he had not in fact received the legal title.<sup>5</sup> The recital in a deed of the payment of the consideration is *prima facie* evidence of a purchase for value as against the rights of persons claiming under a

<sup>1</sup> Webb on Record of Title, § 201.

<sup>2</sup> Memphis Land Co. v. Ford, 58 Fed. Rep. 452, per Sanborn, J.; Kennedy v. Northup, 15 Ill. 148, 157; Bowen v. Prout, 52 Ill. 354, 357; Youngblood v. Vastine, 46 Mo. 239, 242, 2 Am. Rep. 509; Earle v. Fiske, 103 Mass. 491, 494.

<sup>3</sup> Pomeroy's Eq. Jur. § 745; Perry on Trusts, § 239; Webb on Record of Title, § 202; Blanchard v. Tyler, 12 Mich. 339, 86 Am. Dec. 57; Warner v. Whitaker, 6 Mich. 133, 72 Am. Dec. 65; McLeod v. First Nat. Bank, 42 Miss. 99; Hall v.

Delaplaine, 5 Wis. 206, 68 Am. Dec. 57; Clark v. Flint, 22 Pick. 231, 33 Am. Dec. 733; Jewett v. Tucker, 139 Mass. 566; Weaver v. Barden, 49 N. Y. 286; Dickerson v. Tillinghast, 4 Paige, 215, 25 Am. Dec. 528.

<sup>4</sup> Morse v. Wright, 60 Cal. 260; Colton v. Seavey, 22 Cal. 496; Frey v. Clifford, 44 Cal. 335; Moore v. Tarrant Co. Agricultural Asso. (Tex. Civ. App.) 31 S. W. Rep. 709; Anthony v. Wheeler, 130 Ill. 128, 22 N. E. Rep. 494.

<sup>5</sup> Preston v. Nash, 76 Va. 1.

prior unrecorded deed from the same grantor until such recital is rebutted.<sup>1</sup>

1387. But, except as *prima facie* evidence, a purely nominal consideration is not sufficient to protect a subsequent purchaser against a prior unrecorded deed. In a recent case before the Court of Appeals of New York,<sup>2</sup> it appeared that a father conveyed to a daughter a farm worth twenty thousand dollars in consideration of ten dollars, which was paid, and of her undertaking to pay the net proceeds of the place to him during his life, and after his death a certain portion thereof to his wife and other daughter. He had already conveyed the same property to his wife by a deed which remained unrecorded when the deed to the daughter was put upon record. It was held that the daughter was not "a purchaser in good faith and for a valuable consideration," within the meaning of the recording act, so as to entitle her deed to prevail over the prior unrecorded conveyance by the father. The court, in giving judgment, say: "We deem it unnecessary to undertake to determine here what degree of adequacy of price is required to uphold a subsequent deed first recorded. Upon this branch of the case we have no occasion to go further than to hold that a small sum, inserted and paid, perhaps because of a popular belief that some slight money consideration is necessary to render the deed valid, will not of itself satisfy the terms of the statute, where it appears upon the face of the conveyance, or by other competent evidence, that it was not the actual consideration. Where the subsequent conveyance is a mortgage, and only part of the consideration paid, there can be but little difficulty in properly adjusting the equities of the parties, for the mortgagee can then be considered as a *bona fide* purchaser *pro tanto*, and the mortgage enforced to the extent to which he has parted with value upon the faith of it."<sup>3</sup> But in case of a

<sup>1</sup> Kerfoot v. Cronin, 105 Ill. 609; Stone v. Duvall, 77 Ill. 475; Wood v. Chapin, 13 N. Y. 509, 67 Am. Dec. 62.

<sup>2</sup> Ten Eyck v. Witbeck, 135 N. Y. 40, 31 N. E. Rep. 994, citing Upton v. Bassett, Cro. Eliz. 445; Doe v. Routledge, 2 Cowp. 705; Metcalfe v. Pulvertoft, 1 Ves. & B. 183; Fullenwider v. Roberts, 4 Dev. & B. 278; Worthy v. Caddell, 76 N. C. 82, and disapproving of the cases of Webster

v. Van Steenberg, 46 Barb. 211, and Hendy v. Smith, 2 N. Y. Supp. 535. To same effect see, also, Mason v. Mullahy, 145 Ill. 383, 34 N. E. Rep. 36.

<sup>3</sup> Merritt v. Northern R. Co. 12 Barb. 605; Pickett v. Barron, 29 Barb. 505; Williams v. Smith, 2 Hill, 301; Stalker v. McDonald, 6 Hill, 93, 96, 40 Am. Dec. 389; Peabody v. Fenton, 3 Barb. Ch. 451.

deed having a mixed consideration,—that is, partly valuable and partly good,—such a rule would be difficult of application, if not impracticable; and no case has been cited where the question has arisen in that form.<sup>1</sup> The point, however, is not involved in a case like the present, where the money consideration is purely nominal, or infinitesimal in amount, when compared with the value of the property granted, and is shown not to have been the real inducement of the grant. It is proper to observe here that the good faith of a purchaser may be seriously impaired, if not destroyed, by the inadequacy of the price at which the property is offered by a person claiming to be its owner. If the sum which the seller is willing to take is grossly disproportionate to the value of the thing which is the subject of the negotiation, it is strong proof of a defective title, and sufficient to put a prudent man upon inquiry; and if the buyer neglects to diligently prosecute such inquiry, he may not be awarded the standing of a *bona fide* purchaser. It may be said that this rule would not hold good where the relation of parent and child exists, because of the natural and laudable desire of the former to share his worldly possessions with the latter, which is merely equivalent to saying that the actual consideration in such cases is not a pecuniary one. . . . There is a wide distinction between a good and a valuable consideration when the latter term is used in the statutes defining the rights of a subsequent purchaser. Blood, love and affection, future support, a precedent indebtedness, and the like, are either of them sufficient as a consideration between the parties; but neither is potential enough to override the prior equities of others in the property conveyed.”<sup>2</sup>

<sup>1</sup> There is an *obiter* remark by Judge Hand, in *Merritt v. Northern R. Co.* 12 Barb. 605, that such a grantee may be considered a purchaser for value as to the entire title.

<sup>2</sup> The importance of this decision warrants a further quotation from the opinion of Maynard, J.: “The phrase, ‘a purchaser in good faith and for a valuable consideration,’ is not peculiar to the recording act, but is one of frequent occurrence in the statutes. It can be found in the chapters on trusts (4 Rev. St. [8th ed.] p. 2437, §§ 51, 54); on powers (p.

2451, § 132); on conveyances (p. 2452, § 144); and on frauds (p. 2593, § 5). It is an expression which has been borrowed from the language of courts of equity, and should be interpreted in the sense in which it is there understood. As pointed out by Chancellor Walworth in *Dickerson v. Tillinghast*, 4 Paige, 215, it has a curious and instructive history in connection with its introduction into the recording act. The English registry law made the prior unrecorded deed wholly void as against the subsequent grantee, without reference to the question of no-

1388. One who in good faith purchases land upon credit, giving a purchase-money mortgage, or other obligation for the payment of the price, is a *bona fide* purchaser for value, and will be protected.<sup>1</sup>

A beneficiary who brings and maintains an action to have a trustee compelled to make a conveyance to him of the trust property is not a subsequent purchaser, and no title he may acquire by a conveyance so obtained can have precedence over an unrecorded conveyance made by the trustee before such action was brought.<sup>2</sup>

1389. A mortgagee of real estate is a purchaser within the meaning of the recording laws. This is declared by statute in some States, and in others it is a rule of judicial construction.<sup>3</sup> "When I speak of a purchaser for a valuable consideration," says Lord Hardwicke, "I include a mortgagee, for he is a purchaser *pro tanto*."<sup>4</sup> A trustee in a deed of trust is also a purchaser for value. He occupies the same ground with respect to notice, either

tice, or the payment of value. Immediately the court of chancery, with characteristic diligence, sought to relieve the earlier grantee from the hardship which the enforcement of the letter of the law might inflict, and, while respecting the command of the statute which made his deed void at law, it invested him with an equitable title, which it declared should prevail over the legal title of the subsequent purchaser, if it appeared that he had notice of its existence, or did not part with value at the time of the purchase. This rule of judicial construction was incorporated by the legislature into the *lex scripta* in almost the identical words in which it had been phrased by courts of equity. A valuable consideration has been defined by writers upon equity jurisprudence as something 'which the law esteems as an equivalent given for the grant, and it is therefore founded on motives of justice.' 1 Story Eq. Jur. (10th ed.) § 354. If the subsequent grantee does not give up any security, or divest himself of any right, or place himself in a worse situation than he would have been if he had received notice of the prior equitable title or lien previous to his purchase,

he will not be permitted to retain the legal title to the injury of the prior grantee."

<sup>1</sup> Arrington v. Arrington, 114 N. C. 151, 168, 19 S. E. Rep. 351; Beasley v. Bray, 98 N. C. 266.

<sup>2</sup> Warnock v. Harlow, 96 Cal. 298, 31 Pac. Rep. 166, 31 Am. St. Rep. 209.

<sup>3</sup> Carpenter v. Longan, 16 Wall. 271; Haynsworth v. Bischoff, 6 S. C. 159; Bass v. Wheless, 2 Tenn. Ch. 531; Patton v. Eberhart, 52 Iowa, 67, 2 N. W. Rep. 954; Moore v. Walker, 3 Lea, 656; Weinberg v. Rempe, 15 W. Va. 829; Chapman v. Miller, 130 Mass. 289; Jordan v. McNeil, 25 Kans. 459; Whelan v. McCreary, 64 Ala. 319; Brem v. Lockhart, 93 N. C. 191; Fleschner v. Sumpter, 12 Oreg. 161, 6 Pac. Rep. 506; Herff v. Griggs, 121 Ind. 471, 23 N. E. Rep. 279; Fargason v. Edrington, 49 Ark. 207, 214, 4 S. W. Rep. 763; Rowell v. Williams, 54 Wis. 636, 12 N. W. Rep. 86.

<sup>4</sup> In Willoughby v. Willoughby, 1 T. R. 763. And see Porter v. Green, 4 Iowa, 571; Seevers v. Delashmutt, 11 Iowa, 174, 77 Am. Dec. 139; Salter v. Baker, 54 Cal. 140; Tate v. Liggat, 2 Leigh, 84; Singer Manuf. Co. v. Chalmers, 2 Utah, 542.

actual or constructive, of any outstanding equities, that a mortgagee does.<sup>1</sup>

1390. A mortgage given to secure a preëxisting debt is by some courts distinguished from one upon which the consideration is paid at the time of its execution; and the same rule is applied in case of a purchase in consideration of the grantee's cancelling an existing debt of the grantor. The mortgage or deed made in consideration of a preëxisting debt does not constitute the mortgagee or grantee a purchaser for value in good faith. The former, although given upon a valid consideration as between the parties, is not regarded as a purchase for a valuable consideration which will entitle the mortgagee to protection against prior equities, although he had no notice of them when he took the mortgage.<sup>2</sup>

<sup>1</sup> *New Orleans Canal & B. Co. v. Montgomery*, 95 U. S. 16; *Kesner v. Trigg*, 98 U. S. 50.

<sup>2</sup> *Morse v. Godfrey*, 3 Story, 364, 389. **Alabama**: *Gafford v. Stearns*, 51 Ala. 434; *Short v. Battle*, 52 Ala. 456; *Alexander v. Caldwell*, 55 Ala. 517; *Coleman v. Smith*, 55 Ala. 368; *Craft v. Russell*, 67 Ala. 9; *Cook v. Parham*, 63 Ala. 456; *Thurman v. Stoddard*, 63 Ala. 336; *Jones v. Robinson*, 77 Ala. 499; *Banks v. Long*, 79 Ala. 319. But in this State a creditor who accepts an absolute conveyance in payment of a preëxisting debt is a purchaser for a valuable consideration. *Safold v. Wade*, 51 Ala. 214, citing *Ohio Life Ins. Co. v. Ledyard*, 8 Ala. 866, and distinguishing *Wells v. Morrow*, 38 Ala. 125, where a mortgage was taken for a balance of indebtedness. **Arkansas**: *Johnson v. Graves*, 27 Ark. 557; *Fargason v. Edrington*, 49 Ark. 207, 214. **California**: *Withers v. Little*, 56 Cal. 370. **Georgia**: *Chance v. McWhorter*, 26 Ga. 315. **Iowa**: *Koon v. Tramel*, 71 Iowa, 132, 32 N. W. Rep. 243; *Phelps v. Fockler*, 61 Iowa, 340, 14 N. W. Rep. 729, 16 N. W. Rep. 210. **Kentucky**: *Halstead v. Bank*, 4 J. J. Marsh. 554; *Eubank v. Poston*, 5 B. Mon. 285. **Maryland**: *Repp v. Repp*, 12 Gill & J. 341. **Massachusetts**: *Clark v. Flint*, 22 Pick. 231, 243, 33 Am. Dec. 733; *Buffington v. Gerrish*, 15 Mass. 156, 8 Am. Dec. 97. **Michigan**: *Boxheimer v.*

*Gunn*, 24 Mich. 372; *Edwards v. McKernan*, 55 Mich. 520, 523, 22 N. W. Rep. 20. **Mississippi**: *Hinds v. Pugh*, 48 Miss. 268; *Schumpert v. Dillard*, 55 Miss. 348; *Perkins v. Swank*, 43 Miss. 349; *McLeod v. First Nat. Bank*, 42 Miss. 99. **New Jersey**: *Pancoast v. Duval*, 26 N. J. Eq. 445; *Mingus v. Condit*, 23 N. J. Eq. 313. **New York**: *Manhattan Co. v. Evertson*, 6 Paige, 457; *Van Heusen v. Radcliff*, 17 N. Y. 580, 584, 72 Am. Dec. 480; *Wood v. Robinson*, 22 N. Y. 564; *McGown v. Yerks*, 6 Johns. Ch. 450; *Cary v. White*, 7 Lans. 1, 52 N. Y. 138; *Weaver v. Barden*, 49 N. Y. 286; *Padgett v. Lawrence*, 10 Paige, 170, 180, 40 Am. Dec. 232; *Stalker v. McDonald*, 6 Hill, 93, 40 Am. Dec. 389; *Dickerson v. Tillinghast*, 4 Paige, 215, 25 Am. Dec. 528; *Coddington v. Bay*, 20 Johns. 637, 11 Am. Dec. 342; *Westervelt v. Haff*, 2 Sandf. Ch. 98; *Union Dime Savings Inst. v. Duryea*, 67 N. Y. 84; *De Lancey v. Stearns*, 66 N. Y. 157; *Bank for Savings v. Frank*, 13 J. & S. 404; *Constant v. Am. Bap. Soc.* 21 J. & S. 170. **North Carolina**: *Harris v. Horner*, 1 Dev. & B. 455, 30 Am. Dec. 182. **Pennsylvania**: *Ashton's Appeal*, 73 Pa. St. 153. **South Carolina**: *Zorn v. Railroad Co.* 5 S. C. 90; *Summers v. Brice*, 36 S. C. 204, 15 S. E. Rep. 374. **Tennessee**: *Brown v. Vanlier*, 7 Humph. 239. **Texas**: *Spurlock v. Sullivan*, 36 Tex. 511. *Steffian v. Milmo Nat. Bank*, 69 Tex.

He must have parted with some value or some right upon the faith of the mortgage, and at the time of it, to entitle him to protection as a purchaser. He must have received some new consideration, or must have relinquished some security for a preëxisting debt due him.<sup>1</sup>

A mortgage to secure a future indebtedness constitutes the mortgagee a purchaser from the time that advances are made by the mortgagee under the mortgage without actual notice of a subsequent mortgage.<sup>2</sup>

1391. But a mortgage to secure an antecedent debt, or a deed for such a consideration, is perfectly valid as between the parties, whatever may be its effect as to purchasers or incumbrancers.<sup>3</sup> Moreover, such a mortgage, if taken without notice of one given to secure a future indebtedness, has precedence of it, if it be first recorded.<sup>4</sup>

The mortgagee for an antecedent debt acquires a lien upon the property to the extent only of the mortgagor's equitable interest at the time. Thus, if the mortgagor has then contracted to sell the land, and the vendee has paid a portion of the purchase-money, the mortgage is a lien only to the extent of the unpaid purchase-

513, 6 S. W. Rep. 823; *McKamey v. Thorp*, 61 Tex. 648, 653; *Ayres v. Duprey*, 27 Tex. 593, 86 Am. Dec. 657; *Golson v. Fielder*, 2 Tex. Civ. App. 400, 21 S. W. Rep. 173; *Overstreet v. Manning*, 67 Tex. 657, 660, 4 S. W. Rep. 248. Wisconsin: *Funk v. Paul*, 64 Wis. 35, 24 N. W. Rep. 419, 54 Am. Rep. 576.

The same rule was laid down in Illinois in the case of *Metropolitan Bank v. Godfrey*, 23 Ill. 579. In later cases, however, it has been held, so far as negotiable paper is concerned, that an indorsee taking it before maturity as payment or security for a preëxisting debt is a holder for value, and takes it free from latent defences on the part of the maker. *Doolittle v. Cook*, 75 Ill. 354; *Manning v. McClure*, 36 Ill. 490, 499. In the latter case Mr. Justice Lawrence, referring to *Metropolitan Bank v. Godfrey*, 23 Ill. 579, said: "We do not desire to be understood as overruling that position; but if that question comes again before us, it will be open to argument whether a different principle should be

applied to conveyances of real estate from that which all the members of the court agree should be applied to the indorsement of a promissory note."

<sup>1</sup> *Spurlock v. Sullivan*, 36 Tex. 511; *Pickett v. Barron*, 29 Barb. 505; *Webster v. Van Steenbergh*, 46 Barb. 211; *Lawrence v. Clark*, 36 N. Y. 128; *Schumpert v. Dillard*, 55 Miss. 348; *Hinds v. Pugh*, 48 Miss. 268, 272; *Perkins v. Swank*, 43 Miss. 349, 360; *Wilson v. Knight*, 59 Ala. 172; *Bartlett v. Varner*, 56 Ala. 580; *Withers v. Little*, 56 Cal. 370.

<sup>2</sup> *Simons v. First Nat. Bank*, 93 N. Y. 269.

<sup>3</sup> *Steiner v. McCall*, 61 Ala. 406; *Turner v. McFee*, 61 Ala. 468; *Machette v. Wanless*, 1 Colo. 225; *Kranert v. Simon*, 65 Ill. 344; *Smith v. Worman*, 19 Ohio St. 145; *Paine v. Benton*, 32 Wis. 491; *Brooks v. Owen*, 112 Mo. 251, 20 S. W. Rep. 492.

<sup>4</sup> *National Bank v. Whitney*, 103 U. S. 99.



money upon such contract.<sup>1</sup> But after the vendee has received notice of the mortgage, he cannot make a valid payment of the remainder of the purchase-money.<sup>2</sup>

**1392.** The rule requiring the payment of an actual consideration at the time of the transaction to constitute a bona fide purchaser, within the meaning of the recording acts, does not apply to any one but the original grantee or mortgagee. He being protected by the recording acts from a prior unrecorded conveyance, any one who takes an assignment from him is entitled to the same protection, although the assignee parts with no valuable consideration for the assignment, and even though he has actual notice of the prior unrecorded conveyance.<sup>3</sup>

If the mortgagee upon taking the mortgage has surrendered any valuable right, such as a vendor's lien, or a prior mortgage, upon the property, the new mortgage is based upon a valuable consideration as much as if he had paid money for it.<sup>4</sup> If the sole consideration of a conveyance be the love and affection of the grantor, it will not hold against a prior unrecorded mortgage of the same property, or against a mortgage imperfectly recorded.<sup>5</sup>

But numerous authorities hold that a mortgagee who has taken his mortgage in good faith to secure a preëxisting debt, or a purchaser who has received a conveyance in consideration of his cancelling a preëxisting debt, is entitled to be regarded as a purchaser, and to be protected as such.<sup>6</sup> The weight of authority, however, seems to be against this position.

<sup>1</sup> *Evans v. Templeton*, 69 Tex. 375, 6 S. W. Rep. 843.

<sup>2</sup> *Young v. Guy*, 87 N. Y. 457, affirming 23 Hun, 1.

<sup>3</sup> *Webster v. Van Steenbergh*, 46 Barb. 211; *Wood v. Chapin*, 13 N. Y. 509, 67 Am. Dec. 62.

<sup>4</sup> *Lane v. Logue*, 12 Lea, 681; *Constant v. University of Rochester*, 111 N. Y. 604, 19 N. E. Rep. 631; 133 N. Y. 640, 31 N. E. Rep. 26.

<sup>5</sup> *Aubuchon v. Bender*, 44 Mo. 560; *Bishop v. Schneider*, 46 Mo. 472, 2 Am. Rep. 533.

<sup>6</sup> *California*: *Gassen v. Hendrick*, 74 Cal. 444, 16 Pac. Rep. 242; *Schluter v. Harvey*, 65 Cal. 158, 3 Pac. Rep. 659;

*Frey v. Clifford*, 44 Cal. 335; *Robinson v. Smith*, 14 Cal. 94. See *Withers v. Little*, 56 Cal. 370; *Partridge v. Smith*, 2 Biss. 183. *Colorado*: *Knox v. McFarra*, 4 Colo. 586; *Farrand v. Beshoar*, 9 Colo. 291, 293, 12 Pac. Rep. 196; *McMurtrie v. Riddell*, 9 Colo. 497, 13 Pac. Rep. 181; *Merchants' Bank v. McClelland*, 9 Colo. 608, 13 Pac. Rep. 723. *Indiana*: *Babcock v. Jordan*, 24 Ind. 14; *Wert v. Naylor*, 93 Ind. 431; *Gilchrist v. Gough*, 63 Ind. 576, 30 Am. Rep. 250; *Evans v. Pence*, 78 Ind. 439. The doctrine is modified to the extent that such a mortgage does not cut off prior secret equities. *Busenbarke v. Ramey*, 53 Ind. 499. *Kansas*: *Jackson v. Reid*, 30 Kans. 10, 1 Pac. Rep. 308;

1393. The giving of further time for the payment of an existing debt, by a valid agreement, for any period however short, though it be for a day only, is a valuable consideration, and is sufficient to support a mortgage, or a conveyance, as a purchase for a valuable consideration.<sup>1</sup> But the mere taking of collateral security on time is not by itself, and in the absence of any agreement beyond it, an extension of the time of payment of the original debt; and therefore a mortgage taken as security in such way is not a purchase for value.<sup>2</sup> Where a mortgage is made in terms to secure an existing note, and the mortgage declares that "the same shall be paid in the manner following," giving future

Hayner v. Eberhardt, 37 Kans. 308, 15 Pac. Rep. 168. Mississippi: Soule v. Shotwell, 52 Miss. 236; Love v. Taylor, 26 Miss. 567. Missouri: State Bank v. Frame, 112 Mo. 502, 20 S. W. Rep. 620. Macfarlane, J., says: "Whether the satisfaction of a preëxisting debt is a consideration sufficient to protect a purchaser of real estate against a prior unrecorded deed, of which he has no notice, has never been definitely and directly passed upon by this court, so far as we are advised." After reviewing the Missouri cases, the most important of which are Crawford v. Spencer, 92 Mo. 498, 4 S. W. Rep. 713; Fitzgerald v. Barker, 96 Mo. 661, 10 S. W. Rep. 45; Redpath v. Lawrence, 42 Mo. App. 101; Lawrence v. Owens, 39 Mo. App. 318; Feder v. Abrahams, 28 Mo. App. 454; Hess v. Clark, 11 Mo. App. 492, he continues: "We think the rule deducible from these authorities is, that a deed made in consideration of the absolute discharge of a preëxisting debt of the grantor, or an adequate portion of it, will constitute the grantee a purchaser for value, so as to protect him against a previous unrecorded deed of the same grantor. By the satisfaction of the debt the creditor divests himself of the right of an action, or of securing the original liability, and places himself in a worse condition than he would have done by a definite forbearance of the debt." North Carolina: Brem v. Lockhart, 93 N. C. 191; Potts v. Blackwell, 4 Jones Eq. 58; Branch v.

Griffin, 99 N. C. 173, 5 S. E. Rep. 393; Bank v. Bridgers, 98 N. C. 67, 3 S. E. Rep. 826. Virginia: Cammack v. Soran, 30 Gratt. 292.

<sup>1</sup> § 610; Hale v. Omaha Nat. Bank, 1 J. & S. 40; Cary v. White, 52 N. Y. 138; Gilchrist v. Gough, 63 Ind. 576, 19 Alb. L. J. 276, 30 Am. Rep. 250; Schumpert v. Dillard, 55 Miss. 348; Port v. Embree, 54 Iowa, 14, 6 N. W. Rep. 83; Koon v. Trammel, 71 Iowa, 132, 32 N. W. Rep. 243; Davis v. Lutkiewicz, 72 Iowa, 254, 33 N. W. Rep. 670; Phelps v. Fockler, 61 Iowa, 340, 14 N. W. Rep. 729, 16 N. W. Rep. 210; Cook v. Parham, 63 Ala. 456; Thames v. Rembert, 63 Ala. 561; Jones v. Robinson, 77 Ala. 499; Fargason v. Edrington, 49 Ark. 207, 4 S. W. Rep. 763; Sullivan Sav. Inst. v. Young, 55 Iowa, 132, 7 N. W. Rep. 480; Whitfield v. Riddle, 78 Ala. 99.

<sup>2</sup> Cary v. White, 52 N. Y. 138, reversing 7 Lans. 1; Wood v. Robinson, 22 N. Y. 564; the dictum in the case of Pratt v. Coman, 37 N. Y. 440, to the contrary, is denied in Cary v. White, 52 N. Y. 138. The courts have been disposed to limit the authority of Cary v. White to the facts of that case. Durkee v. Nat. Bank, 36 Hun, 565; Hubbard v. Gurney, 64 N. Y. 457. 467; Grocers' Bank v. Penfield, 7 Hun, 279, 282, 69 N. Y. 502, 25 Am. Rep. 231, holding that the precedent debt is a sufficient consideration for the transfer of the security, and no new consideration need be shown.

days of payment beyond the time of payment mentioned in the note, the mortgage extends the time of payment of the note. The mortgage in such case, by reason of the extension of the time of payment, is founded upon a valuable consideration. The date of payment in the note and the date of payment in the mortgage being inconsistent, the latter should prevail.<sup>1</sup>

A mortgage made to secure a loan made at the time, as well as a preëxisting debt, is based upon a valid consideration.<sup>2</sup>

1394. Whether one who purchases by a quitclaim deed is an innocent purchaser without notice is a question upon which the authorities are conflicting, though the prevailing rule is that such a purchaser is, equally with a grantee by a warranty deed, an innocent purchaser without notice, and entitled to full protection under the registry laws. This view was declared by the Supreme Court of the United States in a recent case which practically overrules some earlier decisions of the court.<sup>3</sup> Mr. Justice Field, speaking for the court, said: "The doctrine expressed in many cases, that the grantee in a quitclaim deed cannot be treated as a *bona fide* purchaser, does not seem to rest upon any sound principle. It is asserted upon the assumption that the form of the instrument, that the grantor merely releases to the grantee his claim, whatever it may be, without any warranty of its value, or only passes whatever interest he may have at the time, indicates that there may be other and outstanding claims or interests which may possibly affect the title of the property, and therefore it is said that the grantee, in accepting a conveyance of that kind, cannot be a *bona fide* purchaser and entitled to protection as such, and that he is in fact thus notified by his grantor that there may

<sup>1</sup> Durkee v. Nat. Bank, 36 Hun, 565.

<sup>2</sup> Branch v. Griffin, 99 N. C. 173, 5 S. E. Rep. 398; Bank v. Bridgers, 98 N. C. 67, 3 S. E. Rep. 826.

<sup>3</sup> Moelle v. Sherwood, 148 U. S. 21, 28, 29, 13 Sup. Ct. Rep. 426; United States v. California, &c. Land Co. 148 U. S. 31, 41, 13 Sup. Ct. Rep. 458; Prentice v. Duluth Storage Co. 58 Fed. Rep. 437, 447. The following authorities, so far as they are in conflict, are to be considered as discarded: Dickerson v. Colgrove, 100 U. S. 578, 584; Hastings v. Nissen, 31 Fed. Rep. 597; May v. Le Claire, 11 Wall.

217; Villa v. Rodriguez, 12 Wall. 323, 328; Oliver v. Piatt, 3 How. 333, 409; Woodward v. Jewell, 25 Fed. Rep. 6; Gest v. Packwood, 34 Fed. Rep. 368, 372. In White v. McGarry, 2 Flip. 572, 574, the three last cases are referred to as not fully sustaining the broad proposition that a purchaser by a quitclaim deed is not a *bona fide* purchaser for value, and that these decisions do not apply where there are recording acts. These cases are also commented upon to like effect in Chapman v. Sims, 53 Miss. 154, 163.

be some defect in his title, and he must take it at his risk. This assumption we do not think justified by the language of such deeds or the general opinion of conveyancers. . . . In many parts of the country a quitclaim or a simple conveyance of the grantor's interest is the common form in which the transfer of real estate is made. A deed in that form is, in such cases, as effectual to divest and transfer a complete title as any other form of conveyance. There is in this country no difference in their efficacy and operative force between conveyances in the form of release and quitclaim and those in the form of grant, bargain, and sale. If the grantor in either case at the time of the execution of his deed possesses any claim to or interest in the property, it passes to the grantee. In the one case, that of bargain and sale, he impliedly asserts the possession of a claim to or interest in the property, for it is the property itself which he sells and undertakes to convey. In the other case, that of quitclaim, the grantor affirms nothing as to the ownership, and undertakes only a release of any claim to or interest in the premises which he may possess without asserting the ownership of either. If in either case the grantee takes the deed with notice of an outstanding conveyance of the premises from the grantor, or of the execution by him of obligations to make such conveyance of the premises, or to create a lien thereon, he takes the property subject to the operation of such outstanding conveyance and obligation, and cannot claim protection against them as a *bona fide* purchaser. But in either case, if the grantee takes the deed without notice of such outstanding conveyance or obligation respecting the property, or notice of facts which, if followed up, would lead to a knowledge of such outstanding conveyance or equity, he is entitled to protection as a *bona fide* purchaser, upon showing that the consideration stipulated has been paid, and that such consideration was a fair price for the claim or interest designated."

Many state courts have adopted the rule that a quitclaim deed does not deprive the grantee of the character of a *bona fide* purchaser.<sup>1</sup>

<sup>1</sup> Arkansas: Fargason v. Edrington, 49 Ark. 207, 4 S. W. Rep. 762. A quitclaim deed is a circumstance tending to show notice. Bagley v. Fletcher, 44 Ark. 153, 160; Miller v. Fraley, 23 Ark. 735, 740; Gaines v. Summers, 50 Ark. 322, 327, 328, 7 S. W. Rep. 301. But the cases in this State show that a purchaser by quitclaim deed may become entitled to protection as a *bona fide* purchaser for

**1395.** In several States it is provided by statute that a deed of quitclaim shall pass all the estate that could be lawfully conveyed by a deed of bargain and sale.<sup>1</sup> In accordance with this rule, purchasers under foreclosure and execution sale are pur-

value. *McDonald v. Belding*, 145 U. S. 492, 12 Sup. Ct. Rep. 892. **California**: *Frey v. Clifford*, 44 Cal. 335; *Graff v. Middleton*, 43 Cal. 341. See *Allison v. Thomas*, 72 Cal. 562, 564, 14 Pac. Rep. 309, 1 Am. St. Rep. 89; *Rego v. Van Pelt*, 65 Cal. 254, 3 Pac. Rep. 867; *Spaulding v. Bradley*, 79 Cal. 449, 22 Pac. Rep. 47; *Thompson v. Spencer*, 50 Cal. 532. **Colorado**: *Bradbury v. Davis*, 5 Colo. 265. **Connecticut**: *Potter v. Tuttle*, 22 Conn. 512; *Ely v. Stannard*, 44 Conn. 528, 533. **Georgia**: Question not decided. *Hockenhull v. Oliver*, 80 Ga. 89, 4 S. E. Rep. 323, 12 Am. St. Rep. 235. **Illinois**: *Morgan v. Clayton*, 61 Ill. 35; *Harpham v. Little*, 59 Ill. 509; *Brady v. Spureck*, 27 Ill. 478, 482; *Butterfield v. Smith*, 11 Ill. 485; *McConnel v. Reed*, 5 Ill. 117, 38 Am. Dec. 124; *Brown v. Banner Coal & Oil Co.* 97 Ill. 214, 37 Am. Rep. 105; *Hamilton v. Doolittle*, 37 Ill. 473; *Kennedy v. Northup*, 15 Ill. 148, 154; *Grant v. Bennett*, 96 Ill. 513, 525, 37 Am. Rep. 105. **Massachusetts**: *Woodward v. Sartwell*, 129 Mass. 210, 215, per Endicott, J.; *Kyle v. Kavanagh*, 103 Mass. 356; *Mansfield v. Dyer*, 131 Mass. 200; *Dow v. Whitney*, 147 Mass. 1, 16 N. E. Rep. 722. In the latter case the court say: "A deed of 'all the right, title, and interest,' or of 'all the interest,' of the grantor in a lot of land, conveys the same title as a deed of the land. It is the policy of our laws that a purchaser of land, by examining the registry of deeds, may ascertain the title of his grantor. If there is no recorded deed, he has the right to assume that the record title is the true title. The law has established the rule for the protection of creditors and purchasers that an unrecorded deed, if unknown to them, is, as to them, a mere nullity. The reasons for the rule apply with equal force in the case of a deed of the grantee's right, title, and interest as

in that of a deed of the land." **Michigan**: *White v. McGarry*, 2 Flip. 572. **Minnesota**: Since Stat. of 1875. *Prentice v. Duluth Storage Co.* 58 Fed. Rep. 437, 447; *Strong v. Lynn*, 38 Minn. 315, 37 N. W. Rep. 448. Otherwise under the earlier decisions. *Martin v. Brown*, 4 Minn. 282; *Hope v. Stone*, 10 Minn. 141; *Everest v. Ferris*, 16 Minn. 26; *Marshall v. Roberts*, 18 Minn. 405, 10 Am. Rep. 201. **Mississippi**: *Chapman v. Sims*, 53 Miss. 154, 163. See, however, *Kerr v. Freeman*, 33 Miss. 292. **Missouri**: *Fox v. Hall*, 74 Mo. 315, 41 Am. Rep. 316; *Willingham v. Hardin*, 75 Mo. 429; *Boogher v. Neece*, 75 Mo. 383; *Craig v. Zimmerman*, 87 Mo. 475, 56 Am. Rep. 466; *Munson v. Ensor*, 94 Mo. 504, 7 S. W. Rep. 108; *Sharp v. Cheatham*, 88 Mo. 498, 510; *Hope v. Blair*, 105 Mo. 85, 24 Am. St. Rep. 366; *Ebersole v. Rankin*, 102 Mo. 488; *Eoff v. Irvine*, 108 Mo. 378, 18 S. W. Rep. 907, 32 Am. St. Rep. 609. **Wisconsin**: *Cutler v. James*, 64 Wis. 173, 24 N. W. Rep. 874, 54 Am. Rep. 603.

<sup>1</sup> **Florida**: Dig. 1882, ch. 32, § 4. **Indiana**: R. S. 1888, § 2924. **Maine**: R. S. 1883, ch. 73, § 14. **Massachusetts**: P. S. 1882, ch. 120, § 2. **Michigan**: Comp. Stats. 1882, § 5653. **Minnesota**: G. S. 1894, § 4180; *Strong v. Lynn*, 38 Minn. 315, 37 N. W. Rep. 448. **Mississippi**: R. Code 1880, § 1195. **Oregon**: 2 Annot. Laws, 1887, § 3004. **Wisconsin**: Annot. Stats. 1889, § 2207. Formerly it was held in **Minnesota**, notwithstanding the statute, that a purchaser by a quitclaim deed takes subject to prior equities, on the ground that the grantor cannot lawfully convey that which he has already conveyed to another. *Marshall v. Roberts*, 18 Minn. 405, 10 Am. Rep. 201. The earlier decisions and former rule are now discarded. § 1394. In **Oregon** the rule that a purchaser by quitclaim is not entitled to protection seems to be still retained.

chasers in good faith, who are entitled to the protection of the registry laws.<sup>1</sup>

Of course if a quitclaim deed contains an express limitation in favor of a prior unrecorded deed, such former deed will take precedence.<sup>2</sup> Even without an express limitation in favor of prior unrecorded deeds, any expression indicating the grantor's intention to convey only such interest as he could properly convey may operate to restrict the conveyance to such interest or title.<sup>3</sup> A reservation of a prior conveyance may, however, be construed to refer only to a prior conveyance which is legally executed and legally operative as a conveyance.<sup>4</sup>

But even where a purchaser by a quitclaim deed is ordinarily regarded as a *bona fide* purchaser, the use of a quitclaim deed is a circumstance bearing upon the question of good faith.<sup>5</sup>

**1396.** The doctrine that a purchaser by a quitclaim deed is not a *bona fide* purchaser for value without notice, and is therefore not entitled to the protection of the registry acts, has much support, though it seems upon principle to be a doctrine that should have no place in the modern law of real estate.<sup>6</sup> One

<sup>1</sup> Girardin v. Lampe, 58 Wis. 267, 16 N. W. Rep. 614; Frey v. Clifford, 44 Cal. 335; Woodward v. Sartwell, 129 Mass. 210; Bagley v. Fletcher, 44 Ark. 153, 160; Miller v. Fraley, 23 Ark. 735, 740.

<sup>2</sup> Brown v. Banner Coal & Oil Co. 97 Ill. 214, 37 Am. Rep. 105.

<sup>3</sup> Torrence v. Shedd, 112 Ill. 466.

<sup>4</sup> Hamilton v. Doolittle, 37 Ill. 473.

<sup>5</sup> Knapp v. Bailey, 79 Me. 195, 9 Atl. Rep. 122; Mansfield v. Dyer, 131 Mass. 200. And see Hoyt v. Schuyler, 19 Neb. 652, 29 N. W. Rep. 306; Snowden v. Tyler, 21 Neb. 199, 31 N. W. Rep. 661; Lavender v. Holmes, 23 Neb. 345, 352, 36 N. W. Rep. 516.

<sup>6</sup> Alabama: Smith v. Branch Bank, 21 Ala. 125; Walker v. Miller, 11 Ala. 1067; Derrick v. Brown, 66 Ala. 162; O'Neal v. Seixas, 85 Ala. 80, 4 So. Rep. 745; Barclift v. Lillie, 82 Ala. 319, 2 So. Rep. 120. Florida: Snow v. Lake, 20 Fla. 656, 51 Am. Rep. 625. Idaho: Leland v. Isenbeck, 1 Ida. 469. Indiana: Meikel v. Borders, 129 Ind. 529, 29 N. E. Rep. 29. Miller, J., said: "The very

form of the deed indicates to the grantee that the grantor has doubts concerning the title, and the deed itself is notice to him that he is getting only a doubtful title. In such cases it is held that a prior unrecorded deed will prevail against a subsequent quitclaim deed first recorded." And see Fleetwood v. Brown, 109 Ind. 567, 571, 11 N. E. Rep. 789. Iowa: Raymond v. Morrison, 59 Iowa, 371, 13 N. W. Rep. 332; Springer v. Bartle, 46 Iowa, 688; Besore v. Dosh, 43 Iowa, 211; Watson v. Phelps, 40 Iowa, 482; Butler v. Barkley, 61 Iowa, 491, 25 N. W. Rep. 747; Pastel v. Palmer, 71 Iowa, 157, 32 N. W. Rep. 257; Steele v. Sioux Val. Bank, 79 Iowa, 339, 44 N. W. Rep. 564, 18 Am. St. Rep. 370, overruling Pettingill v. Devin, 35 Iowa, 344, 353. Kansas: Johnson v. Williams, 37 Kans. 179, 1 Am. St. Rep. 243, 14 Pac. Rep. 537. In this State the quitclaim deed does not, under all circumstances, deprive the purchaser of the right to be considered a *bona fide* purchaser, but it puts him upon inquiry. Such a deed will prevail over a prior unrecorded deed in case the pur-

taking such a deed is deemed to be a purchaser of only such interest as the grantor had at the time of executing such deed, and,

chaser had no notice of the former deed, and could not have discovered its existence from the records, or by the exercise of reasonable diligence in making proper examinations and inquiries. *Merrill v. Hutchinson*, 45 Kans. 59, 25 Pac. Rep. 215; *Goddard v. Donaha*, 42 Kans. 754, 22 Pac. Rep. 708; *Hutchinson v. Hartmann*, 15 Kans. 133; *Young v. Clippinger*, 14 Kans. 148; *Utey v. Fee*, 33 Kans. 683, 691, 7 Pac. Rep. 555. A party receiving a quitclaim deed for real estate is presumed to take it with notice of all outstanding interests and claims of which he could obtain knowledge by the exercise of a reasonable degree of diligence in the examination of all of the public records affecting the title to the property included in such deed, and from inquiries which he might make of persons whom the records show had redeemed the property from tax sale, and had paid subsequent taxes thereon, or were otherwise ostensibly interested in such property. *Smith v. Rudd*, 48 Kans. 296, 29 Pac. Rep. 310. **Maine:** *Bragg v. Paulk*, 42 Me. 502, 517, citing *Oliver v. Piatt*, 3 How. 333, since discarded on this point. **Michigan:** *Peters v. Cartier*, 80 Mich. 124, 45 N. W. Rep. 73. The court says: "Under the cloak of quitclaim deeds, schemers and speculators close their eyes to honest and reasonable inquiries, and traffic in apparent imperfections in titles. The usual method of conveying a good title — one in which the grantor has confidence — is by warranty deed. The usual method of conveying a doubtful title is by quitclaim deed." Also *Eaton v. Trowbridge*, 38 Mich. 454. **Montana:** *McAdow v. Black*, 6 Mont. 601, 13 Pac. Rep. 377. **Nebraska:** *Pleasants v. Blodgett*, 39 Neb. 741, 58 N. W. Rep. 423, affirming 32 Neb. 427, 49 N. W. Rep. 453; *Hoyt v. Schuyler*, 19 Neb. 652, 657, 28 N. W. Rep. 306. The doctrine in this State is that a purchaser by a quitclaim deed is not a *bona fide* purchaser in respect to outstanding and adverse equities and inter-

ests against his grantor shown by the record, or which are discoverable by the exercise of reasonable diligence in making proper examinations and inquiry. *Bowman v. Griffith*, 35 Neb. 361, 53 N. W. Rep. 140. **North Dakota:** *Gress v. Evans*, 1 Dak. 387, 400, 46 N. W. Rep. 1132. **Oregon:** *Baker v. Woodward*, 12 Ore. 3, 6 Pac. Rep. 173; *American Mortg. Co. v. Hutchinson*, 19 Ore. 334, 24 Pac. Rep. 515. **South Dakota:** *Parker v. Randolph* (S. Dak.), 59 N. W. Rep. 722. **Texas:** *Fletcher v. Ellison*, 1 Tex. Un. Cas. 661; *Richardson v. Levi*, 67 Tex. 359, 3 S. W. Rep. 444; *Graham v. Hawkins*, 38 Tex. 628, 635; *Thorn v. Newsom*, 64 Tex. 161, 53 Am. Rep. 747; *Shepard v. Hunsacker*, 1 Tex. Un. Cas. 578. "But the doctrine is limited to quitclaim deeds in the strict sense of that species of conveyance, and where its legal import is a quitclaim or deed of release of all one's right, title, and interest, which is not intended and does not purport to convey an absolute right to land, without covenants of warranty, as contradistinguished from a conveyance of the title or chance for title which the grantor may be supposed to have." *Taylor v. Harrison*, 47 Tex. 454, 26 Am. Rep. 304; *Rodgers v. Burchard*, 34 Tex. 441, 453, 7 Am. Rep. 283; *Harrison v. Boring*, 44 Tex. 255. In other words, the absence of the covenant of warranty does not of itself constitute a conveyance a quitclaim. If the deed, though using the word "quitclaim," in any way shows an intention on the part of the grantor to convey the land itself, and not merely his right or title, it is not a quitclaim deed. In the case of *Garrett v. Christopher*, 74 Tex. 453, 12 S. W. Rep. 67, 15 Am. St. Rep. 850, the court held a deed containing the following language to be a conveyance of the land itself: "Do by these presents sell, convey, remise, release, and quitclaim unto the said C. Von Carlowitz, his heirs and assigns forever, all our right, title, claim, interest, and demand in and to and for [describing the

if he had already conveyed such interest by an unrecorded deed, he had no further interest to convey.

1397. This view is particularly applicable to cases where the land in the hands of the grantor is subject to equities to which the recording act does not apply.<sup>1</sup> Thus a quitclaim deed, from one whose title had been transferred by adverse possession, was held to pass no right as against the adverse occupant to whom such title had been so transferred, for the reason that such title by possession was not subject to the recording acts, and could not be recorded, and the grantee in the quitclaim deed took only what the grantor could lawfully convey.<sup>2</sup>

land]. To have and to hold the above-described premises unto the said C. Von Carlowitz, his heirs and assigns, forever." In several other instances deeds similarly worded to the one we are considering have been held to convey the land, and not a chance of title. *Tram Lumber Co. v. Hancock*, 70 Tex. 312, 7 S. W. Rep. 724; *Lewis v. Terrell* (Tex. Civ. App.), 26 S. W. Rep. 754; *Taylor v. Harrison*, 47 Tex. 454, 460; *Lindsay v. Freeman*, 83 Tex. 259, 18 S. W. Rep. 727; *Carleton v. Lombardi*, 81 Tex. 355, 16 S. W. Rep. 1081. In the case of *Harrison v. Boring*, 44 Tex. 255, there was no sale or warranty of the land itself, but merely of the title, and the distinction between the two instruments is sharply drawn by Chief Justice Roberts; and in that case, while it is held that a special warranty would not alter the character of a quitclaim deed, yet where the deed conveys the land itself, and there is a general warranty, it is not a quitclaim deed. In *Laughlin v. Tips* (Tex. Civ. App.), 28 S. W. Rep. 551, it was held that a deed which conveyed "all that certain real and personal property, to wit, my right, title, and interest in and to a certain tract of land, "to have and to hold the above-described premises" unto the grantees and their heirs forever, conveyed the land itself, and was not a mere quitclaim deed. To like effect, see *Baylor v. Scottish-Amer. Mortg. Co.* 66 Fed. Rep. 631. A deed by which the grantor assumes to "sell, alienate, convey, and quit-

claim the following described tract of land" is not a mere transfer of the grantor's interest, but is an absolute conveyance of the land itself. *Abernathy v. Stone*, 81 Tex. 430, 16 S. W. Rep. 1102; *Dycus v. Hart* (Tex. Civ. App.), 21 S. W. Rep. 299. But where a quitclaim deed, after the habendum clause concluding, "so that neither the grantor or his heirs, nor any person claiming under him, shall at any time hereafter have, claim, or demand any right or title to the aforesaid premises," is only a quitclaim, and therefore will not support a title depending alone on a *bona fide* purchase. To same effect, *Finch v. Trent* (Tex. Civ. App.), 24 S. W. Rep. 679; *Threadgill v. Bickerstaff* (Tex.), 29 S. W. Rep. 757. **Vermont:** *Smith v. Pollard*, 19 Vt. 272; *Cummings v. Dearborn*, 56 Vt. 441.

<sup>1</sup> *Fox v. Hall*, 74 Me. 315, 41 Am. Rep. 316, citing *Stoffel v. Schroeder*, 62 Mo. 147; *Stivers v. Horne*, 62 Mo. 473; *Mann v. Best*, 62 Mo. 491. Vide, also, *Oliver v. Piatt*, 3 How. 333, 383; *May v. Le Claire*, 11 Wall. 217, 232; *Springer v. Bartle*, 46 Iowa, 688.

<sup>2</sup> *Ridgeway v. Holliday*, 59 Mo. 444. In *Johnson v. Williams*, 37 Kans. 179, 14 Pac. Rep. 537, the court say: "It may be that with reference to some equities or interests in real estate, the purchaser who holds only under a quitclaim deed may be deemed to be a *bona fide* purchaser; for equities and interests in real estate may sometimes be latent, hidden, secret, and



1398. But this principle is not extended by some courts so as to affect a subsequent purchaser who takes title through a quitclaim deed, but not from his immediate grantor. In such cases "the subsequent purchaser, it may be presumed, pays what the parties deem the value, and upon the assumption that he is acquiring a title that is valid. It appears to us that he should not be affected by the mere fact that he takes through a quitclaim deed. It is not unreasonable to conclude that a quitclaim deed occurs in the line of many titles where there is no outstanding equity. If the rule contended for should be held, it would tend directly to impair the selling value of all such property."<sup>1</sup> Accordingly an innocent purchaser, claiming under a warranty deed from his immediate grantor, is protected against a prior unrecorded conveyance, though his immediate grantor received only a quitclaim deed which was executed after the prior unrecorded conveyance.<sup>2</sup> In many of the cases deciding that a holder by a quitclaim deed cannot be a *bona fide* purchaser, the words used limit the decisions to cases where the quitclaim deed is given directly to the party claiming under it.<sup>3</sup>

1399. A limitation of a covenant of warranty is not sufficient to put a prudent purchaser upon inquiry, even in States in which a purchaser by quitclaim deed is not a *bona fide* purchaser for value. Thus a statement by a grantor after the covenants of special warranty as follows, "except as to back taxes, and so far as the acts of said grantor are concerned, this is to be a warranty deed," does not suggest an inquiry whether the grantor had previously conveyed the land to another.<sup>4</sup>

Deeds by trustees and others acting in fiduciary or official capacities are merely releases or transfers of the grantors, and

concealed, and not only unknown to the purchaser, but undiscoverable by the exercise of any ordinary or reasonable degree of diligence. It is possible, also, that a purchaser taking a quitclaim deed may, under the registry laws, be considered a *bona fide* purchaser with reference to a prior unrecorded deed with respect to which he has no notice, nor any reasonable means of obtaining notice." See, also, *Merrill v. Hutchinson*, 45 Kans. 59, 61, 25 Pac. Rep. 215.

<sup>1</sup> *Winkler v. Miller*, 54 Iowa, 476, 478,

6 N. W. Rep. 698. Also, *Snowden v. Tyler*, 21 Neb. 199, 31 N. W. Rep. 661; *Sherwood v. Moelle*, 36 Fed. Rep. 478; *Gress v. Evans*, 1 Dak. 387, 46 N. W. Rep. 1132; *Fletcher v. Ellison*, 1 Tex. Un. Cas. 661, 672; *Snowden v. Tyler*, 21 Neb. 199, 31 N. W. Rep. 661.

<sup>2</sup> *Meikel v. Borders*, 129 Ind. 529, 29 N. E. Rep. 29.

<sup>3</sup> *Johnson v. Williams*, 37 Kans. 179, 14 Pac. Rep. 537.

<sup>4</sup> *Jennings v. Dockham*, 99 Mich. 253, 58 N. W. Rep. 66.

purchasers are not charged with bad faith by reason of the form of such conveyances.<sup>1</sup>

**1400.** A deed which in express terms conveys only the right, title, and interest of the grantor does not convey the land itself or any particular interest in it, but only the grantor's interest; and the grantee does not obtain anything which the grantor had previously conveyed to another, though the prior deed be not recorded, and the second deed of release be first recorded.<sup>2</sup>

In like manner a quitclaim deed which was manifestly intended to transfer only such right, title, or interest as the grantor had at the time, passes only such title as the grantor had not already conveyed by an unrecorded deed. The prior record of the second deed does not give it precedence over the unrecorded first deed.<sup>3</sup>

In Massachusetts, however, a deed of all the right, title, and interest of the grantor in land conveys the same title as a deed of the land, and, if it contains a specific description, is good against any prior unrecorded deed of the grantor.<sup>4</sup>

**1401.** Where a deed contains no particular description, but only a general description, such as "all my land," it does not take precedence of prior unrecorded deeds of the grantor. The question in these cases is whether the land previously sold was included within the description of the later deed.<sup>5</sup> Where a conveyance is made with no particular description, but with only a general description, such as "all the land owned by me," the description is naturally understood to mean "all the land now owned by me."<sup>6</sup>

<sup>1</sup> *Fargason v. Edrington*, 49 Ark. 207, 4 S. W. Rep. 763.

<sup>2</sup> *Coe v. Persons Unknown*, 43 Me. 432; *Walker v. Lincoln*, 45 Me. 67; *Nash v. Bean*, 74 Me. 340; *White v. McGarry*, 2 Flap. 572; *Brown v. Jackson*, 3 Wheat. 449; *Allison v. Thomas*, 72 Cal. 562, 564, 14 Pac. Rep. 309.

<sup>3</sup> *Brown v. Jackson*, 3 Wheat. 449; *Hamilton v. Doolittle*, 37 Ill. 473; *Butterfield v. Smith*, 11 Ill. 485.

<sup>4</sup> *Dow v. Whitney*, 147 Mass. 1, 16 N. E. Rep. 722; *Woodward v. Sartwell*, 129 Mass. 210.

<sup>5</sup> *Adams v. Cuddy*, 13 Pick. 460, 25 Am. Dec. 330; *Jamaica Pond Aqueduct Corp. v. Chandler*, 9 Allen, 159; *Fitzgerald v. Libby*, 142 Mass. 235, 7 N. E. Rep. 917; *Hamilton v. Doolittle*, 37 Ill. 473, 482; *Butterfield v. Smith*, 11 Ill. 485; *Morgan v. Clayton*, 61 Ill. 35, 40; *Dow v. Whitney*, 147 Mass. 1, 16 N. E. Rep. 722; *Callanan v. Merrill*, 81 Iowa, 73, 46 N. W. Rep. 753; *Eaton v. Trowbridge*, 38 Mich. 454.

<sup>6</sup> *Fitzgerald v. Libby*, 142 Mass. 235, 7 N. E. Rep. 917.

III. *When a Judgment Creditor is a Purchaser.*

1402. A judgment creditor is not a purchaser within the recording acts, unless he is made so by statute. He was not regarded as a purchaser at common law. In a case in Peere Williams, "it was granted," said the reporter, "that if Lord Winchelsea, the covenantor, had made a mortgage of the premises for a valuable consideration and without notice, such mortgagee, in regard that he might have pleaded his mortgage, and would have been as a purchaser without notice, should have held place against the intended purchaser, for there the money would have been lent on the title and credit of the land, and would have attached upon the land; which would not be so in the case of a judgment creditor, who, for aught that appeared, might have taken out execution against the person or goods of the party that gave the judgment; and a judgment is a general security, not a specific lien on the land."<sup>1</sup> And in another case given by the same reporter it was said that "one cannot call a judgment creditor a purchaser, nor has such creditor any right to the land; he has neither *jus in re* nor *ad rem*."<sup>2</sup> The recording acts do not change the common law in this respect, unless they in terms interpose to protect a judgment lien; and where they do not it stands, as at common law, subject to the prior conveyance, though this be not recorded.<sup>3</sup> The ground of this rule is that, as between the parties, the recording of a deed adds nothing to its effectiveness. The deed takes effect by delivery. If there be an existing mortgage at the time the judgment is rendered, the judgment will bind only the equity of redemption, whether the mortgage be recorded or not, or whether the judgment creditor had or had not actual notice of the mortgage when he obtained the judgment.<sup>4</sup> An attachment of land upon the debt of one holding the record title does not avail at all against the equitable owner of the estate, or against one claiming under a mortgage or deed not recorded.<sup>5</sup> There is no appreciable distinction between an attachment and a levy of an execution or a judgment lien, except that which results from the amount of

<sup>1</sup> Finch v. Winchelsea, 1 P. Wms. 277.<sup>4</sup> Hackett v. Callender, 32 Vt. 97.<sup>2</sup> Brace v. Marlborough, 2 P. Wms. 491.<sup>5</sup> Hart v. Farmers' & Mechanics' Bank, 33 Vt. 252; Le Clerc v. Oullahan, 52 Cal.<sup>3</sup> Knell v. Green St. Building Asso. 34 Md. 67.

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expense incurred in the latter proceedings, and such expense can not be regarded as placing the creditor in the situation of a *bona fide* purchaser.<sup>1</sup> Whether the lien be by attachment or by judgment, it is a lien only upon the real estate, or the interest in it owned by the debtor, not upon that owned by another, as is the case when the debtor has conveyed it or mortgaged it, although the deed be unrecorded. The creditor is entitled to the same rights as the debtor had, and to no more.<sup>2</sup>

1403. A deed or mortgage recorded prior to an entry of judgment which is a lien upon the property takes precedence of the judgment lien,<sup>3</sup> and a foreclosure of the mortgage, or a sale of the property under a power in the mortgage, defeats the judgment lien;<sup>4</sup> and a deed or mortgage recorded prior to an attachment is superior to the attachment lien, although the order for attachment be in the sheriff's hands at the time, but the attachment has not been actually made.<sup>5</sup> If the judgment becomes a lien only from the date of its record, then as against a deed priority depends upon the priority of record.<sup>6</sup> An attachment which takes effect from the time of delivering the order to the officer takes precedence of the lien of a mortgage executed before the order of attachment comes to the hands of the officer, but not recorded till afterwards.<sup>7</sup> And so a judgment which is a lien from the time it is docketed takes precedence of a conveyance executed and recorded after the docketing of the judgment.<sup>8</sup> A creditor having actual notice of a prior unrecorded conveyance at the time of obtaining his judgment lien,<sup>9</sup> or before the debt was

<sup>1</sup> Pennsylvania: Cover v. Black, 1 Pa. St. 493, per Chief Justice Gibson; Rodgers v. Gibson, 4 Yeates, 111; Heister v. Fortner, 2 Binn. 40, 4 Am. Dec. 417; Shryock v. Waggoner, 28 Pa. St. 430.

<sup>2</sup> Jackson v. Dubois, 4 Johns. 216; Scott v. M'Murran, 7 Blackf. 284; Dunwell v. Bidwell, 8 Minn. 34; Wertz's Appeal, 65 Pa. St. 306; Tarver v. Ellison, 57 Ga. 54; Goodenough v. McCoid, 44 Iowa, 659; Lambertville Nat. Bank v. Boss (N. J.), 13 Atl. Rep. 18.

<sup>3</sup> Kennard v. Mabry, 78 Tex. 151, 14 S. W. Rep. 272.

<sup>4</sup> Gray v. Patton, 13 Bush, 625.

<sup>5</sup> Belbaze v. Ratto, 69 Tex. 636, 7 S.

W. Rep. 501; Coles v. Berryhill, 37 Minn. 56, 33 N. W. Rep. 213.

<sup>6</sup> In some States a judgment does not become a lien until the record of the judgment has been entered upon an index. Dewey v. Sugg, 109 N. C. 328, 13 S. E. Rep. 923, 14 L. R. A. 393; Ætna L. Ins. Co. v. Hesser, 77 Iowa, 381; Steffens v. Cameron (Tex.), 19 S. W. Rep. 1068; Crouse v. Murphy, 140 Pa. St. 335, 21 Atl. Rep. 358, 12 L. R. A. 58.

<sup>7</sup> Cross v. Fombey, 54 Ark. 179, 15 S. W. Rep. 461.

<sup>8</sup> Gulley v. Thurston, 112 N. C. 192, 17 S. E. Rep. 13.

<sup>9</sup> Williams v. Tatnall, 29 Ill. 553; Thomas v. Vanlieu, 28 Cal. 616. And

contracted,<sup>1</sup> will hold his lien subject to such conveyance. A mortgage executed and recorded after a judgment has been entered against the mortgagor is of course subject to the judgment lien,<sup>2</sup> unless the mortgagor holds the land in trust, such as a resulting trust in favor of his wife.<sup>3</sup> As between a mortgage and a judgment rendered in a county different from that in which the land is, priority is determined by priority of registration in the county where the land is situate.<sup>4</sup> A mortgage and a judgment entered of record on the same day, the record not showing which was first recorded, are payable *pro rata*.<sup>5</sup>

Under a statute which provides that a mortgage recorded within a certain time after its date shall take effect as between the parties from its date, a judgment recovered subsequently to the date of a mortgage, and before the recording of it, binds only the equity of redemption, and is subject to the mortgage without regard to the question of actual notice, if the mortgage is subsequently recorded within the time prescribed by law.<sup>6</sup> A deed or mortgage recorded after the time prescribed takes priority over the claims of all creditors who have not previously established a lien.<sup>7</sup>

The failure of a grantee or mortgagee to record his deed does not invalidate it as against an ordinary creditor of the mortgagor who has acquired no lien upon the property, on the ground that while the deed remained unrecorded the debtor secured the renewal of notes to his creditor, who was ignorant of his debtor's conveyance.<sup>8</sup>

**1404. An unrecorded conveyance is in several States preferred to a subsequent judgment.** A judgment creditor is not considered a purchaser within the recording acts of these States, for a judgment lien or attachment is not protected by them; and a deed or mortgage being valid without being recorded, for all

see *Cheesebrough v. Millard*, 1 Johns. Ch. 409, 7 Am. Dec. 494; *Mead v. New York, Housatonic & Northern R. Co.* 45 Conn. 199.

<sup>1</sup> *Britton's Appeal*, 45 Pa. St. 172; *Lahr's Appeal*, 90 Pa. St. 507.

<sup>2</sup> *Tarver v. Ellison*, 57 Ga. 54; *Lambertville Nat. Bank v. Boss* (N. J.), 13 Atl. Rep. 18; *Vanstory v. Thornton*, 112 N. C. 196, 17 S. E. Rep. 566.

<sup>3</sup> *Seeberger v. Campbell*, 88 Iowa, 63, 55 N. W. Rep. 20.

<sup>4</sup> *Firebaugh v. Ward*, 51 Tex. 409.

<sup>5</sup> *Hendrickson's Appeal*, 24 Pa. St. 363; *Maze v. Burke*, 12 Phila. 335.

<sup>6</sup> See § 544; *Knell v. Green St. Building Asso.* 34 Md. 67.

<sup>7</sup> *South Carolina Loan, &c. Co. v. McPherson*, 26 S. C. 431, 2 S. E. Rep. 267.

<sup>8</sup> *Cutler v. Steele*, 93 Mich. 204, 53 N. W. Rep. 521; *In re Lemert* (Iowa), 59 N. W. Rep. 207.

purposes except that of preserving its lien against *bona fide* purchasers and mortgagees, is valid against a subsequent judgment lien.<sup>1</sup> In such case it makes no difference that the mortgage was given to secure future advances, which had not been made when the judgment was rendered.<sup>2</sup> It has even been held that lands omitted from a deed or mortgage by mistake may be regarded as conveyed by an unrecorded deed or mortgage so far as a subsequent judgment is concerned; and the lien of the judgment will

<sup>1</sup> *Burgh v. Francis*, 1 Eq. Cas. Abr. 320, pl. 1; *Finch v. Winchelsea*, 1 P. Wms. 277; *Burn v. Burn*, 3 Ves. 573, 582. **California**: *Pixley v. Huggins*, 15 Cal. 127; *Plant v. Smythe*, 45 Cal. 161; *Hoag v. Howard*, 55 Cal. 564; *Wilcoxson v. Miller*, 49 Cal. 193; *Hunter v. Watson*, 12 Cal. 363, 73 Am. Dec. 543; *Packard v. Johnson*, 51 Cal. 545; *Galland v. Jackman*, 26 Cal. 79, 85 Am. Dec. 172. **Indiana**: *Shirk v. Thomas*, 121 Ind. 147, 16 Am. St. Rep. 381; *Orth v. Jennings*, 8 Blackf. 420; *Foltz v. Wert*, 103 Ind. 404; *Hays v. Reger*, 102 Ind. 524; *Boyd v. Anderson*, 102 Ind. 217; *Heberd v. Wines*, 105 Ind. 237, 4 N. E. Rep. 457; *Wright v. Jones*, 105 Ind. 17. **Iowa**: *First Nat. Bank v. Hayzlett*, 40 Iowa, 659; *Hoy v. Allen*, 27 Iowa, 208; *Churchill v. Morse*, 23 Iowa, 229, 92 Am. Dec. 422; *Welton v. Tizzard*, 15 Iowa, 495; *Bell v. Evans*, 10 Iowa, 353; *Evans v. McGlasson*, 18 Iowa, 150; *Norton v. Williams*, 9 Iowa, 528; *Patterson v. Linder*, 14 Iowa, 414; *Sigworth v. Meriam*, 66 Iowa, 477, 24 N. W. Rep. 4; *Duncan v. Miller*, 64 Iowa, 223, 227, 20 N. W. Rep. 161; *Phelps v. Fockler*, 61 Iowa, 340, 14 N. W. Rep. 729, 16 N. W. Rep. 210. **Kansas**: *Plumb v. Bay*, 18 Kans. 415; *Holden v. Garrett*, 23 Kans. 98, where the subject is quite fully considered; *Northwestern Forwarding Co. v. Mahaffey*, 36 Kans. 152, 12 Pac. Rep. 705. **Kentucky**: *Righter v. Forrester*, 11 Bush, 278; *Morton v. Robards*, 4 Dana, 258; *Forepaugh v. Appold*, 17 B. Mon. 625, 631. **Maryland**: *Knell v. Green St. Building Asso.* 34 Md. 67. **Minnesota**: Since G. S. 1878, ch. 40, § 21, a judgment takes precedence of an unrecorded deed.

*Dutton v. M'Reynolds*, 31 Minn. 66, 16 N. W. Rep. 468; *Welles v. Baldwin*, 28 Minn. 408, 10 N. W. Rep. 427. **Mississippi**: *Kelly v. Mills*, 41 Miss. 267. **Missouri**: *Black v. Long*, 60 Mo. 181; *Fox v. Hall*, 74 Mo. 315, 41 Am. Rep. 316; *Davis v. Ownsby*, 14 Mo. 170, 55 Am. Dec. 105; *Draper v. Bryson*, 26 Mo. 108, 69 Am. Dec. 483; *Reed v. Ownby*, 44 Mo. 204; *Sappington v. Oeschli*, 49 Mo. 244; *Potter v. McDowell*, 43 Mo. 93; *Stillwell v. McDonald*, 39 Mo. 282. **Montana**: *Vaughn v. Schmalsle*, 10 Mont. 186, 25 Pac. Rep. 102; *McAdow v. Black*, 4 Mont. 475. **Nebraska**: *Withnell v. Courtland Wagon Co.* 25 Fed. Rep. 372; *Harral v. Gray*, 10 Neb. 186; *Mansfield v. Gregory*, 11 Neb. 297, 9 N. W. Rep. 87; *Galway v. Malchow*, 7 Neb. 285; *Hubbard v. Walker*, 19 Neb. 94, 26 N. W. Rep. 713; *Courtney v. Parker*, 21 Neb. 582, 33 N. W. Rep. 262; *Dewey v. Walton*, 31 Neb. 819, 824, 48 N. W. Rep. 960; *Pearson v. Davis (Neb.)*, 59 N. W. Rep. 885. **New York**: *Buchan v. Sumner*, 2 Barb. Ch. 165, 47 Am. Dec. 305; *Jackson v. Dubois*, 4 Johns. 216; *Stevens v. Watson*, 4 Abbott App. 302; *Thomas v. Kelsey*, 30 Barb. 268; *Wilder v. Butterfield*, 50 How. Pr. 385; *Schmidt v. Hoyt*, 1 Edw. 652. **Pennsylvania**: *Cover v. Black*, 1 Pa. St. 493; *Shryock v. Waggoner*, 28 Pa. St. 430. **Texas**: *Masterson v. Little*, 75 Tex. 682, 13 S. W. Rep. 154. **Vermont**: *Hackett v. Callender*, 32 Vt. 97; *Hart v. Farmers' & Mechanics' Bank*, 33 Vt. 252. **Virginia**: *Cowardin v. Anderson*, 78 Va. 88; *Floyd v. Harding*, 28 Gratt. 401.

<sup>2</sup> *Thomas v. Kelsey*, 30 Barb. 268.

be subject to the equity of such deed or mortgage. This decision is based upon a statute which is held to accord priority only to a lien evidenced by some instrument "required to be recorded."<sup>1</sup>

A judgment lien is subject to every possible description of equity in favor of a third person against the debtor at the time the judgment lien attached, "and it is immaterial whether the rights of such third party consist of an equitable estate or interest in the judgment debtor's land, an equitable lien on his land, or a mere equity against the debtor which attaches to or affects his land."<sup>2</sup> Even if the vendee has no deed, but has only purchased by parol contract, and has been put in possession, so that he has a valid equitable title, the land is not subject to judgments recovered against his vendor after the sale, and possession taken in pursuance thereof.<sup>3</sup>

**1405.** The lien of a mortgage unrecorded at the date of a judgment, but recorded before the sale upon an execution thereon, is prior to the lien of the judgment, and the purchaser buys with constructive notice of the mortgage.<sup>4</sup> But where a statute provides that a mortgage shall not be a lien upon the property until it shall have been recorded, then the doctrine of notice, it has been held, does not apply to a creditor, but to purchasers only.<sup>5</sup>

<sup>1</sup> *Galway v. Malchow*, 7 Neb. 285.

<sup>2</sup> *Snyder v. Martin*, 17 W. Va. 276; *Meier v. Kelly*, 22 Oreg. 136, 29 Pac. Rep. 265; *Sweet v. Jacobs*, 6 Paige, 355; *Churchill v. Morse*, 23 Iowa, 229; *Peck v. Williams*, 113 Ind. 256, 15 N. E. Rep. 270; *Baker v. Morton*, 12 Wall. 150; *Bush v. Bush*, 33 Kans. 556, 6 Pac. Rep. 794.

<sup>3</sup> *Snyder v. Botkin*, 37 W. Va. 355, 16 S. E. Rep. 591; *Snyder v. Martin*, 17 W. Va. 276; *Pack v. Hansbarger*, 17 W. Va. 313; *Renick v. Ludington*, 20 W. Va. 511, 569; *Floyd v. Harding*, 28 Gratt. 401. In this case Judge Staples, delivering the judgment, said: "Now, if the title of the purchaser is good against the creditor when the judgment is recovered, can it be the title becomes invalid by reason of the subsequent execution of a deed by the vendor? The bare statement of the proposition is its own refutation. But let us take the strongest case, that of a valid

parol contract so far executed as to pass the equitable title, and subsequently a deed of conveyance, which is, however, not recorded, or, if recorded at all, not until after a judgment recovered. This is the case presented in *Withers v. Carter*, 4 Gratt. 407, 1 Am. Dec. 78, except that there the contract was in writing, while here, in the case supposed, it is parol; but the principle is the same."

<sup>4</sup> *Holden v. Garrett*, 23 Kans. 98, which see for a full discussion of the subject; followed in *Northwestern Forwarding Co. v. Mahaffey*, 36 Kans. 152, 12 Pac. Rep. 705.

<sup>5</sup> *Hulings v. Guthrie*, 4 Pa. St. 123; *Jaques v. Weeks*, 7 Watts, 261. These cases seem to be overruled in *Solms v. McCulloch*, 5 Pa. St. 473; but the authority of the latter case is questioned in *Uhlér v. Hutchinson*, 23 Pa. St. 110; *Davis v. Ownsby*, 14 Mo. 170, 55 Am. Dec. 105; *Holden v. Garrett*, 23 Kans. 98.

An unrecorded mortgage given by an ancestor retains its priority over a judgment recorded against an heir at law during the lifetime of the ancestor, although the judgment creditor had no notice of the mortgage when he recovered his judgment.<sup>1</sup>

1406. But, on the other hand, under the registry laws of many States, it is held that the lien of a judgment or attachment is superior to an unrecorded conveyance, or to a recorded conveyance which is defectively executed, in the absence of actual notice of it on the part of the judgment or attaching creditor, or of the execution purchaser.<sup>2</sup>

<sup>1</sup> Voorhis v. Westervelt, 43 N. J. Eq. 642, 12 Atl. Rep. 533. See Vreeland v. Clafflin, 24 N. J. Eq. 313.

<sup>2</sup> Taylor v. Miller, 13 How. 287, 292. **Alabama:** Barker v. Bell, 37 Ala. 354; King v. Paulk, 85 Ala. 186, 4 So. Rep. 825. **Arkansas:** Hawkins v. Files, 51 Ark. 417, 11 S. W. Rep. 681; Main v. Alexander, 9 Ark. 112, 47 Am. Dec. 732; Cleveland v. Shannon (Ark.), 12 S. W. Rep. 497. **Connecticut:** Moor v. Watson, 1 Root, 388. **District of Columbia:** Hitz v. Nat. Metropolitan Bank, 111 U. S. 722, 4 Sup. Ct. Rep. 613. **Georgia:** In case the debt on which the judgment was obtained was antecedent to the date of the mortgage. Andrews v. Mathews, 59 Ga. 466. **Illinois:** R. S. 1891, ch. 30, § 30; Reichert v. McClure, 23 Ill. 516; Columbus Buggy Co. v. Graves, 108 Ill. 459; Massey v. Westcott, 40 Ill. 160; McFadden v. Worthington, 45 Ill. 362; Guiteau v. Wisely, 47 Ill. 433; Munford v. McIntyre, 16 Ill. App. 316; Roane v. Baker, 120 Ill. 308, 11 N. E. Rep. 246. **Massachusetts:** Coffin v. Ray, 1 Met. 212; Gallagher v. Galletley, 128 Mass. 367. **Minnesota:** G. S. 1878, ch. 40, § 21; Dutton v. McReynolds, 31 Minn. 66, 16 N. W. Rep. 468; Lamberton v. Merchants' Bank, 24 Minn. 281; Wilcox v. Leominster Nat. Bank, 43 Minn. 541, 45 N. W. Rep. 1136; Berryhill v. Smith (Minn.), 61 N. W. Rep. 144. The latter case holds that the statute is not limited to money judgments in favor of creditors, but applies to any judgment affecting the title to real estate, where such title appears of

record in the name of the person against whom the judgment is rendered, overruling, so far as in conflict, Johnson v. Robinson, 20 Minn. 189, and Windom v. Schuppel, 39 Minn. 35, 38 N. W. Rep. 757. The statute of this State is much broader than the statutes of other States, which generally limit the protection of recording acts to "creditors" or "judgment creditors." **Mississippi:** Humphreys v. Merrill, 52 Miss. 92; Mississippi Valley Co. v. Chicago, St. L. & N. O. R. Co. 58 Miss. 846, 38 Am. St. Rep. 348. Where, however, the outstanding equity of a third person is one that arises by operation of law, and is incapable of being made a matter of record, the registry laws have no application, and the judgment creditor remains, as at common law, a mere volunteer. Kelly v. Mills, 41 Miss. 267; Walton v. Hargroves, 42 Miss. 18, 97 Am. Dec. 429. **New Jersey:** Sharp v. Shea, 32 N. J. Eq. 65; Hoag v. Sayre, 33 N. J. Eq. 552; Westervelt v. Voorhis, 42 N. J. Eq. 179, 6 Atl. Rep. 665; Howell v. Brewer (N. J.), 5 Atl. Rep. 137. **New Mexico:** Moore v. Davey, 1 N. Mex. 303; Ludlow v. Clinton Line R. R. Co. 1 Flip. 25. **North Carolina:** King v. Portis, 77 N. C. 25. **Ohio:** Van Thorniley v. Peters, 26 Ohio St. 471; Mayham v. Coombs, 14 Ohio, 428; White v. Denman, 16 Ohio, 59, 1 Ohio St. 110; Fosdick v. Barr, 3 Ohio St. 471; Holliday v. Franklin Bank, 16 Ohio, 533; Ludlow v. Clinton Line R. Co. 1 Flip. 25; Tousley v. Tousley, 5 Ohio St. 78; Paine v. Mooreland, 15 Ohio, 435, 45 Am. Dec. 585. **Oregon:**



The statutes of these States in terms provide that unrecorded conveyances shall be void as to creditors or subsequent incumbrancers;<sup>1</sup> or void except as between the parties;<sup>2</sup> or not valid against other persons than the grantors, their heirs and devisees, and persons having actual notice.<sup>3</sup>

*Baker v. Woodward*, 12 Oreg. 3, 6 Pac. Rep. 173; *United States v. Griswold*, 7 Sawyer, 311, 332; *Dickey v. Henarie*, 15 Oreg. 351, 15 Pac. Rep. 464. **Pennsylvania**: *Hulings v. Guthrie*, 4 Pa. St. 123; *Hibberd v. Bovier*, 1 Grant Cas. 266; *Uhler v. Hutchinson*, 23 Pa. St. 110; *Corpman v. Baccastow*, 84 Pa. St. 363. **Tennessee**: *Butler v. Maury*, 10 Humph. 420. **Texas**: *Ranney v. Hogan*, 1 Tex. Un. Cas. 253; *Mainwarring v. Templeman*, 51 Tex. 205; *Ayres v. Duprey*, 27 Tex. 593; *Grimes v. Hobson*, 46 Tex. 416; *Stevenson v. Texas Ry. Co.* 105 U. S. 703; *McKeen v. Sultenfuss*, 61 Tex. 325; *Arledge v. Hail*, 54 Tex. 398. **Virginia**: Even if the creditor has notice of the unrecorded deed. *Heermans v. Montague* (Va.), 20 S. E. Rep. 899; *Guerrant v. Anderson*, 4 Rand, 208. **West Virginia**: *Parkersburg Nat. Bank v. Neal*, 28 W. Va. 744; *Anderson v. Nagle*, 12 W. Va. 98.

<sup>1</sup> *Void as against "creditors:" Arizona* T.: R. S. 1887, § 2601. **District of Columbia**: R. S. 1874, § 447. **Florida**: R. S. 1892, § 1972. **Illinois**: R. S. 1889, ch. 30, § 30. **Kentucky**: G. S. 1894, ch. 29, § 494. **Mississippi**: G. S. 1892, § 2457. **Nebraska**: Comp. Stats. 1895, § 4108. **North Carolina**: Laws 1885, ch. 147, § 1. **Tennessee**: Code 1884, § 2890. **Texas**: 2 Rev. Civ. Stats. 1889, § 4332. **Virginia**: Code 1887, § 2465. **West Virginia**: Code 1891, ch. 74, § 2.

*Void as against "judgment creditors:" Alabama*: Code 1886, §§ 1810, 1811. **Arkansas**: Dig. of Stats. 1894, § 728. **California**: Stats. 1895, ch. 48. **Colorado**: G. S. 1883, § 215; Annot. Stats. 1891, § 446. **Minnesota**: G. S. 1891, § 4131. The statute of Minnesota is not limited to money judgments. It specifies "any judgment lawfully obtained at the suit of any party against the person in whose

name the title to such land appears of record." *Berryhill v. Smith* (Minn.), 61 N. W. Rep. 144. **New Jersey**: Rev. 1877, p. 155; Supp. 1886, pp. 133, 135.

*Not valid as against "subsequent creditors" or "incumbrancers:" Delaware*: R. Code 1893, p. 628, § 17. **Maryland**: R. Code 1888, art. 24, § 21; Laws 1881, ch. 520. **Oklahoma** T.: Comp. Stats. 1893, § 6127. **South Carolina**: G. S. 1882, § 1776. Under this statute a judgment obtained after the execution of a mortgage, upon a debt contracted before its execution, cannot be considered a subsequent debt. *Carraway v. Carraway*, 27 S. C. 576, 5 S. E. Rep. 157. **Texas**: Rev. Civ. Stats. 1889, § 4332.

<sup>2</sup> **Connecticut**: G. S. 1888, § 2961. **Indiana**: R. S. 1888, § 2936. **Kansas**: G. S. 1889, § 1125; G. S. 1885, § 1103. **Maine**: R. S. 1883, ch. 73, § 8. **Massachusetts**: P. S. 1882, ch. 120, § 4. **New Hampshire**: G. S. 1891, ch. 136, § 4. **Rhode Island**: P. S. 1882, ch. 173, § 4. **Vermont**: Stats. 1894, § 2217.

*Creditors not mentioned in these States:* **Georgia**: Code 1882, § 2705. **Idaho**: R. S. 1887, § 3001. **Iowa**: Code 1888, § 3112. **Michigan**: Annot. Stats. 1882, § 5683. **Montana**: Civ. Code 1895, § 1641. **Nevada**: G. S. 1885, § 2594. **New Mexico**: Laws 1887, ch. 10. **North Dakota**: Comp. Laws 1887, § 3293. **South Dakota**: Comp. Laws 1887, § 3293. **New York**: R. S. 1889, pt. 2, ch. 3, § 1. **Ohio**: 1 R. S. 1890, § 4134. **Oregon**: 2 Annot. Laws 1887, § 3027; Laws 1889, p. 86. **Pennsylvania**: Brightly's Purdon's Dig. 1894, pp. 646, 647. **Utah**: Comp. Laws 1888, § 2613. **Washington**: G. S. 1891, § 1439. **Wisconsin**: Annot. Stats. 1889, § 2241. **Wyoming**: R. S. 1887, § 17.

<sup>3</sup> **Louisiana**: R. Code 1889, § 2266. **Missouri**: 1 R. S. 1889, § 2420.

A purchaser under execution sale following such judgment or attachment is, of course, in like manner protected against a prior unrecorded deed of which he had no notice.<sup>1</sup> It does not matter that the judgment was for a preëxisting debt,<sup>2</sup> or that the subsequently recorded mortgage was given to secure purchase-money.<sup>3</sup>

In Ohio, inasmuch as the statute declares that mortgages shall take effect only from the time they are left for record, a judgment recovered after the date of a mortgage, and before it is recorded, takes precedence of it.<sup>4</sup> Yet in this State a judgment creditor is not a purchaser, nor is he in any way entitled to the privileges of that position.<sup>5</sup>

If a mortgage of land lying in two counties be recorded in but one, a foreclosure sale passes the land in both, as against a purchaser under a judgment docketed in the county where the mortgage was not recorded subsequently to the foreclosure proceedings. The want of registration does not disable the debtor from disposing of the property by a valid conveyance before the judgment lien attaches; nor does it prevent the court, in a proceeding to which the debtor is a party, from transferring it by a judicial sale.<sup>6</sup>

1407. Generally, knowledge on the part of a judgment or attaching creditor of an unrecorded conveyance of the debtor's property affects him as it would a purchaser; that is, the notice is equivalent to a record of the deed.<sup>7</sup> But although the creditor

<sup>1</sup> *McFadden v. Worthington*, 45 Ill. 362; *Andrews v. Mathews*, 59 Ga. 466; *Jackson v. Chamberlain*, 8 Wend. 620, 625; *Garwood v. Garwood*, 9 N. J. L. 193; *Morrison v. Funk*, 23 Pa. St. 421; *Paine v. Mooreland*, 15 Ohio, 435, 45 Am. Dec. 585; *Ehle v. Brown*, 31 Wis. 405. Otherwise in *Mississippi*: *Kelly v. Mills*, 41 Miss. 267.

<sup>2</sup> *Uhler v. Semple*, 20 N. J. Eq. 288.

<sup>3</sup> *Roane v. Baker*, 120 Ill. 308, 11 N. E. Rep. 246.

<sup>4</sup> *Mayham v. Coombs*, 14 Ohio, 428. Under a statute of the State of *Kansas*, quite similar in effect, the Supreme Court of the latter State took a different view. *Holden v. Garrett*, 23 Kans. 98.

<sup>5</sup> *Tousley v. Tousley*, 5 Ohio St. 78.

<sup>6</sup> *King v. Portis*, 81 N. C. 382.

<sup>7</sup> *Mead v. N. Y., Housatonic & North-*

*ern R. Co.* 45 Conn. 199; *Priest v. Rice*, 1 Pick. 164, 11 Am. Dec. 156; *Hutchinson v. Bramhall*, 42 N. J. Eq. 372, 7 Atl. Rep. 873; *Loughridge v. Bowland*, 52 Miss. 546; *Humphreys v. Merrill*, 52 Miss. 92; *Henderson v. Downing*, 24 Miss. 106; *Swan v. Moore*, 14 La. Ann. 833; *Wyatt v. Stewart*, 34 Ala. 716; *Hart v. Farmers' & Mechanics' Bank*, 33 Vt. 252; *Goddard v. Prentice*, 17 Conn. 546; *Britton's App.* 45 Pa. St. 172; *Stroud v. Lockart*, 4 Dall. (Pa.) 153; *Floyd v. Harding*, 28 Gratt. 401; *Young v. Devries*, 31 Gratt. 304; *Doyle v. Wade*, 23 Fla. 90, 1 So. Rep. 516; *Uhler v. Hutchinson*, 23 Pa. St. 110; *De Vendell v. Doe*, 27 Ala. 156; *Baldwin v. Crow*, 86 Ky. 679, 7 S. W. Rep. 146. In *Tennessee and Virginia* it is held that notice, while effectual as against subsequent purchasers, does

has notice of an unrecorded conveyance, a purchaser at the sale upon execution is not affected by it, and, being without notice himself, he acquires a title superior to the unrecorded conveyance.<sup>1</sup> And, on the other hand, a judgment creditor having gained priority over an unrecorded deed or mortgage, a purchaser at the execution sale obtains the same priority, notwithstanding he has notice of the deed or mortgage.<sup>2</sup> But knowledge acquired by an attaching or judgment creditor after his lien has attached does not displace or affect it.<sup>3</sup> If a creditor's attorney have actual notice of a conveyance of his debtor's land, he is as much debarred from obtaining relief, as a *bona fide* creditor without notice thereof, as if he had had such actual notice himself, although the creditor denies notice in his answer under oath.<sup>4</sup>

1408. A purchaser at an execution sale without notice, either actual or constructive, of any interest or equity of a third person, is a purchaser for a valuable consideration, and is entitled to the protection of the registry acts, though the judgment did not make the judgment creditor a *bona fide* purchaser entitled to such protection.<sup>5</sup> But if the purchaser at the execution sale had at the time actual or constructive notice of the rights or equities of third persons in the land, he acquires a title subject to such rights or equities.<sup>6</sup> Possession operates as notice to the judgment creditor, and to the purchaser at the execution sale, of the purchaser's rights, just as it does to a subsequent purchaser.<sup>7</sup>

If the judgment creditor himself becomes the purchaser at the not avail as against creditors. *Coward v. Duprey*, 27 Tex. 593, 86 Am. Dec. 657; *Culver*, 12 Heisk. 540; *Lookout Bank v. Thomas v. Vanlien*, 28 Cal. 616. See, *Noe*, 86 Tenn. 21, 5 S. W. Rep. 433; however, *Nugent v. Priebatsch*, 61 Miss. Heermans *v. Montague* (Va.), 20 S. E. Rep. 899.

<sup>1</sup> *Miles v. King*, 5 S. C. 146.

<sup>2</sup> *Smith v. Jordan*, 25 Ga. 687; *Wait v. Savage* (N. J.), 15 Atl. Rep. 225.

<sup>3</sup> *Humphreys v. Merrill*, 52 Miss. 92; *Loughridge v. Bowland*, 52 Miss. 546; *Hulings v. Guthrie*, 4 Pa. St. 123.

<sup>4</sup> *Dickerson v. Bowers*, 42 N. J. Eq. 295, 11 Atl. Rep. 142.

<sup>5</sup> *McNitt v. Turner*, 16 Wall. 352; *Jackson v. Chamberlain*, 8 Wend. 620, 625; *Ehle v. Brown*, 31 Wis. 405; *Den v. Richman*, 13 N. J. L. 43; *Holmes v. Buckner*, 67 Tex. 107, 2 S. W. Rep. 452; *Lee v. Birmingham*, 30 Kans. 312; *Ayres v.*

<sup>6</sup> *Apperson v. Burgett*, 33 Ark. 328; *Righter v. Forrester*, 1 Bush, 278; *Black v. Long*, 60 Mo. 181; *Fox v. Hall*, 74 Mo. 315, 41 Am. Rep. 316; *Sappington v. Oeschli*, 49 Mo. 244; *Potter v. McDowell*, 43 Mo. 93; *Davis v. Ownsby*, 14 Mo. 170, 55 Am. Dec. 105; *Hackett v. Callender*, 32 Vt. 97; *Hoy v. Allen*, 27 Iowa, 208; *Schroeder v. Gurney*, 73 N. Y. 430; *Priest v. Rice*, 1 Pick. 164, 11 Am. Dec. 156.

<sup>7</sup> *Weld v. Madden*, 2 Cliff. 584; *Glen-denning v. Bell*, 70 Tex. 632, 8 S. W. Rep. 324; *Woodson v. Collins*, 56 Tex. 168; *King v. Paulk* (Ala.), 4 So. Rep. 825.

execution sale, he is not, according to the weight of authority, entitled to the position of a *bona fide* purchaser for value as against unrecorded conveyances.<sup>1</sup> Yet there are numerous authorities which hold that the judgment creditor so purchasing is a purchaser for value within the recording acts, although the entire purchase-price is applied in payment of the debt.<sup>2</sup>

1409. A mortgage given at the time of the purchase of real estate, to secure the payment of purchase-money, has preference over all judgments and other debts of the mortgagor, to the extent of the land purchased. It is so provided by statute in several States.<sup>3</sup> In other States the same precedence is given to purchase-money mortgages without the aid of any statute.<sup>4</sup> A purchase-money mortgage is good and effectual against the wife of the mortgagor, without her joining in the execution of it. The seisin of the husband is instantaneous only; and it is a well-settled rule that in such case no estate or interest can intervene.<sup>5</sup> On the other hand, a mortgage made by a married

<sup>1</sup> *Shirk v. Thomas*, 121 Ind. 147, 22 N. E. Rep. 976, 16 Am. St. Rep. 381; *Mansfield v. Gregory*, 8 Neb. 432; *Harral v. Gray*, 10 Neb. 186, 4 N. W. Rep. 1040; *Treptow v. Buse*, 10 Kans. 170; *Carney v. Emmons*, 9 Wis. 114; *National Bank v. King*, 110 Ill. 254; *Wright v. Douglass*, 10 Barb. 97; *Orme v. Roberts*, 33 Tex. 768; *McAdow v. Black*, 6 Mont. 601, 13 Pac. Rep. 377; *O'Rourke v. O'Connor*, 39 Cal. 442; *Emerson v. Sansome*, 41 Cal. 552; *Kelly v. Mills*, 41 Miss. 267; *Rutherford v. Green*, 2 Ired. Eq. 121, 127.

<sup>2</sup> *Alabama*: *Fash v. Ravesies*, 32 Ala. 451. *California*: *Hunter v. Watson*, 12 Cal. 363, 73 Am. Dec. 543. *Georgia*: *Smith v. Jordan*, 25 Ga. 687. *Iowa*: *Gower v. Doheney*, 33 Iowa, 36; *Frazier v. Crafts*, 40 Iowa, 110. *New Jersey*: *Condit v. Wilson*, 36 N. J. Eq. 370; *Sharp v. Shea*, 32 N. J. Eq. 65. *New York*: *Wood v. Chapin*, 13 N. Y. 509, 67 Am. Dec. 62. See, however, *Wright v. Douglass*, 10 Barb. 97. *Texas*: *Stevenson v. Texas Ry. Co.* 105 U. S. 703; *Wallace v. Campbell*, 54 Tex. 87; *Grace v. Wade*, 45 Tex. 522.

<sup>3</sup> *Delaware*: R. Code 1874, p. 504. *Georgia*: Act of 1875. Prior to that act

dower had preference to such a mortgage. *Wilson v. Peebles*, 61 Ga. 218; *Carter v. Hallahan*, 61 Ga. 314. *Indiana*: 1 R. S. 1888, § 1089, 2 R. S. 1876, p. 334. *Kansas*: 1 G. S. 1889, § 3888. *Maryland*: 2 Pub. Gen. Laws 1888, art. 66, § 4. *Mississippi*: R. Code 1880, § 1205. *New Jersey*: R. S. 1877, p. 167, § 77. *New York*: 4 R. S. 8th ed. 1889, p. 2454. *North Carolina*: 1 Code 1883, § 1272.

<sup>4</sup> *Illinois*: *Roane v. Baker*, 120 Ill. 308, 11 N. E. Rep. 246; *Curtis v. Root*, 20 Ill. 53. *Iowa*: *Phelps v. Fockler*, 61 Iowa, 340; *Laidley v. Aikin*, 80 Iowa, 112, 45 N. W. Rep. 384. *Maine*: *Grant v. Dodge*, 43 Me. 489. *Massachusetts*: *Clark v. Munroe*, 14 Mass. 351. *Minnesota*: *Bolles v. Carli*, 12 Minn. 113; *Stewart v. Smith*, 36 Minn. 82, 30 N. W. Rep. 430. *Missouri*: *Rogers v. Tucker*, 94 Mo. 346, 7 S. W. Rep. 414. *New Jersey*: *Clark v. Butler*, 32 N. J. Eq. 664. *North Carolina*: *Bunting v. Jones*, 78 N. C. 242. *Virginia*: *Cowardin v. Anderson*, 78 Va. 88.

<sup>5</sup> *Birnie v. Main*, 29 Ark. 591; *Stow v. Tift*, 15 Johns. 458, 8 Am. Dec. 266; *Mills v. Van Voorhies*, 20 N. Y. 412; *Thomas v. Hanson*, 44 Iowa, 651; *Hinds v. Ballou*, 44 N. H. 619; *Thompson v.*

woman for the purchase-money of the mortgaged land, the mortgagee supposing that she was unmarried, though invalid because of the wife's incapacity to make a separate grant, is a good equitable mortgage; for the deed and mortgage are evidence of an agreement for reconveyance. The wife is affected with a trust for a reconveyance, and a subsequent purchaser with notice would take the title in trust for the payment of the purchase-money.<sup>1</sup> This rule applies even where the mortgage is made to a third person,<sup>2</sup> who as part of the same transaction advances the purchase-money; but one advancing money is not entitled to be subrogated to the rights of the vendor, where this would result in defeating the vendor's lien or mortgage for the unpaid purchase-money.<sup>3</sup> Dower attaches as against every one but the mortgagee and his assigns.<sup>4</sup> A homestead exemption cannot be set up against a mortgage for the purchase-money,<sup>5</sup> or even against a mortgage to secure money borrowed with which to pay the purchase-price when such mortgage is executed simultaneously with the deed of purchase.<sup>6</sup>

1410. A mortgage for purchase-money, to be entitled to preference, must be executed simultaneously with the deed of conveyance from the vendor. If an interval of time is left between the two transactions, during which the interest of the purchaser is liable to be seized on execution upon the judgment, this preference is lost, and the judgment is entitled to priority.<sup>7</sup> If the instruments are delivered at the same time, it does not matter that they were executed on different days, because they take effect only from the delivery.<sup>8</sup> The provision that a mortgage

Lyman, 28 Wis. 266; *Walters v. Walters*, 73 Ind. 425.

<sup>1</sup> *Ogle v. Ogle*, 41 Ohio St. 359.

<sup>2</sup> *Clark v. Munroe*, 14 Mass. 351; *Stewart v. Smith*, 36 Minn. 82, 30 N. W. Rep. 430; *Rogers v. Tucker*, 94 Mo. 346, 7 S. W. Rep. 414; *McGowan v. Smith*, 44 Barb. 232; *Kittle v. Van Dyck*, 1 Sandf. Ch. 76; *Jones v. Parker*, 51 Wis. 218, 8 N. W. Rep. 124; *Kaiser v. Lembeck*, 55 Iowa, 244, 7 N. W. Rep. 519; *Billingsley v. Niblett*, 56 Miss. 537; *Bradley v. Bryan*, 43 N. J. Eq. 396, 13 Atl. Rep. 806; *Curtis v. Root*, 20 Ill. 53; *Moring v. Dickerson*, 85 N. C. 466; *Cowardin v. Anderson*, 78 Va. 88; *Butler v. Thornburg*, 131 Ind.

237, 30 N. E. Rep. 1073. And see § 1414, and *Strong v. Ehle*, 86 Mich. 42, 48 N. W. Rep. 868.

<sup>3</sup> *Brower v. Witmeyer*, 121 Ind. 83, 22 N. E. Rep. 975.

<sup>4</sup> *Young v. Tarbell*, 37 Me. 509.

<sup>5</sup> § 470; *Kimble v. Esworthy*, 6 Bradw. 517; *Guinn v. Spurgin*, 1 Lea, 228.

<sup>6</sup> *Guinn v. Spurgin*, 1 Lea, 228; *Midlebrooks v. Warren*, 59 Ga. 230.

<sup>7</sup> *Ahern v. White*, 39 Md. 409; *Heuiler v. Nickum*, 38 Md. 270; *Foster's Appeal*, 3 Pa. St. 79.

<sup>8</sup> *Cake's Appeal*, 23 Pa. St. 186, 62 Am. Dec. 328; *Mayburry v. Brien*, 15 Pet. 21; *Banning v. Edes*, 6 Minn. 402; *Summers*

from a purchaser to a vendor, delivered simultaneously with the deed, to secure the purchase-money, shall be preferred to a previous judgment against the vendee, does not imply that in every other case such judgment shall have preference. A mortgage from a lessee to his lessor, delivered at the same time with the lease, to secure future advances, is within this provision.<sup>1</sup>

If the vendor neglects to take a mortgage for purchase-money until after the execution of a mortgage to a third person for value and without notice, the mortgage for purchase-money is subject to the prior mortgage.<sup>2</sup>

A provision of statute, that a mortgage for purchase-money shall be preferred to any previous judgment which may have been obtained against the purchaser, applies only to a mortgage made by the purchaser to the vendor, and not to a mortgage made to a third person to secure the payment of money which was applied by the purchaser to the payment of the purchase-money of the land. The term "purchase-money" does not include money that may be borrowed to complete a purchase, but that which is stipulated to be paid by the purchaser to the vendor. It is only between them that it is purchase-money. As between the purchaser and a third party, it is simply borrowed money. To give this provision any other construction would be to assign and enlarge the vendor's lien without limit.<sup>3</sup>

The effect of a mortgage to secure purchase-money, executed simultaneously with the deed to the vendee, is that the vendee has only an instantaneous seisin, and the legal title remains with the vendor, who becomes the mortgagee of the land.<sup>4</sup>

A reservation in a conveyance of an annual rent, with a condition that the grantor may enter and take possession in case of non-payment, is in effect a conveyance and a mortgage back for the

*v. Darne*, 31 Gratt. 791; *Lafayette Building, &c. Assn. v. Erb* (Pa.), 8 Atl. Rep. 62; *Pascault v. Cochran*, 34 Fed. Rep. 358.

<sup>1</sup> *Ahern v. White*, 39 Md. 409.

<sup>2</sup> *Houston v. Houston*, 67 Ind. 276.

<sup>3</sup> *Heusler v. Nickum*, 38 Md. 270; *Anderson v. Ames*, 6 Md. 52, 56; *Stansell v. Roberts*, 13 Ohio, 148, 42 Am. Dec. 193; *Calmes v. McCracken*, 8 S. C. 87. In *Clabough v. Byerly*, 7 Gill, 354, 48 Am. Dec.

575, it was decided that a junior mortgage was entitled to no preference over a prior one by showing that the money received upon it was applied in payment of judgments which had priority. See, however, § 1414, and *Flanagan v. Cushman*, 48 Tex. 241, that a homestead right does not intervene in such case.

<sup>4</sup> *Baker v. Clepper*, 26 Tex. 629, 84 Am. Dec. 591.

purchase-money, and is superior to any other incumbrance which the grantee can create.<sup>1</sup>

1411. A purchase-money mortgage, executed simultaneously with the deed of purchase, excludes any claim or lien arising through the mortgagor, and no statute is necessary to effect this.<sup>2</sup> "It is a principle of law," says Chief Justice Caton, of Illinois,<sup>3</sup> "too familiar to justify a reference to the authorities, that a mortgage given for the purchase-money of land, and executed at the same time the deed is executed to the mortgagor, takes precedence of a judgment against the mortgagor. The execution of the deed and of the mortgage being simultaneous acts, the title to the land does not for a single moment rest in the purchaser, but merely passes through his hands and vests in the mortgagee, without stopping at all in the purchaser, and during such instantaneous passage the judgment lien cannot attach to the title. This is the reason assigned by the books why the mortgage takes precedence of the judgment, rather than any supposed equity which the vendor might be supposed to have for the purchase-money."

1412. A purchase-money mortgage loses its priority if a later mortgage is first recorded,<sup>4</sup> and the mortgagee has no notice of the purchase-money mortgage, or a mortgagee with such notice assigns to one who purchases for full value and without notice of the purchase-money mortgage; but if the assignment is not made until after the purchase-money mortgage is recorded, the assignee obtains no priority.<sup>5</sup>

A change in the form of the security for the purchase-money, as from a mortgage to a deed of trust, will not change the character of the debt. The consideration continues to be purchase-money.<sup>6</sup>

<sup>1</sup> *Stephenson v. Haines*, 16 Ohio St. 478.

<sup>2</sup> *City Nat. Bank's Appeal*, 91 Pa. St. 163; *Fitts v. Davis*, 42 Ill. 391; *Banning v. Edes*, 6 Minn. 402; *Bolles v. Carli*, 12 Minn. 113; *Roane v. Baker*, 120 Ill. 308, 11 N. E. Rep. 246; *Moring v. Dickerson*, 85 N. C. 466; *Howell v. Howell*, 7 Ired. 491, 47 Am. Dec. 335; *Cornish v. Frees*, 74 Wis. 490, 43 N. W. Rep. 507.

<sup>3</sup> *Curtis v. Root*, 20 Ill. 53. See *Blatchford v. Boyden*, 122 Ill. 657, 668, 13 N. E. Rep. 801.

<sup>4</sup> *Jackson v. Reid*, 30 Kans. 10.

<sup>5</sup> *Brower v. Witmeyer*, 121 Ind. 83, 22 N. E. Rep. 975.

<sup>6</sup> *Curtis v. Root*, 20 Ill. 53; *Austin v. Underwood*, 37 Ill. 438, 87 Am. Dec. 254; *Summers v. Darne*, 31 Gratt. 791; *Jackson v. Austin*, 15 Johns. 477; *Haywood v. Nooney*, 3 Barb. 643; *Adams v. Hill*, 29 N. H. 202; *Clark v. Munroe*, 14 Mass. 351; *Kaiser v. Lembeck*, 55 Iowa, 244, 7 N. W. Rep. 519.

1413. The record of a mortgage made and recorded before the execution of the conveyance to the mortgagor is not notice to the vendor, and is not as to him a purchase-money mortgage. The lien of the true purchase-money mortgage to the vendor attaches *eo instanti* upon the execution of the vendor's deed, as a part of an indivisible transaction.<sup>1</sup> Therefore a mortgage for purchase-money recorded with the deed of purchase has priority of a mortgage executed by the purchaser before he concluded the purchase, though this was made to secure a loan with which to make the cash payment, and this mortgage was recorded before the mortgage to the vendor.<sup>2</sup> The purchase-money mortgage might become a second lien by the acquiescence of the vendor in the claim of priority for the other mortgage.<sup>3</sup>

A judgment obtained against the mortgagor before the purchase does not take priority over the lien of the purchase-money mortgage, though this be not acknowledged and recorded for a long period after the recording of the deed.<sup>4</sup>

1414. A purchase-money mortgage may be made to a third person who advances the purchase-money at the time the purchaser receives his conveyance, and such mortgage is entitled to the same preference over a prior judgment as it would have had if it had been executed to the vendor himself.<sup>5</sup> It is not essential that there should be a prior agreement between the parties to give the mortgages priority. No such condition is necessary. When all the acts of the parties appear to be parts of one transaction, "in its legal effect it is the same as though the purchaser

<sup>1</sup> *Boyd v. Mundorf*, 30 N. J. Eq. 545; *Oliver v. Davy*, 34 Minn. 292, 25 N. W. Rep. 629; *Tolman v. Smith*, 85 Cal. 280; *Schoch v. Birdsall*, 48 Minn. 441, 51 N. W. Rep. 382.

<sup>2</sup> *Rogers v. Tucker*, 94 Mo. 346, 7 S. W. Rep. 414; *Turk v. Funk*, 68 Mo. 18, 30 Am. Rep. 771; *City Nat. Bank's Appeal*, 91 Pa. St. 163; *Brower v. Witmeyer*, 121 Ind. 83, 22 N. E. Rep. 975; *Cox v. Carson*, 3 Head, 607.

<sup>3</sup> *Mutual Loan Asso. v. Elwell*, 38 N. J. Eq. 18.

<sup>4</sup> *Roane v. Baker*, 120 Ill. 308, 11 N. E. Rep. 246; *Curtis v. Root*, 20 Ill. 53; *Dusenbury v. Hulbert*, 59 N. Y. 541; *Ward v. Carey*, 39 Ohio St. 361.

<sup>5</sup> *Laidley v. Aikin*, 80 Iowa, 112, 45 N. W. Rep. 384; *Jones v. Tainter*, 15 Minn. 512; *Curtis v. Root*, 20 Ill. 53; *Jackson v. Austin*, 15 Johns. 477; *Adams v. Hill*, 29 N. H. 202; *Clark v. Munroe*, 14 Mass. 351; *Kaiser v. Lembeck*, 55 Iowa, 244, 7 N. W. Rep. 244; *Moring v. Dickerson*, 85 N. C. 466; *Pearl v. Hervey*, 70 Mo. 160; *Dwenger v. Branigan*, 95 Ind. 221; *Jones v. Parker*, 51 Wis. 218, 8 N. W. Rep. 124; *Carey v. Boyle*, 53 Wis. 574, 11 N. W. Rep. 47; *Mize v. Barnes*, 78 Ky. 506. See § 1409.

Otherwise in Ohio and Maryland by reason of the terms of the statute. § 1410; *Stansell v. Roberts*, 13 Ohio, 148; *Heuissler v. Nickum*, 38 Md. 270.



had executed a mortgage to the vendor for the purchase-money, and he had assigned it to the party advancing the money.”<sup>1</sup>

1415. It must appear, however, that the deed and mortgage constituted but one transaction.<sup>2</sup> The seisin of the purchaser being merely a transitory one, no lien can intervene, and therefore the same rule applies to the exclusion of any intervening lien, as, for instance, a lien for labor and materials furnished the purchaser, who has entered before the execution of the deed and mortgage, which are afterwards delivered simultaneously;<sup>3</sup> or an agreement made in relation to the premises by the purchaser before the purchase;<sup>4</sup> or right of homestead;<sup>5</sup> or right of dower.<sup>6</sup> If there be an interval of time between the purchase and the making of a mortgage to secure the purchase-money, the wife is not barred of her right of dower by reason of any recitals made by the husband in the mortgage deed in which the wife does not join.<sup>7</sup> In such case, also, a judgment rendered against the grantee prior to the purchase takes precedence of the mortgage.<sup>8</sup>

A suit to foreclose a mortgage, given to secure the purchase-money of land, is not a suit for the enforcement of a vendor's lien. A mortgage for purchase-money has priority over a mechanic's lien for a building erected by the purchaser before he

<sup>1</sup> *Haywood v. Nooney*, 3 Barb. 643.

<sup>2</sup> *Grant v. Dodge*, 43 Me. 489; *Stewart v. Smith*, 36 Minn. 82, 30 N. W. Rep. 430. See *Hurlbert v. Weaver*, 24 Minn. 30, for peculiar circumstances under which a deed and mortgage executed at different times were regarded as constituting one transaction.

<sup>3</sup> *Lamb v. Cannon*, 38 N. J. L. 362; *Strong v. Van Deursen*, 23 N. J. Eq. 369; *Macintosh v. Thurston*, 25 N. J. Eq. 242; *Clark v. Butler*, 32 N. J. Eq. 664; *Guy v. Carriere*, 5 Cal. 511. Otherwise in Georgia by statute. Code, § 1979; *Tanner v. Bell*, 61 Ga. 584.

<sup>4</sup> *Bolles v. Carli*, 12 Minn. 113; *Morris v. Pate*, 31 Mo. 315.

<sup>5</sup> *New England Jewelry Co. v. Merriam*, 2 Allen, 390; *Jones v. Parker*, 51 Wis. 218, 8 N. W. Rep. 124; *Carr v. Caldwell*, 10 Cal. 380, 70 Am. Dec. 740; *Amphlett v. Hibbard*, 29 Mich. 298; *Nichols v. Overacker*,

16 Kans. 54; *Magee v. Magee*, 51 Ill. 500, 99 Am. Dec. 571; *Austin v. Underwood*, 37 Ill. 438, 87 Am. Dec. 254; *Allen v. Hawley*, 66 Ill. 164, 168; *Lane v. Collier*, 46 Ga. 580; *Hopper v. Parkinson*, 5 Nev. 233; *Hand v. Savannah & C. R. Co.* 12 S. C. 314; *Peterson v. Hornblower*, 33 Cal. 266. See *Pratt v. Topeka Bank*, 12 Kans. 570, for a case where a mortgage given upon a homestead by husband and wife was partly paid, and a new mortgage for the balance given by the husband alone, explained in *Greeno v. Barnard*, 18 Kans. 518.

<sup>6</sup> *George v. Cooper*, 15 W. Va. 666; *Jones v. Parker*, 51 Wis. 218; 8 N. W. Rep. 124; *Bunting v. Jones*, 78 N. C. 242; *Grant v. Dodge*, 43 Me. 489.

<sup>7</sup> *Tibbetts v. Langley Manuf. Co.* 12 S. C. 465.

<sup>8</sup> *Cohn v. Hoffman*, 50 Ark. 108, 6 S. W. Rep. 511.

received a deed, and while he held a bond for a deed, and although the lien was filed before the making of the deed.<sup>1</sup>

1416. Equitable mortgages are generally held to be within the recording acts as much as are legal mortgages.<sup>2</sup> At first a different interpretation was put upon the acts, and a mortgage of an equity or of an equitable estate was not constructive notice when registered.<sup>3</sup> But at an early day in this country it was established, either judicially or by statute, that all rights, incumbrances, or conveyances touching or in any way concerning land should appear upon the public records, and that conveyances of equitable interests as well as legal were within the registry acts. A mortgage, therefore, of such an interest, if first recorded, is preferred to a mortgage of the legal estate.<sup>4</sup> A mortgage of an equitable interest under a contract of purchase, although no legal estate passes by it, is within the operation of the registration acts, and should be recorded to entitle it to priority over a subsequent mortgage of the same interest; and an assignment of such a contract as a security for a debt is regarded as a mortgage.<sup>5</sup>

1417. Generally the record of an agreement constituting an equitable mortgage is notice to a subsequent purchaser of the legal estate from the same grantor.<sup>6</sup> One in possession of lands under a parol contract to purchase them may mortgage his interest in them, and the record of the mortgage will be notice to subsequent purchasers and incumbrancers.<sup>7</sup> The registry of a conveyance of an equitable title is notice to a subsequent purchaser of the same interest or title from the same grantor; but it is not notice to a purchaser of the legal title from a person who appears by the record to be the real owner. Thus a mortgage by a mem-

<sup>1</sup> *Virgin v. Brubaker*, 4 Nev. 31.

<sup>4</sup> *United States Ins. Co. v. Shriver*, 3 Md. Ch. 381. And see *White & Tudor's Lead. Cas. in Eq.* 4th Am. ed. vol. 2, part 1, p. 204, where the cases are collected.

<sup>5</sup> *Bank v. Clapp*, 76 N. C. 482.

<sup>6</sup> *Parkist v. Alexander*, 1 Johns. Ch. 394; *Hunt v. Johnson*, 19 N. Y. 279; *General Ins. Co. v. United States Ins. Co.* 10 Md. 517, 69 Am. Dec. 174; *Jarvis v. Dutcher*, 16 Wis. 307; *Edwards v. McKernan*, 55 Mich. 520, 524, 22 N. W. Rep. 20; *Putnam v. White*, 76 Me. 551.

<sup>7</sup> *Crane v. Turner*, 7 Hun, 357.

<sup>2</sup> *Hunt v. Johnson*, 19 N. Y. 279; *Parkist v. Alexander*, 1 Johns. Ch. 394; *Crane v. Turner*, 7 Hun, 357; *Boyce v. Shiver*, 3 S. C. 515; *Stoddard v. Whiting*, 46 N. Y. 627; *Tarbell v. West*, 86 N. Y. 280; *Tefft v. Munson*, 63 Barb. 31; *Edwards v. McKernan*, 55 Mich. 520, 524; 22 N. W. Rep. 20; *Smith v. Neilson*, 13 Lea, 461; *O'Neal v. Seixas*, 85 Ala. 80, 4 So. Rep. 745; *Pierce v. Jackson*, 56 Ala. 599. Dictum to the contrary in *Bailey v. Timberlake*, 74 Ala. 221, erroneous.

<sup>3</sup> *Doswell v. Buchanan*, 3 Leigh, 365, 377, 23 Am. Dec. 280.

ber of a partnership of his interest in the real estate of the firm, the title to which stands in the name of another member of the firm, is properly admitted of record; but it is not notice to a subsequent purchaser or mortgagee of the legal title from such other partner. The two titles have apparently no connection.<sup>1</sup> The record of a mortgage, or other conveyance which is entitled to be recorded, operates as constructive notice to subsequent purchasers claiming under the same grantor, or through one who is the common source of title.<sup>2</sup> The mortgage of an equitable title, such as that constituted by a bond for a deed, is not constructive notice to purchasers of the land from a holder of the legal title in possession of the land, inasmuch as the purchaser's title is not derived through the title of the mortgagor, and he will not take subject to the mortgage of the equitable title, though this be recorded.<sup>3</sup>

1418. An equitable mortgagee for a precedent debt has no equity superior to that of a creditor having a valid subsequent judgment at law. Between such contestants the first perfected legal title should prevail. The rule is otherwise with regard to *bona fide* purchasers or equitable mortgagees, where the consideration of the mortgage is paid at the time it is given. Equity in the latter case regards the equitable mortgagee as a *bona fide* purchaser.<sup>4</sup>

1419. The recording acts apply as well to leasehold estates and to mortgages of leasehold estates, of such duration of term as to come within the recording acts of the several States.<sup>5</sup> Such mortgages are not only, as a general rule, within the terms of these acts, but likewise within the reason and spirit of them, in-

<sup>1</sup> Tarbell v. West, 86 N. Y. 280.

<sup>2</sup> Edwards v. McKernan, 55 Mich. 520, 526, 22 N. W. Rep. 20.

<sup>3</sup> Halstead v. Bank, 4 J. J. Marsh. 554; Irish v. Sharp, 89 Ill. 261.

<sup>4</sup> Wheeler v. Kirtland, 24 N. J. Eq. 552.

<sup>5</sup> Decker v. Clarke, 26 N. J. Eq. 163; Spielmann v. Kliest, 36 N. J. Eq. 199; Berry v. Mutual Ins. Co. 2 Johns. Ch. 603; Johnson v. Stagg, 2 Johns. 510, 523; Breese v. Bange, 2 E. D. Smith, 474. The earlier New Jersey cases were in effect overruled by the recent decision in

Hutchinson v. Bramhall, 42 N. J. Eq. 372, 7 Atl. Rep. 873; reversing *sub nom.* Deane v. Hutchinson, 40 N. J. Eq. 83, 2 Atl. Rep. 292, and holding that the recording act does not apply to leases for years.

In Pennsylvania a leasehold mortgage is required by statute to be recorded with the lease; the mortgage must refer to the record of the lease, or, if it is not recorded, it must be recorded with the mortgage. Hilton's App. 116 Pa. St. 351, 9 Atl. Rep. 342. See First Nat. Bank v. Sheaffer, 149 Pa. St. 236, 24 Atl. Rep. 221.

asmuch as they are equally within the mischief for which they provide a remedy ; and they do not come under the provisions relating to the recording of mortgages of personal property, as these have reference only to chattels personal.<sup>1</sup>

A grain elevator of permanent structure, built by a lessee on ground held under a lease which provides that the lessor may terminate the lease on sixty days' notice, and that the lessee may remove his buildings at any time before expiration of the lease, is, together with the leasehold estate, to be classed as real estate, so that the holder of a recorded mortgage thereon has priority over a subsequent execution creditor, even though the mortgagee has not taken possession within two years after the date of the mortgage, as is necessary in case of chattel mortgages.<sup>2</sup>

An option of purchasing the leasehold estate at a fixed price within a limited time does not pass by a mortgage of such leasehold estate. "The person holding the right of option is not a purchaser. He becomes such only by exercising his right of option, and not until he becomes a purchaser does he acquire anything which a court of law or equity can recognize."<sup>3</sup>

#### IV. *An Assignee of a Mortgage is a Purchaser.*

1420. The recording laws and the doctrines of priority by record generally extend to assignments of mortgages as well, either by express provision of statute or by judicial construction.<sup>4</sup>

<sup>1</sup> Decker v. Clarke, 26 N. J. Eq. 163.

<sup>2</sup> Knapp v. Jones, 143 Ill. 375, 32 N. E. Rep. 382, affirming 38 Ill. App. 489, 28 N. E. Rep. 820.

<sup>3</sup> Sweezy v. Jones, 65 Iowa, 272, 21 N. W. Rep. 603; Conn. v. Tonner, 86 Iowa, 577, 53 N. W. Rep. 320.

<sup>4</sup> Jones on Mortgages, § 820. **New York**: Belden v. Meeker, 47 N. Y. 307, 2 Lans. 470, overruling Hoyt v. Hoyt, 8 Bosw. 511; Vanderkemp v. Shelton, 11 Paige, 28, Clarke, 321; Fort v. Burch, 5 Den. 187; St. John v. Spalding, 1 Thomp. & C. 483; James v. Johnson, 6 Johns. Ch. 417; James v. Morey, 2 Cow. 246, 14 Am. Dec. 475; Campbell v. Vedder, 1 Abb. App. Dec. 295; Purdy v. Huntington, 46 Barb. 389, 42 N. Y. 334. **Iowa**: Bowling v. Cook, 39 Iowa, 200; Bank v. Anderson, 14 Iowa, 544, 83 Am. Dec. 390;

McClure v. Burris, 16 Iowa, 591; Cornog v. Fuller, 30 Iowa, 212. **New Jersey**: Stein v. Sullivan, 31 N. J. Eq. 409; Tradesmen's Building Asso. v. Thompson, 31 N. J. Eq. 536. **Illinois**: Turpin v. Ogle, 4 Bradw. 611; Smith v. Keohane, 6 Bradw. 585. **Oregon**: Laws 1895, p. 55.

In **Indiana**, before the statute providing for the record of assignments, the record of them was not notice. Hasselman v. McKernan, 50 Ind. 441; Dixon v. Hunter, 57 Ind. 278; Reeves v. Hayes, 95 Ind. 521. Now, by statute, any mortgage of record, or any part thereof, may be assigned, either by an assignment entered on the margin of such record, signed by the person making the assignment and attested by the recorder, or by a separate instrument executed and acknowledged before any person authorized to take ac-

Where the statutes themselves do not in terms directly apply to assignments of mortgages, the courts have generally drawn an inference of intended application.<sup>1</sup> The assignment is invalid against subsequent purchasers without notice unless it is recorded. Consequently, if a mortgagee transfers the note secured by the mortgage, or makes a formal assignment of the mortgage which is not recorded, and afterwards enters a satisfaction of the mortgage upon the record, or if the mortgagee takes a conveyance of the equity of redemption, and then with an apparent ample title conveys the property to another, the mortgage ceases to be a lien as against one who purchases the property in good faith and without notice.<sup>2</sup> In like manner an assignee of the mortgage is

knowledgeable, and recorded on such

margin, or in the mortgage records of the

county. Acts 1877, ch. 58, § 1.

In **Pennsylvania** the record of an assign-

ment of a mortgage is notice to subsequent

assignees of the mortgage. *Neide v. Pen-*

*nypacker*, 9 Phila. 86. And to subsequent

purchasers and mortgagees as well. *Leech*

*v. Bonsall*, 9 Phila. 204. These decisions

are based on the Act of April 9, 1849, § 14.

So far as the general recording act of

1715 is concerned, "though there has been

no express decision that under it an as-

ignment of a mortgage may be recorded,

so as to be notice to subsequent pur-

chasers, yet, taking the latest expression

of the Supreme Court on the subject, we

might so decide without disregarding any

binding authority, or any clearly indicated

opinion of that court." Per Mr. Justice

Mitchell in *Neide v. Pennypacker*, 9 Phila.

86, citing *Philips v. Bank*, 18 Pa. St. 394,

401. In the later case of *Pepper's Ap-*

*peal*, 77 Pa. St. 373, it was distinctly held

that the recording of an assignment is notice

to a subsequent assignee under the

above statute. Mr. Justice Mercur, deliver-

ing the opinion of the court, said it was

alleged in the argument that it is not cus-

tomary in Philadelphia to search the rec-

ords for assignments of mortgages. Be

that as it may, if any custom exists not in

harmony with the act, it must give way.

*Malus usus abolendus est.*

In **Maryland** provision was made for

recording assignments of mortgages by

Act 1868, ch. 373; R. Code 1878, art. 44, §§ 37, 38; but this does not affect an equitable assignment. *Byles v. Tome*, 39 Md. 461.

In **Virginia** the assignee of a mortgage is not regarded as a purchaser, and the record of the assignment is not notice to third persons. *Gordon v. Rixey*, 76 Va. 694, 701.

In **Delaware** an assignment of a mortgage attested by one credible witness is valid. Laws 1887, ch. 213.

<sup>1</sup> *Reeves v. Hayes*, 95 Ind. 521, where the subject is ably considered by Chief Justice Elliott; *Bowling v. Cook*, 39 Iowa, 200; *Summers v. Kilgus*, 14 Bush, 449; and by Justices Niblack and Zollars in dissenting opinions.

<sup>2</sup> *Bowling v. Cook*, 39 Iowa, 200; *Ferguson v. Glassford*, 68 Mich. 36, 35 N. W. Rep. 820; *Sheldon v. Holmes*, 58 Mich. 138, 24 N. W. Rep. 795; *Girardin v. Lampe*, 58 Wis. 267, 16 N. W. Rep. 614; *Van Keuren v. Corkins*, 66 N. Y. 77; *Clark v. Mackin*, 95 N. Y. 346; *Henderson v. Pilgrim*, 22 Tex. 464; *Turpin v. Ogle*, 4 Bradw. 611; *Smith v. Keohane*, 6 Bradw. 585; *Bacon v. Van Schoonhoven*, 87 N. Y. 446, 19 Hun, 158; *Connecticut Mut. L. Ins. Co. v. Talbot*, 113 Ind. 373, 3 Am. St. Rep. 655, 14 N. E. Rep. 586; *Lewis v. Kirk*, 28 Kans. 497, 42 Am. Rep. 173; *Morris v. Beecher*, 1 N. D. 130, 45 N. W. Rep. 696. Otherwise in **Oregon**: *Watson v. Dundee M. & T. Co.* 12 Oreg. 474, 8 Pac. Rep. 548.

not bound by an unrecorded agreement executed between the parties to the mortgage, whereby the mortgagee was bound to release a portion of the premises upon receiving a certain sum in payment.<sup>1</sup> The doctrine, that the assignee of a mortgage takes it subject to all equities existing between the mortgagor or his grantees and the mortgagee, cannot be applied to those instruments which are properly designated in the recording acts as conveyances, which both a release of a mortgage and an agreement for such release would be, without nullifying the acts to that extent, and withholding the protection they were designed to confer upon purchasers.<sup>2</sup>

Although a statute provides that assignments of mortgages may be recorded, so that the recording of them is discretionary, the record is nevertheless notice to subsequent assignees.<sup>3</sup>

1421. But the record of an assignment of a mortgage is not constructive notice of it to the mortgagor so as to make invalid a payment made by him to the mortgagee.<sup>4</sup> It is desirable, for this reason, that personal notice should be given him of the assignment, though the assignee's title is complete without notice to the owner of the equity of redemption.<sup>5</sup>

A purchaser of the equity of redemption is charged with notice of an assignment of the mortgage which has been recorded prior to the purchase.<sup>6</sup> The record of the assignment is a part of the record title of which he must take notice at the time of his purchase.

Where a power of attorney to assign a mortgage,<sup>7</sup> or one to collect a mortgage and discharge it,<sup>8</sup> is not within the recording acts, a record of them is not notice.

1422. It is provided by statute in several States that the recording of an assignment of a mortgage shall not in itself be deemed notice of such assignment to the mortgagor, his heirs or personal representatives, so as to invalidate any payment

<sup>1</sup> Warner v. Winslow, 1 Sandf. Ch. 430; St. John v. Spalding, 1 Thomp. & C. 483.

<sup>2</sup> St. John v. Spalding, 1 Thomp. & C. 483.

<sup>3</sup> Neslin v. Wells, 104 U. S. 428, 434; Pepper's App. 77 Pa. St. 373, 377.

<sup>4</sup> Hubbard v. Turner, 2 McLean, 519; Ely v. Scofield, 35 Barb. 330; New York

Life Ins. & Trust Co. v. Smith, 2 Barb. Ch. 82. So provided by statute in several States.

<sup>5</sup> Jones v. Gibbons, 9 Ves. 407, 410; *Ex parte Barnett*, 1 De G. 194.

<sup>6</sup> Brewster v. Carnes, 103 N. Y. 556, 9 N. E. Rep. 323.

<sup>7</sup> Williams v. Birbeck, Hoffm. 359.

<sup>8</sup> Jackson v. Richards, 6 Cow. 617.

made by them to the person holding the bond or note.<sup>1</sup> But such a statute does not apply to a purchaser of the equity of redemption, unless it is in terms made applicable to him.. A purchaser of land already subject to a mortgage is chargeable with notice of an assignment of the mortgage which has been recorded prior to his purchase.<sup>2</sup>

On the other hand, in two or three States the record of an assignment is notice to the owner of the equity of redemption, as well as to subsequent purchasers.<sup>3</sup>

The object of the statutory provision that the record of an assignment shall not be deemed in itself notice to the mortgagor, his heirs or personal representatives, of such assignment, so as to invalidate any payment made by him or them to the mortgagee, is to save the necessity of examining the record every time a payment is made. It is argued, therefore, that for all other purposes the record of the assignment is notice even to the mortgagor. Accordingly under such a provision it has been held that the record of an assignment of a mortgage is constructive notice as against a grantee of the mortgagor that the mortgagee can no longer deal with the mortgage title, and that a subsequent discharge or release of the mortgage executed by the mortgagee is invalid.<sup>4</sup> If the release is obtained by the mortgagor himself without the payment of any sum of money upon the mortgage debt, the statute does not protect him against the effect of an assignment already recorded.<sup>5</sup>

**1423.** The effect of recording an assignment is not only to protect the assignee against a subsequent sale of the mortgage by the apparent holder of it, but also to prevent a wrongful discharge

<sup>1</sup> **California**: Civ. Code, § 2935; Acts 1874, p. 261; Codes & Statutes 1876, § 7935. **Kansas**: Dassel's Stats. 1876, ch. 68, § 3. **Michigan**: Howell's Stats. § 5687. **Minnesota**: G. S. 1878, ch. 40, § 24. **Nebraska**: Compiled Stats. 1881, p. 392. **New York**: 1 R. S. 7th ed. p. 763, § 41. **Oregon**: Annot. Laws 1887, § 3030. **Wisconsin**: R. S. 1878, p. 641, § 2244. **Wyoming**: R. S. 1887, § 22.

<sup>2</sup> *Brewster v. Carnes*, 103 N. Y. 556, 9 N. E. Rep. 323.

<sup>3</sup> **New Jersey**: R. S. 1877, p. 708, § 32. If an assignment be not recorded, payment to the mortgagee without knowledge of

the assignment and a release by him are binding upon the assignee. *Shotwell v. Matthews* (N. J. Eq.), 21 Atl. Rep. 1067.

**Indiana**: Acts 1877, ch. 58, § 1; R. S. 1881, §§ 1093, 1094; *Connecticut Mut. L. Ins. Co. v. Talbot*, 113 Ind. 373, 3 Am. St. Rep. 655, 14 N. E. Rep. 586. Prior to this statute the record of an assignment was not notice. *Reeves v. Hayes*, 95 Ind. 521. **North Dakota** and **South Dakota**: Civ. Code, § 1629.

<sup>4</sup> *Belden v. Meeker*, 47 N. Y. 307, 2 Lans. 470; *Viele v. Judson*, 82 N. Y. 32.

<sup>5</sup> *Belden v. Meeker*, 47 N. Y. 307, 2 Lans. 470.

of it by the mortgagee.<sup>1</sup> It is true that as against subsequent purchasers of the premises, or the holders of subsequent mortgages upon them, and attaching and judgment creditors, the record of a prior mortgage is sufficient notice of its existence without the record of an assignment of the mortgage to one who has purchased it. The failure to record the assignment does not blot out the record of the mortgage itself.<sup>2</sup> If the premises are conveyed to the mortgagee after he has assigned the mortgage, there is no merger of the mortgage title.<sup>3</sup> It makes no difference that the assignment is not recorded. If the mortgagee, in this condition of the title, then conveys the estate to one who purchases without knowledge of the assignment of the mortgage, the question arises whether the assignee, having omitted to record his assignment, thus leaving, so far as the record shows, a complete title in the mortgagee, can be protected in his title as against the purchaser from the mortgagee?<sup>4</sup>

1424. Of course a purchaser is charged with constructive notice of the existence of a mortgage, and of the continuance of its lien, by its record. Having this information he is chargeable in law with the further notice that the mortgage is a lien in the hands of any person to whom it may have been legally transferred, and that the record of such transfer is not necessary to its validity, nor as a protection against a purchaser of the property mortgaged, or any other person than a subsequent purchaser in good faith of the mortgage itself, or the bond or debt secured by it; but rather that one purchasing the premises from the mortgagor would take them subject to the lien of the mortgage, irrespective of the ownership of it, unless the mortgagee was the

<sup>1</sup> Jones on Mortgages, §§ 872, 956; Crane v. Turner, 67 N. Y. 437; Van Keuren v. Corkins, 66 N. Y. 77; Ladd v. Campbell, 56 Vt. 529; Quincy v. Ginsbach (Iowa), 55 N. W. Rep. 37; Parmenter v. Oakley, 69 Iowa, 388; Pennsylvania Salt Co. v. Neel, 54 Pa. St. 9; Henderson v. Pilgrim, 22 Tex. 464.

<sup>2</sup> Campbell v. Vedder, 3 Keyes, 174, 1 Abb. App. Dec. 295; Sprague v. Rockwell, 51 Vt. 401; Viele v. Judson, 82 N. Y. 32; Fisher v. Cowles, 41 Kans. 418, 21 Pac. Rep. 228; Enos v. Cook, 65 Cal. 175, 3 Pac. Rep. 632; Bridges v. Bidwell, 20 Neb. 185, 29 N. W. Rep. 302.

It is a too narrow view of the authorities to say that the record of the assignment protects merely against a subsequent assignment by the mortgagee.

<sup>3</sup> Campbell v. Vedder, 3 Keyes, 174, 1 Abb. App. Dec. 295; Purdy v. Huntington, 42 N. Y. 334, 1 Am. Rep. 532.

<sup>4</sup> This, then, is the case: "A sells and conveys land to B. B gives back a bond and mortgage for the purchase-money. A sells and assigns the bond and mortgage to C, and afterwards receives a conveyance of the equity of redemption from B, and then by a full covenant deed conveys the land, and all his estate and interest in the land, to D."



owner. That knowledge and notice make it his duty, in the exercise of proper diligence, to inquire whether his vendor, the mortgagee, is still the owner of the mortgage, and his omission to make that inquiry deprives him of the protection of a *bona fide* purchaser.<sup>1</sup>

The rule that a mortgagor is entitled to deal with the mortgagee as the holder of the mortgage, until he has actual notice of an assignment, has no application when the mortgage is given to secure a negotiable note, and this is transferred before it is due.<sup>2</sup>

A different rule prevails in Massachusetts.<sup>3</sup> There the estate of a mortgagee of land is a legal estate, which passes by the same instruments of conveyance as other legal estates. It is declared to be as important to be able to ascertain from the registry the existence or continuance of a mortgage as of any other legal title. "Not unfrequently the whole or part of an estate held in mortgage is released or conveyed when the debt is not paid; and, in the absence of fraud, a conveyance by the party who appears on the record to be the owner of the mortgage should be sufficient to protect a purchaser who has no actual or constructive notice of title in any other."<sup>4</sup>

**1425.** An assignee of a mortgage is a purchaser, and is entitled to the protection of the recording acts as much as a purchaser of the equity of redemption.<sup>5</sup> If he purchases in good faith, and for a valuable consideration, he is not chargeable with any notice his assignor had of prior incumbrances upon the property, provided he records his assignment before such prior mortgage or other deed is recorded.<sup>6</sup> He is then chargeable only with constructive notice, such as is afforded by record, or by open and adverse possession of the premises by another.<sup>7</sup> The assignee

<sup>1</sup> Jones on Mortgages, § 804; Purdy v. Huntington, 42 N. Y. 334, 1 Am. Rep. 532, overruling 46 Barb. 389. And see Van Keuren v. Corkins, 6 Thomp. & C. 355, 4 Hun, 129, 66 N. Y. 77; Gillig v. Maass, 28 N. Y. 191; Warner v. Winslow, 1 Sandf. Ch. 430; Burhans v. Hutcheson, 25 Kans. 625, 37 Am. Rep. 274; Oregon Trust Co. v. Shaw, 5 Sawyer, 336, quoting and approving the text.

<sup>2</sup> Jones v. Smith, 22 Mich. 360.

<sup>3</sup> Welch v. Priest, 8 Allen, 165; Wolcott v. Winchester, 15 Gray, 461, stated

in Jones on Mortgages, § 804; Blunt v. Norris, 123 Mass. 55, 25 Am. Rep. 14. So by statute in Maryland: Act 1868, ch. 373. The act does not affect equitable assignments. Byles v. Tome, 39 Md. 461. So in Vermont: Ladd v. Campbell, 56 Vt. 529.  
<sup>4</sup> Welch v. Priest, 8 Allen, 165, per Hoar, J.

<sup>5</sup> Westbrook v. Gleason, 79 N. Y. 23; Decker v. Boice, 83 N. Y. 215; Smyth v. Knickerbocker L. Ins. Co. 84 N. Y. 589.

<sup>6</sup> Decker v. Boice, 83 N. Y. 215.

<sup>7</sup> Trustees of Union College v. Wheeler,

gains priority in such case, not by the prior recording of the assigned mortgage, but by the prior recording of his own assignment.<sup>1</sup> If the assignee omits to record his assignment, and an elder mortgage of which he had no notice, but of which his assignor had notice, is first recorded, he will hold subject to such elder mortgage; and he would also hold subject to it if such elder mortgage had been recorded before he took the assignment, but after the recording of the mortgage assigned.<sup>2</sup>

1426. If an assignment is not recorded until after the mortgagor makes a conveyance of the mortgaged premises to the mortgagee, and the latter executes another mortgage of the same, which deed and subsequent mortgage are first recorded, the last mortgage will take precedence of the first; but another mortgage after the recording of the assignment of the first mortgage will be subject thereto.<sup>3</sup>

A second mortgagee assigned his mortgage and part of the debt, but the assignment was not recorded. Subsequently the mortgagor conveyed the land to the second mortgagee. The first mortgagee then released his mortgage, and took a third mortgage on the land for the unpaid principal and interest, without actual knowledge of the assignment, and on the faith of the record and of the second mortgagee's representation that his mortgage had been extinguished by merger. It was held that he was entitled to priority over the assignee claiming under the unrecorded assignment of the second mortgage, though such mortgage was never actually discharged of record.<sup>4</sup>

And so, where there were two successive mortgages of the same land, and the mortgagor in the first mortgage was the mortgagee in the second, and the second mortgage was first recorded and was then assigned to a *bona fide* purchaser for value before the first mortgage was recorded, but the assignment was not recorded until after the recording of the first mortgage, the mort-

59 Barb. 585; Jackson v. Van Valkenburgh, 8 Cow. 260; Bush v. Lathrop, 22 N. Y. 535, 549; Varick v. Briggs, 6 Paige, 323; Jackson v. Given, 8 Johns. 137, 5 Am. Dec. 328; Jackson v. Reid, 30 Kans. 10, 1 Pac. Rep. 308.

<sup>1</sup> Decker v. Boice, 83 N. Y. 215. The contrary rule declared in Jackson v. Van

Valkenburgh, 8 Cow. 260, is no longer in force. Bank v. Frank, 13 J. & S. 404.

<sup>2</sup> Fort v. Burch, 5 Denio, 187; De Lancey v. Stearns, 66 N. Y. 157; Brower v. Witmeyer, 121 Ind. 83, 22 N. E. Rep. 975.

<sup>3</sup> McCormick v. Bauer, 122 Ill. 573, 13 N. E. Rep. 852.

<sup>4</sup> Pritchard v. Kalamazoo College, 82 Mich. 587, 47 N. W. Rep. 31.

gagee in the second mortgage could not claim priority, because when he recorded his mortgage he had notice of the prior mortgage which he had himself executed. It was held, in a controversy between assignees of the respective mortgages, that the assignee of the second mortgage could derive no benefit from the prior record of his mortgage, as he stood as to that in the shoes of his assignor; and that he was not entitled to priority by the record of his assignment, because the first mortgage was recorded before the recording of his assignment. But it was conceded that if he had recorded his assignment before the first mortgage was recorded, he would have gained a preference.<sup>1</sup>

If a mortgagee assigns one of the notes secured by a mortgage, and afterwards assigns another note secured by it, together with the mortgage, to another person, the latter assignee is not protected against the assignee of the note as an innocent purchaser, because the mortgage itself is notice to him of the existence of such note.<sup>2</sup>

1427. It is not often that the question of priority of rights under different assignments of the same mortgage can arise, because an assignment is generally accompanied by a delivery of the note or bond secured by the mortgage and of the mortgage itself; and except under peculiar circumstances a person acting in good faith would not take a mere written transfer of the mortgage title without a delivery of these.<sup>3</sup> The fact that the assignor did not have these papers to deliver would be enough ordinarily to put the purchaser on his guard, even if it did not amount to notice to him of a prior assignment. At any rate, the absence of these papers would be enough to put in doubt his good faith in taking the assignment; and would make him chargeable with notice of any defect there might be in the assignor's title.<sup>4</sup>

But if two assignments of the same mortgage by any means are made and taken by different persons in good faith, of course the assignee who first records his assignment would gain the better title to the mortgage, if he has paid full value for it at the

<sup>1</sup> *Westbrook v. Gleason*, 79 N. Y. 23, reversing same case, 14 Hun, 245. This case is stated and approved by Andrews, J., in *Decker v. Boice*, 83 N. Y. 215, 221.

<sup>2</sup> *Wilson v. Eigenbrodt*, 30 Minn. 4.

<sup>3</sup> *Porter v. King*, 1 Fed. Rep. 755, quoting text with approval.

<sup>4</sup> *Kellogg v. Smith*, 26 N. Y. 18; *Brown v. Blydenburgh*, 7 N. Y. 141, 57 Am. Dec. 506.

time of taking it. If he paid only part of the consideration, then he would have priority only to the extent of the payment made by him; for he is then a purchaser, and entitled to protection only to that extent.<sup>1</sup>

**1428. Manner of recording an assignment.** — When an assignment of a mortgage is indorsed upon the mortgage deed, which is referred to as “the within described mortgage,” it is sufficient to record the assignment without recording the mortgage with it anew.<sup>2</sup> A reference is usually made by the register from the record of one instrument to the other; but unless required by law, this is not essential. A recital of the names of the parties to the mortgage, and its date, is a sufficient identification of it; although it is usual in addition to this description, when the assignment is not indorsed upon the mortgage, to refer, in the description of it, to the book and page of the record. But neither a reference to the record of the mortgage nor a description of the mortgaged lands is necessary. An assignment is sufficient which so identifies the mortgage that by examining the records the one referred to can be ascertained.<sup>3</sup>

It is usual for the register to note an assignment upon the margin of the record of a mortgage, and in many States it is made by statute his duty to do so. But in the absence of such a statute the omission of the register to do so does not affect the right of the assignee.<sup>4</sup>

Under a statute requiring mortgages to be recorded in separate books, an assignment of a mortgage should be recorded in a book for mortgages, and the record of it in the book for deeds is held to be of no avail.<sup>5</sup>

<sup>1</sup> *Pickett v. Barron*, 29 Barb. 505; *Purdy v. Huntington*, 46 Barb. 389, 42 N. Y. 334, 1 Am. Rep. 532; *Campbell v. Vedder*, 3 Keyes, 174; *Bush v. Lathrop*, 22 N. Y. 535; *Wiley v. Williamson*, 68 Me. 71; *Oregon Trust Co. v. Shaw*, 5 Sawyer, 336; *Potter v. Stransky*, 48 Wis. 235, 4 N. W. Rep. 95.

<sup>2</sup> *Carli v. Taylor*, 15 Minn. 171; *Soule v. Corbley*, 65 Mich. 109, 31 N. W. Rep. 785. It is for the jury to determine whether an assignment of “the within” refers to a deed recorded on the same page of the record, immediately preceding the record of the assignment, and not sep-

arated from it by any space or line. The jury may consider the circumstances that both the deed and the assignment purport to be acknowledged before the same officer on the same day; that both deed and assignment are recorded in the same handwriting and in the same ink; and that there is but a single file-mark for the two instruments. *Harlowe v. Hudgins*, 84 Tex. 107, 19 S. W. Rep. 364.

<sup>3</sup> *Viele v. Judson*, 82 N. Y. 32.

<sup>4</sup> *Viele v. Judson*, 82 N. Y. 32, overruling *Moore v. Sloan*, 50 Barb. 442.

<sup>5</sup> *Purdy v. Huntington*, 42 N. Y. 334, 343, 1 Am. Rep. 532, per Lott, J.

1429. The same principles apply equally to the record of any agreement affecting a mortgage. If not executed with the formalities entitling it to be recorded, the record affords no constructive notice of its contents. If, for instance, land subject to a mortgage is sold, and mortgaged back for the purchase-price, the vendor agreeing to pay off the elder mortgage, or in default of so doing to allow the purchaser to pay it, and have the amount of it deducted from the mortgage given for the price of the land, and this agreement, without being entitled to be recorded, is nevertheless put upon record, and the purchaser subsequently pays the elder mortgage as contemplated by the agreement, an assignee of the mortgage for the purchase-money, having no actual notice of this agreement, is not concluded by it, but may hold his mortgage for the original amount of it.<sup>1</sup>

A release of a part of the mortgaged premises is a conveyance by which the title to real estate may be affected, and, unless it be recorded, it is void against a subsequent assignee of the mortgage for value and without notice.<sup>2</sup> An unrecorded agreement to release is in like manner void against an assignee of the mortgage in good faith.<sup>3</sup>

### V. *Priority as affected by Mechanics' Lien Laws.*

1430. The statutes providing for mechanics' liens qualify and affect and sometimes destroy the priority of conveyances as established by the registry laws; and it is therefore important that these statutes should be considered in connection with the registry laws.<sup>4</sup> Such liens may be given priority of mortgages executed and recorded subsequently to the date of the contract under which the lien is claimed;<sup>5</sup> but more frequently mechan-

<sup>1</sup> Dutton v. Ives, 5 Mich. 515.

<sup>2</sup> Mutual Life Ins. Co. v. Wilcox, 55 How. Pr. 43.

<sup>3</sup> St. John v. Spalding, 1 T. & C. 483.

<sup>4</sup> For a statement of the law as to priority between mechanics' liens and mortgages, see Jones on Liens, §§ 1457-1486.

For lien laws affecting priority of railroad mortgages, see Jones on Liens, §§ 1618-1675.

As to priority of statutory liens for water rates, see Jones on Liens, § 102.

<sup>5</sup> As in Illinois, Massachusetts, and

South Carolina; in Louisiana, from the recording of the bargain; in Mississippi, from the time of filing the contract for record; in New York and Vermont, from the time of filing notice of the lien; in Tennessee, from time of written notice of the contract to the mortgagee and his assent thereto. Jones on Liens, § 1465.

Mechanics' liens have priority of unrecorded mortgages, of which the lienor had no notice when the lien attached, in Arizona, Arkansas, California, Colorado, Dis-

ics' liens are given precedence of mortgages of the property recorded after the commencement of the work or improvement for which the lien is claimed. The argument in favor of such a provision is, that one who takes a mortgage of a building in process of erection, or of land upon which any improvements for which a lien is given are making, is bound to know that there may be a lien upon the property for the work already done, and to assume that the work is to go forward, and that there may be a further lien for completing the work. It is not desirable, either, that the execution of a mortgage upon the land should be permitted to arrest the work and prevent its completion, as would most likely happen if the making of the mortgage had the effect of postponing any lien afterwards filed. It is regarded also as just that the mechanic should have the benefit of the labor and materials that go into the property and give it value, rather than the mortgagee, who has taken his mortgage during the progress of the work.<sup>1</sup>

Under such statutes, a mortgage made in good faith to secure future advances on a building, if recorded before the commencement of the building, is entitled to priority over liens for labor or materials, although the advances are not made till after the commencement of the building.<sup>2</sup>

Under still other statutes, a *bona fide* mortgagee is regarded as a purchaser who is not affected by a mechanic's lien unless he has received actual or constructive notice of it in a manner prescribed; and the fact that the mechanic is at work upon the building at the time of the mortgage is not actual notice of his lien.<sup>3</sup>

trict of Columbia, Idaho, Maryland, Massachusetts, Nevada, New York, Oregon, South Carolina, Utah, Washington. Jones on Liens, § 1460.

In the following States mechanics' liens attach in preference to mortgages or other incumbrances made subsequently to the commencement of the building or improvement: Alabama, Arkansas, District of Columbia, Idaho, Iowa, Kansas, Maryland, Missouri, Nevada, New Mexico, North Dakota, Oklahoma T., Oregon, Pennsylvania, Rhode Island, South Dakota, Utah, Washington, Wisconsin, Wyoming. Jones on Liens, § 1469.

In the following States mechanics' liens

are preferred to mortgages, and incumbrances which attach subsequently to the commencement of the work or the furnishing of the materials: Arizona, California, Colorado, Connecticut, Delaware, Michigan, Montana, North Carolina, Ohio, Texas, Virginia, West Virginia. Jones on Liens, § 1480.

<sup>1</sup> Davis v. Bilsland, 18 Wall. 659; Neilson v. Iowa Eastern Ry. Co. 44 Iowa, 71; Equitable Life Ins. Co. v. Slye, 45 Iowa, 615.

<sup>2</sup> Wisconsin Planing Mill Co. v. Schuda, 72 Wis. 277, 39 N. W. Rep. 558.

<sup>3</sup> Foushee v. Grigsby, 12 Bush, 75; Gere v. Cushing, 5 Bush, 304.

This lien is waived by taking a mortgage<sup>1</sup> or other security for the amount for which a lien might be claimed.

**1431.** The commencement of a building, within the meaning of these statutes, is the first labor done on the ground which is made the foundation of the building, and forms part of the work suitable and necessary for its construction.<sup>2</sup> It is some work or labor on the ground, such as beginning to dig the foundation, which every one can see and recognize as the commencement of a building; and the work, moreover, must be done with the intention thus formed of continuing it to completion.<sup>3</sup>

When a building is changed or enlarged, the lien attaches from the commencement of the alteration on the ground, and is subject to liens that had previously attached.<sup>4</sup> As against a mortgage the lien of which attached after such commencement of a building or of alterations and additions to it,<sup>5</sup> a lien can be supported for machinery and fixtures afterwards furnished, although not upon the ground at the time, and the work was not done there, but at a distance in shops. When additions to an old building are in their extent and value significant enough to give notice to purchasers and creditors of the change in the character of the property, the additions so made, the work and materials furnished therefor, and the machinery placed therein, are subjects of mechanics' liens as new buildings.<sup>6</sup>

In computing the time after the completion of work done for which a mechanic's lien is claimed for filing a notice of the lien, occasional repairs made subsequently to the completion of the work cannot be added to the work done months before, so as to render the whole work one continued performance, for which a single lien can be claimed within the time limited by statute.<sup>7</sup>

**1432.** A mechanic's lien for repairing or enlarging a building is not paramount to an existing mortgage upon it, even where such lien relates back to the commencement of the work upon a building, so that, when a mortgage covers a building par-

<sup>1</sup> *Trullinger v. Kofoed*, 7 Oreg. 228, 33 Am. Rep. 708. 36 Md. 65, 70; *Jean v. Wilson*, 38 Md. 288, 296.

<sup>2</sup> *Brooks v. Lester*, 36 Md. 65, 70. \* *Norris's Appeal*, 30 Pa. St. 122.  
*Conrad v. Starr*, 50 Iowa, 470, 13 West. Jur. 210; *Pennock v. Hoover*, 5 Rawle, 291. <sup>5</sup> *Parrish and Hazard's Appeal*, 83 Pa. St. 111.

<sup>6</sup> *Parrish and Hazard's Appeal*, 83 Pa. St. 111.

<sup>7</sup> *Davis v. Alvord*, 94 U. S. 545.

tially erected, a lien for work done or materials furnished in completing the building would relate back to the time of the commencement of the building, and would take precedence of the mortgage.<sup>1</sup> This rule prevails although the building be changed so that very little of the original structure remains; as, for instance, where there was a mortgage upon a paper-mill which was out of repair and was almost wholly removed, and a new one was erected in its place, and this was supplied with new machinery.<sup>2</sup>

**1433. Enforcement of the lien.**<sup>3</sup>—Mechanics and laborers asserting a lien upon real property for their work, and claiming priority over mortgagees and others who have acquired interest in the property, must make strict proof of all that is essential to the creation of the lien; such, for instance, as proof of the commencement of the work, of its character, and of its completion. The commencement of the work must be shown, for from that date the lien attaches, if at all. The character of the work must be shown, for it is not for all kinds of work that a lien is allowed. The completion of the work must be shown, for notice of claiming a lien must be filed.<sup>4</sup> Whether the work relied on as having been done prior to the mortgage is to be regarded as a *commencement of the building* is a question of fact, to be determined by the evidence.<sup>5</sup> Whether a mortgage must be recorded before the building is commenced, in order to have priority, depends upon the terms of the statute.<sup>6</sup>

**1434. In several States a prior mortgage retains its priority upon the land only, the lien having priority upon the buildings.**<sup>7</sup> The manner of establishing the priority of a mechanic's lien upon a *building* over a preëxisting incumbrance upon the land, is by a sale and removal of the building; and, when the nature of the improvement is such that it could not be removed, the lien is necessarily postponed to the prior incumbrance upon the land.<sup>8</sup> The lien of the mechanic cannot exceed the right of the

<sup>1</sup> Getchell v. Allen, 34 Iowa, 559; Neilson v. Iowa Eastern Ry. Co. 44 Iowa, 71.

<sup>2</sup> Equitable Life Ins. Co. v. Slye, 45 Iowa, 615.

<sup>3</sup> Jones on Liens, §§ 1553-1617.

<sup>4</sup> Davis v. Alvord, 94 U. S. 545.

<sup>5</sup> Kelly v. Rosenstock, 45 Md. 389.

<sup>6</sup> Jones on Liens, § 1460; Brooks v.

Lester, 36 Md. 65; Meyer v. Construction Co. 100 U. S. 457.

<sup>7</sup> Jones on Liens, § 1462. These States are: Alabama, Colorado, Illinois, Iowa, Michigan, Missouri, Montana, North Dakota, Oklahoma T., Oregon, South Dakota, Texas, Wyoming.

<sup>8</sup> Conrad v. Starr, 50 Iowa, 470, 13 West. Jur. 210.



owner who contracted for the improvements upon the land, and therefore, where the owner's interest was an estate in fee of one undivided third part of the property, and a life estate in the remaining two thirds, the lien of the mechanic was limited to the same interests. The owner of such a part interest in the land would not have the power to remove a building erected by him upon it, and a purchaser under a mechanic's lien would acquire no greater right to remove it.<sup>1</sup> If the owner's interest in the building were such that he might remove it, the right of removal would pass by sale under the mechanic's lien; subject, however, to the qualification that the right of removal depends upon the fact whether the building upon which the materials were furnished and the work done is so far an independent structure as to be capable of being removed without material injury to that which would remain.<sup>2</sup> If the building cannot be removed without materially injuring or altogether destroying its value, — if it be, for instance, a building of brick, three stories high, with a stone foundation; or if the interest of the owner be such that he had no right of removal as against others, — the lien of a mechanic cannot be enforced through a removal of the building.<sup>3</sup>

A prior mortgage, though given to secure future advances, has precedence.<sup>4</sup> A mortgage for purchase-money has priority.<sup>5</sup>

## VI. *Requisites as to Execution and Acknowledgment.*

**1435. Generally.** — The first requisite to the valid record of any deed is that it shall be executed according to law. If defectively executed, it is not generally entitled to be recorded; but even if it is recorded it is not constructive notice, so as to vest in the grantee or mortgagee any interest in the premises as against subsequent purchasers in good faith without notice.<sup>6</sup> Thus a

<sup>1</sup> Jessup v. Stone, 13 Wis. 466; Conrad v. Starr, 50 Iowa, 470, 13 West. Jur. 210.

<sup>2</sup> O'Brien v. Pettis, 42 Iowa, 293.

<sup>3</sup> Conrad v. Starr, 50 Iowa, 470, 13 West. Jur. 210.

<sup>4</sup> Lyle v. Ducomb, 5 Binn. 585.

<sup>5</sup> Campbell's Appeal, 36 Pa. St. 247; Clark v. Butler, 32 N. J. Eq. 664.

<sup>6</sup> Schults v. Moore, 1 McLean, 520; Strong v. Smith, 3 McLean, 362; Lewis v. Baird, 3 McLean, 56. California: Mc-

Minn v. O'Connor, 27 Cal. 238. Connecticut: Carter v. Champion, 8 Conn. 549, 21 Am. Dec. 695; Sumner v. Rhodes, 14 Conn. 135. Florida: Keech v. Enriquez, 28 Fla. 597, 10 So. Rep. 91. Georgia: Herndon v. Kimball, 7 Ga. 432, 50 Am. Dec. 406. Iowa: Barney v. Little, 15 Iowa, 527; Reynolds v. Kingsbury, 15 Iowa, 238. Maine: Brown v. Lunt, 37 Me. 423; De Witt v. Moulton, 17 Me. 418. Maryland: Cockey v. Milne, 16 Md. 200; Johns v. Reardon, 3 Md. Ch. 57. Massa-

deed or mortgage executed and recorded with the name of the grantee omitted does not impart constructive notice of the existence of the deed or mortgage.<sup>1</sup> The record of a deed, which appears on its face to have been properly executed and acknowledged, is evidence that the deed was in fact so executed, though the deed, by reason of extrinsic facts, may be void or voidable.<sup>2</sup> As between the parties, as already noticed, equity will give the instrument effect according to the intention of the parties.<sup>3</sup> If a conveyance defectively executed be afterwards reformed, it will not affect the interest of one who has in the mean time purchased in good faith, and, according to some authorities, will not affect a lien obtained in the mean time by an attachment, or judgment, or a levy of execution. If for any reason a deed be not executed, acknowledged, or recorded according to the statutory requirements, yet, if it be shown that a subsequent purchaser or creditor had actual notice of the deed, or must be presumed to have had such notice of it, from the defective record, he is chargeable with notice, as in other cases.<sup>4</sup>

Inasmuch as the registration of a deed or mortgage is solely

chusetts: *Sigourney v. Larned*, 10 Pick. 72; *Blood v. Blood*, 23 Pick. 80. **Michigan**: *Galpin v. Abbott*, 6 Mich. 17. **Minnesota**: *Parret v. Shaubhut*, 5 Minn. 323, 80 Am. Dec. 424; *Prentice v. Duluth Storage Co.* 58 Fed. Rep. 437; *Cogan v. Cook*, 22 Minn. 137, 143. **Mississippi**: *Work v. Harper*, 24 Miss. 517; *Bass v. Estill*, 50 Miss. 300. **Missouri**: *Bishop v. Schneider*, 46 Mo. 472, 2 Am. Rep. 533; *Stevens v. Hampton*, 46 Mo. 404. **New York**: *Fryer v. Rockefeller*, 63 N. Y. 268; *Frost v. Beekman*, 1 Johns. (Ch.) 288, 300. **North Carolina**: *Todd v. Outlaw*, 79 N. C. 235. **Ohio**: *White v. Denman*, 1 Ohio St. 110. **Pennsylvania**: *Green v. Drinker*, 7 W. & S. 440; *McKean v. Mitchell*, 35 Pa. St. 269, 78 Am. Dec. 335. **Tennessee**: *Johnson v. Walton*, 1 Sneed, 258. **Texas**: *Holliday v. Cromwell*, 26 Tex. 188. **Vermont**: *Pope v. Henry*, 24 Vt. 560; *Isham v. Bennington Iron Co.* 19 Vt. 230. **Wisconsin**: *Ely v. Wilcox*, 20 Wis. 523, 91 Am. Dec. 436; *Pringle v. Dunn*, 37 Wis. 449, 19 Am. Rep. 772.

Thus, in Louisiana, to create a conventional mortgage, two things are essential, namely, there must be an intention by the parties to create a mortgage; and to give effect to that intention it must be expressed with sufficient clearness to serve as notice to third persons when the instrument is recorded. *Benjamin's Succession*, 39 La. Ann. 612, 2 So. Rep. 187. See, also, *Howe v. Powell*, 40 La. Ann. 307, 4 So. Rep. 450.

<sup>1</sup> *Disque v. Wright*, 49 Iowa, 538, 13 West. Jur. 34, 158.

<sup>2</sup> *Clague v. Washburn*, 42 Minn. 371, 44 N. W. Rep. 130. And see *Stevens v. Hampton*, 46 Mo. 404; *Stevens v. Morse*, 47 N. H. 532; *Choteau v. Jones*, 11 Ill. 300, 50 Am. Rep. 460.

<sup>3</sup> *Van Thorniley v. Peters*, 26 Ohio St. 471; *Schaidt v. Blaul*, 66 Md. 141.

<sup>4</sup> *Hastings v. Cutler*, 24 N. H. 481; *Kerns v. Swope*, 2 Watts, 75, dictum of C. J. Gibson. But it would seem that actual knowledge of the deed must be proved, and not merely presumed.

for the benefit and protection of the grantee, and rests wholly in his election, he cannot, in the absence of an agreement express or implied to the contrary, hold the grantor liable for the registration fees.<sup>1</sup>

1436. The description of the property conveyed or incumbered by mortgage must be such as reasonably to enable subsequent purchasers to identify the land; otherwise the record of the conveyance is not constructive notice.<sup>2</sup> Registration is constructive notice only of what appears on the face of the deed. It is not notice of what one might possibly ascertain by such inquiries as an examination of the record might induce a prudent man to make.<sup>3</sup> A conveyance of lands without description of boundary or location, but merely as "all other lands owned by the vendor" in a State named, is inoperative as notice to the public of any particular tract conveyed, if not void for want of description.<sup>4</sup> If a subsequent mortgagee or purchaser has notice of a mistake in the description of a prior conveyance, as, for instance, that the lot was described as number "eighteen" instead of "eight," the correct number, such mortgagee or purchaser will take subject to the prior conveyance, in the same way that he would had the description been correctly given;<sup>5</sup> and the subsequent mortgagee has constructive notice of the mortgage as it was intended

<sup>1</sup> *Simon v. Sewell*, 64 Ala. 241.

<sup>2</sup> *Bright v. Buckman*, 39 Fed. Rep. 243; *Barrows v. Baughman*, 9 Mich. 213; *Rodgers v. Kavanaugh*, 24 Ill. 583; *Eggleston v. Watson*, 53 Miss. 339; *Ripley v. Harris*, 3 Biss. 199; *Goodbar v. Dunn*, 61 Miss. 618; *Bailey v. Galpin*, 40 Minn. 319, 41 N. W. Rep. 1054; *Simmons v. Fuller*, 17 Minn. 485; *Roberts v. Grace*, 16 Minn. 126; *Peters v. Ham*, 62 Iowa, 656, 18 N. W. Rep. 296; *Nelson v. Wade*, 21 Iowa, 49; *Port v. Embree*, 54 Iowa, 14, 6 N. W. Rep. 83; *Halloway v. Platner*, 20 Iowa, 121, 89 Am. Dec. 517; *Stewart v. Huff*, 19 Iowa, 557; *Warren v. Syme*, 7 W. Va. 474; *Banks v. Ammon*, 27 Pa. St. 172; *Murphy v. Hendricks*, 57 Ind. 593; *Porter v. Bryne*, 10 Ind. 146, 71 Am. Dec. 305; *Mundy v. Vawter*, 3 Gratt. 518; *Chamberlain v. Bell*, 7 Cal. 292, 68 Am. Dec. 260; *Adams v. Edgerton*, 48 Ark. 419, 3 S. W.

Rep. 628; *Green v. Witherspoon*, 37 La. Ann. 751; *Waters v. Spofford*, 58 Tex. 115; *Carter v. Hawkins*, 62 Tex. 393; *Laughlin v. Tips* (Tex. Civ. App.), 28 S. W. Rep. 551; *Lally v. Holland*, 1 Swan, 396; *Thorp v. Merrill*, 21 Minn. 336; *Stead v. Grosfield*, 67 Mich. 289, 34 N. W. Rep. 871.

<sup>3</sup> *McLouth v. Hurt*, 51 Tex. 115; *Taylor v. Harrison*, 47 Tex. 454; *Laughlin v. Tips* (Tex. Civ. App.), 28 S. W. Rep. 551; *Gulf, C. & C. Ry. Co. v. Gill*, 86 Tex. 284, 24 S. W. Rep. 502.

<sup>4</sup> *Green v. Witherspoon*, 37 La. Ann. 751; *Mundy v. Vawter*, 3 Gratt. 518; *Herman v. Deming*, 44 Conn. 124.

<sup>5</sup> *Warburton v. Lauman*, 2 Greene (Iowa), 420; *Cox v. Esteb*, 81 Mo. 393; *Hoopeston Building Asso. v. Green*, 16 Ill. App. 204; *Duncan v. Miller*, 64 Iowa, 223, 20 N. W. Rep. 161; *Peters v. Ham*, 62 Iowa, 656, 18 N. W. Rep. 296.

to be given, when the premises are well defined and well known to the parties, and a notice on the margin of a prior defective mortgage referred to a prior deed in which the land was correctly described.<sup>1</sup> The mortgagee cannot enforce his mortgage upon the land actually described when he knows that by mistake this particular land was described in place of another lot intended to be described.<sup>2</sup>

But when the grantee has no notice of any mistake, and there is no uncertainty on the face of the deed, though in fact the land described is, through mistake, not the land intended to be conveyed, the record is notice of a conveyance of the land actually described, not of that intended to be described.<sup>3</sup>

A mortgage described certain lots by a town plat which was not recorded, but a plat was subsequently recorded upon which the same lots were described by different numbers. It was held that the record was not enough to put a subsequent purchaser upon inquiry, and that he was not affected with constructive notice of the mortgage.<sup>4</sup>

**1437.** When a description in a deed or mortgage is erroneous, and it is apparent what the error is, the record is constructive notice of the deed or mortgage of the lot intended to be described.<sup>5</sup> And so the record of a deed, describing the premises by an impossible sectional number, is sufficient to put a purchaser from the same grantor upon inquiry, and may charge him with notice of the grant actually made or intended to be made.<sup>6</sup> Parol

<sup>1</sup> *Bent v. Coleman*, 89 Ill. 364, 7 Reporter, 366. And see *Wallace v. Furber*, 62 Ind. 103; *Newman v. Tymeson*, 13 Wis. 172, 80 Am. Dec. 735.

<sup>2</sup> *Northrup v. Hottenstein*, 38 Kans. 263, 16 Pac. Rep. 445.

The clause creating the lien prevails as to the interest conveyed. Thus a mortgage of an undivided fourth part of certain lands is not enlarged by a recital in the description as being one undivided half part.

On the other hand, the interest conveyed by a mortgage is not diminished by an incidental recital as to the source of title. Thus a mortgage of "a certain tract of land, being the same premises conveyed to me by a deed referred to," the mort-

gagor then owning the entire tract, though only an undivided half of it was conveyed by the deed referred to, is a mortgage of the whole land, and not merely of an undivided half of it, in the absence of evidence of any intention to limit the conveyance in this way. *Morse v. Morse*, 58 N. H. 391.

<sup>3</sup> *Sanger v. Craigue*, 10 Vt. 555; *Wait v. Smith*, 92 Ill. 385.

<sup>4</sup> *Stewart v. Huff*, 19 Iowa, 557.

<sup>5</sup> *Anderson v. Baughman*, 7 Mich. 69, 74 Am. Dec. 699; *Tousley v. Tousley*, 5 Ohio St. 78; *People v. Storms*, 97 N. Y. 364; *Wolfe v. Dyer*, 95 Mo. 545, 8 S. W. Rep. 551.

<sup>6</sup> *Merrick v. Wallace*, 19 Ill. 486, 498; *Carter v. Hawkins*, 62 Tex. 393.

evidence is admissible to identify the land intended when there is an ambiguity or uncertainty in the description.<sup>1</sup>

A purchaser who is able from his knowledge of the property to interpret an erroneous description, and give it the meaning intended, is charged with notice from the record of it.<sup>2</sup>

But although a mistake in description be such that the conveyance would be invalidated as against a subsequent purchaser, yet it has been held that a subsequent judgment lien will not for this reason become a paramount lien upon the land intended to be described.<sup>3</sup> Even where a parcel of land which the parties intended to include in the conveyance was wholly omitted in the description, the deed may be reformed in chancery, and the omitted tract included in the conveyance free from any judgment lien which has in the mean time attached to the debtor's real estate.<sup>4</sup>

If the description is such as reasonably to put one upon inquiry as to the property intended to be conveyed, and to lead him to ascertain what that property is, the record will afford constructive notice of a conveyance of that property.<sup>5</sup>

**1438.** The record of a deed without the signature of the grantor is not constructive notice; and this is so though the instrument was in fact signed, but the signature was omitted by mistake from the record.<sup>6</sup> A signature is binding if made at the proper time and duly acknowledged, whether signed by the person owning the name, or by some one else with his consent.<sup>7</sup>

If the name of the mortgagee be by mistake written in the blank for the mortgagor, and the name of the mortgagor in that left for the mortgagee, but the mortgage is signed by the right

<sup>1</sup> *Tranum v. Wilkinson*, 81 Ala. 408, 1 So. Rep. 201; *Salisbury v. Andrews*, 19 Pick. 250, 252.

<sup>2</sup> *Bright v. Buckman*, 39 Fed. Rep. 243; *Erickson v. Rafferty*, 79 Ill. 209; *Carter v. Hawkins*, 62 Tex. 393.

<sup>3</sup> *Welton v. Tizzard*, 15 Iowa, 495; *Swarts v. Stees*, 2 Kans. 236, 85 Am. Dec. 588; *Gillespie v. Moon*, 2 Johns. Ch. 585, 7 Am. Dec. 559, per Kent, Chancellor; *White v. Wilson*, 6 Blackf. 448, 39 Am. Dec. 437.

<sup>4</sup> *White v. Wilson*, 6 Blackf. 448.

<sup>5</sup> *Citizens' Nat. Bank v. Dayton*, 116 Ill. 257, 4 N. E. Rep. 492; *Partridge v. Smith*, 2 Biss. 183; *Tranum v. Wilkinson*,

81 Ala. 408; *Anderson v. Baughman*, 7 Mich. 69, 74 Am. Dec. 699; *Gouverneur v. Titus*, 6 Paige, 347; *Tousley v. Tousley*, 5 Ohio St. 78; *Dargin v. Beeker*, 10 Iowa, 571; *Bent v. Coleman*, 89 Ill. 364, 7 Reporter, 366; *Erickson v. Rafferty*, 79 Ill. 209; *Merrick v. Wallace*, 19 Ill. 486; *Roberts v. Bauer*, 35 La. Ann. 453; *Nye v. Moody*, 70 Tex. 434, 8 S. W. Rep. 606; *Carter v. Hawkins*, 62 Tex. 393; *Knox Co. v. Brown*, 103 Mo. 223, 15 S. W. Rep. 382.

<sup>6</sup> See §§ 1000-1009; *Shepherd v. Burkhalter*, 13 Ga. 443, 58 Am. Dec. 523.

<sup>7</sup> *Johnson v. Van Velsor*, 43 Mich. 208, 5 N. W. Rep. 265.

party and purports to secure a debt from the party signing to the other, and is acknowledged by the party signing, the mistake in the transposition of the names of the parties being palpable, its record will be notice to subsequent purchasers from the mortgagor of the mistake.<sup>1</sup>

A deed signed by a wrong name, or a name by which the grantor is not customarily known, imparts no notice. Such is the case, if a married woman executes a deed under the name she bore prior to her marriage, without mention of her married name.<sup>2</sup>

**1439.** Conveyances must generally be executed under seal to entitle them to be recorded.<sup>3</sup> In several States the use of a seal has been wholly dispensed with by statute. In others a scroll is given the same effect as a seal.<sup>4</sup> But where the use of a seal or of its equivalent is required, an instrument purporting to be a mortgage, but not executed under seal, is not entitled to be recorded; and if it be copied into the records, it does not impart notice to subsequent purchasers or incumbrancers.<sup>5</sup> A mortgage without a seal, however, will operate as an equitable mortgage, and will prevail against a subsequent agreement to give a mortgage,<sup>6</sup> or against a subsequent purchaser with notice of the existence of the unsealed mortgage.<sup>7</sup>

If the instrument was sealed at the time of its execution, the subsequent detachment of the seal does not invalidate it, unless it be proved that the seal was detached before the instrument reached the clerk's office for record; and the burden of such proof is upon the party who attacks the validity of the instrument.<sup>8</sup>

**1440.** A seal need not be copied into the record. All that is necessary is, that the record should afford some indication that

<sup>1</sup> *Beaver v. Slanker*, 94 Ill. 175, 176.

<sup>2</sup> *Draude v. Rohrer Manuf. Co.* 9 Mo. App. 249.

<sup>3</sup> See § 1060; *Hebron v. Centre Harbor*, 11 N. H. 571; *Bowers v. Oyster*, 3 Pa. 239; *In re St. Helen Mill Co.* 3 Sawyer, 88. And see *Woods v. Wallace*, 22 Pa. St. 171; *Hughes v. Tong*, 1 Mo. 389; *Moore v. Madden*, 7 Ark. 530, 46 Am. Dec. 298.

<sup>4</sup> §§ 1068-1072; *Jones's Forms in Conveyancing*, pp. 58, 59.

<sup>5</sup> *Racouillat v. Sansevain*, 32 Cal. 376;

*Racouillat v. Rene*, 32 Cal. 450; *Arthur v. Screven*, 39 S. C. 77, 17 S. E. Rep. 640.

<sup>6</sup> *Portwood v. Outton*, 3 B. Mon. 247.

<sup>7</sup> *Westerly Sav. Bank v. Stillman Manuf. Co.* 16 R. I. 497, 17 Atl. Rep. 918; *Harrington v. Fortner*, 58 Mo. 468; *McClurg v. Phillips*, 57 Mo. 214.

<sup>8</sup> *Van Riswick v. Goodhue*, 50 Md. 57.

the instrument was under seal.<sup>1</sup> The fact that the deed purports to be signed and sealed affords a presumption that it was sealed when recorded.<sup>2</sup> But if the record does not show a copy of the seal, or anything to indicate that there was a seal upon the original deed, the presumption is that there was no seal to the deed when it was executed.<sup>3</sup> The same rule applies to copying the official seal to the certificate of acknowledgment, or the seal of a clerk of court to his certificate authenticating the official character of the acknowledging officer.<sup>4</sup> All that is necessary is, that the record should show in some manner that such a seal was attached to the certificate.<sup>5</sup> A statement in the body of the certificate that the officer had affixed his seal of office raises a presumption that such was the fact.<sup>6</sup> There is always a presumption that an officer required to affix a seal has performed his official duty.<sup>7</sup>

**1441.** The record of a deed not executed in compliance with a statute requiring that it shall be attested by two witnesses is not constructive notice,<sup>8</sup> though the defect be not ap-

<sup>1</sup> §§ 1075-1078; *Smith v. Dall*, 13 Cal. 510; *Jones v. Martin*, 16 Cal. 165; *Hedden v. Overton*, 4 Bibb, 406; *Sneed v. Ward*, 5 Dana, 187; *Summer v. Mitchell*, 29 Fla. 179, 10 So. Rep. 56, 30 Am. St. Rep. 106, 14 L. R. A. 815; *Geary v. Kansas City*, 61 Mo. 378; *Hammond v. Gordon*, 93 Mo. 223, 6 S. W. Rep. 93; *Griffin v. Sheffield*, 38 Miss. 359, 77 Am. Dec. 646; *Witt v. Harlan*, 66 Tex. 660, 2 S. W. Rep. 41; *Gale v. Shillock*, 4 Dak. 182, 29 N. W. Rep. 661, 666; *Aycock v. Raleigh, &c. R. Co.* 89 N. C. 323; *Beardsley v. Day*, 52 Minn. 451, 55 N. W. Rep. 46.

<sup>2</sup> *Smith v. Dall*, 13 Cal. 510; *Grown v. Behn*, 10 B. Mon. 383; *Heath v. Big Falls Cotton Mills*, 115 N. C. 202, 20 S. E. Rep. 369; *Beardsley v. Day*, 52 Minn. 451, 55 N. W. Rep. 46.

<sup>3</sup> *Switzer v. Knapps*, 10 Iowa, 72, 74 Am. Dec. 375.

<sup>4</sup> *Thorn v. Mayer*, 12 Misc. Rep. 487, 33 N. Y. Supp. 664.

<sup>5</sup> *Addis v. Graham*, 88 Mo. 197; *Geary v. Kansas City*, 61 Mo. 378; *Griffin v. Sheffield*, 38 Miss. 359, 77 Am. Dec. 646; *Jones v. Martin*, 16 Cal. 165; *Smith v. Dall*, 13 Cal. 510; *Ballard v. Perry*, 28

Tex. 347, 364; *Hadden v. Larned*, 87 Ga. 634, 13 S. E. Rep. 806.

<sup>6</sup> *Addis v. Graham*, 88 Mo. 197; *Norfleet v. Russell*, 64 Mo. 176; *Geary v. Kansas City*, 61 Mo. 378; *Griffin v. Sheffield*, 38 Miss. 359, 77 Am. Dec. 646.

<sup>7</sup> *Beardsley v. Day*, 52 Minn. 451, 55 N. W. Rep. 46; *Starkweather v. Martin*, 28 Mich. 471, 480. In *Equitable Mortg. Co. v. Kempner*, 84 Tex. 102, 19 S. W. Rep. 358, it was held that where an original deed is produced, with the seal of the officer taking the acknowledgment affixed thereto, and it is proved that such officer affixed his seal to the certificate at the time the acknowledgment was taken, the deed is properly of record, and admissible in evidence, although the county records show, in place of the word "Seal" opposite the notary's certificate of acknowledgment of this deed, the words "No seal on."

<sup>8</sup> See § 1086; *Thompson v. Morgan*, 6 Minn. 292; *Harper v. Barsh*, 10 Rich. Eq. 149; *New York Life Ins. & Trust Co. v. Staats*, 21 Barb. 570; *Van Thorniley v. Peters*, 26 Ohio St. 471; *Gardner v. Moore*, 51 Ga. 268; *Ross v. Worthing-*

parent on the face of the instrument, one of the witnesses being the grantor's wife.<sup>1</sup> Upon the same principle the record of a mortgage acknowledged before one justice of the peace, when a statute required it to be made before two justices, does not operate as notice.<sup>2</sup> But a mortgage attested by one witness under such a statute is good in equity between the parties,<sup>3</sup> and as against all others, whether purchasers or creditors, who had actual notice of the existence of the mortgage.<sup>4</sup> When a statute provides that a deed, to be recordable, shall be attested by two witnesses, and a mortgage so witnessed was by mistake recorded without any copy of the attestation, it was held that the registry was not constructive notice. The recording of the instrument not being in compliance with the law, the registration is a mere nullity; and a subsequent purchaser is affected only by such actual notice as would amount to a fraud.<sup>5</sup>

**1442.** The recording acts generally prescribe certain formalities in the execution of a deed which must be complied with to entitle it to be recorded. An acknowledgment or proof of the deed before some officer is in most of the States an essential prerequisite. Without an acknowledgment, or with one that is defective, the record of the deed is unauthorized and is not constructive notice.<sup>6</sup> It has been held, however, that where an

ton, 11 Minn. 438, 88 Am. Dec. 95; *White v. Denman*, 16 Ohio, 59, 1 Ohio St. 110; *Hodgson v. Butts*, 3 Cranch, 140; *Frostburg Mut. Building Asso. v. Brace*, 51 Md. 508; *Potter v. Stransky*, 48 Wis. 235, 4 N. W. Rep. 95; *Morrill v. Morrill*, 53 Vt. 74, 38 Am. Rep. 659; *Galpin v. Abbott*, 6 Mich. 17, 37; *Batte v. Stone*, 4 Yerg. 168; *White v. Magarahan*, 87 Ga. 217, 13 S. E. Rep. 509; *Hendricks v. Huffmeyer* (Tex. Civ. App.), 27 S. W. Rep. 777.

It has been held, however, that, under a statute which does not actually declare a deed without attestation invalid, a deed not properly attested, when actually acknowledged and recorded, affords constructive notice of the actual contents of the record; but not of the deed as actually written, when there was a mistake in recording it. *Brydon v. Campbell*, 40 Md. 331.

<sup>1</sup> *Carter v. Champion*, 8 Conn. 549, 21 Am. Dec. 695.

<sup>2</sup> *Dufphey v. Frenaye*, 5 St. & P. 215. And see *Munn v. Lewis*, 2 Port. 24.

<sup>3</sup> *Moore v. Thomas*, 1 Oreg. 201; *Hastings v. Cutler*, 24 N. H. 481.

<sup>4</sup> *Sanborn v. Robinson*, 54 N. H. 239; *Hastings v. Cutler*, 24 N. H. 481; *Morrill v. Morrill*, 53 Vt. 74.

<sup>5</sup> *Pringle v. Dunn*, 37 Wis. 449, 19 Am. Dec. 772.

<sup>6</sup> See §§ 1109-1113. **Alabama:** *Dufphey v. Frenaye*, 5 St. & P. 215. **Arkansas:** *Jacoway v. Gault*, 20 Ark. 190, 73 Am. Dec. 494; *Keech v. Enriquez*, 28 Fla. 597, 10 So. Rep. 91. **Iowa:** *Jones v. Berkshire*, 15 Iowa, 248, 83 Am. Dec. 412; *Willard v. Cramer*, 36 Iowa, 22. **Kansas:** *Meskimen v. Day*, 35 Kans. 46, 10 Pac. Rep. 14. Though near a former statute, acknowledgment was not a prerequisite to registration. *Brown v. Simpson*, 4 Kans. 76; *Simpson v. Munde*, 3 Kans. 172; *Fisher v. Cowles*, 41 Kans. 418, 21 Pac. Rep. 228. **Maryland:** *Sitler*



acknowledgment is in due form, the only defect in it being a latent one, as, for instance, being taken by the officer out of his jurisdiction, the record of the mortgage is notice to subsequent purchasers in favor of one holding an assignment of the mortgage duly recorded.<sup>1</sup> The purpose of this requirement is to insure the authenticity of the instrument before admitting it of record. The certificate must be made and attested substantially in the form given by statute; or, where no special form is prescribed, then in accordance substantially with the provisions of the statute respecting it; but it need not be in the exact words of the form or of the statute.<sup>2</sup> If the statute requires the officer taking the acknowledgment to certify the same under his seal, a certificate not under seal is not sufficient to admit the deed to record, and the record of such deed is not notice of it.<sup>3</sup> In aid of the certificate reference may be had<sup>4</sup> to the instrument itself, or to the certificate of the recorder, as, for instance, to fix the date of acknowledgment, in compliance with a statute providing that the certificate of acknowledgment shall contain the time when it is taken.<sup>5</sup> When

*v. McComas*, 66 Md. 135, 6 Atl. Rep. 527; *Johns v. Scott*, 5 Md. 81; *Price v. McDonald*, 1 Md. 403, 54 Am. Dec. 657. **Massachusetts**: *Blood v. Blood*, 23 Pick. 80. **Minnesota**: *Parret v. Shaubhut*, 5 Minn. 323, 80 Am. Dec. 424; *Baze v. Asper*, 6 Minn. 220. **Mississippi**: *Work v. Harper*, 24 Miss. 517; *Bass v. Estill*, 50 Miss. 300. **Missouri**: *Bishop v. Schneider*, 46 Mo. 472, 2 Am. Rep. 533; *Stevens v. Hampton*, 46 Mo. 404. **Nebraska**: *Irwin v. Welch*, 10 Neb. 479. **New York**: *Frost v. Beekman*, 1 Johns. Ch. 288. **North Carolina**: *Todd v. Outlaw*, 79 N. C. 235. **Ohio**: *White v. Denman*, 1 Ohio St. 110. **Oregon**: *Fleschner v. Sumpter*, 12 Oreg. 161, 6 Pac. Rep. 506. **Pennsylvania**: *Kerns v. Swope*, 2 Watts, 75; *Heister v. Fortner*, 2 Binn. 40, 44, 4 Am. Dec. 417; *Barney v. Button*, 2 Watts, 31. **South Carolina**: *Woolfolk v. Graniteville Manuf. Co.* 22 S. C. 332. **Texas**: *Weber v. Moss*, 21 S. W. Rep. 609; *Hill v. Taylor*, 77 Tex. 295, 14 S. W. Rep. 366. **Vermont**: *Wood v. Cochrane*, 39 Vt. 544. **Virginia**: *Carper v. McDowell*, 5 Gratt. 212, 233; *Raines v. Walker*, 77 Va. 92. **West Virginia**: *Cox v. Wayt*, 26 W. Va.

807. **Wisconsin**: *Girardin v. Lampe*, 58 Wis. 267, 16 N. W. Rep. 614; *Pringle v. Dunn*, 37 Wis. 449, 19 Am. Rep. 772.

*In the following States acknowledgment is not a prerequisite to registration*: **Alabama**: Code 1886, § 1797. **Colorado**: Annot. Stats. 1891, p. 600, § 448. **Connecticut**: G. S. 1888, § 2964. **Illinois**: A record of a conveyance, though not proven or acknowledged, operates as constructive notice to subsequent purchasers and creditors. R. S. 1889, ch. 30, § 20; *Reed v. Kemp*, 16 Ill. 445; *Choteau v. Jones*, 11 Ill. 300, 50 Am. Dec. 460; *Morrison v. Brown*, 83 Ill. 562; *Stebbins v. Duncan*, 108 U. S. 32, 2 S. Ct. 313. **Michigan**: 2 Annot. Stats. 1882, § 5727. **Washington**: Code 1881, § 2323.

<sup>1</sup> *Heilbrun v. Hammond*, 13 Hun, 474.

<sup>2</sup> *Alvis v. Morrison*, 63 Ill. 181, 14 Am. Rep. 117; *Meriam v. Harsen*, 2 Barb. Ch. 232; *Duval v. Covenhoven*, 4 Wend. 561; *Allen v. Lenoir*, 53 Miss. 321.

<sup>3</sup> *Herd v. Cist* (Ky.), 12 S. W. Rep. 466; *Masterson v. Todd*, 6 Tex. Civ. App. 131, 24 S. W. Rep. 682.

<sup>4</sup> *Carpenter v. Dexter*, 8 Wall. 513.

<sup>5</sup> *Kelly v. Rosenstock*, 45 Md. 389.

a statute requires the acknowledgment of a married woman to be taken separate and apart from her husband, the record is no notice of a lien on her estate unless the acknowledgment is so taken.<sup>1</sup>

If the acknowledgment be by an agent, the certificate should show with reasonable clearness that the acknowledgment was made on behalf of the constituent, or as being his deed.<sup>2</sup> A mortgage recorded without having been acknowledged creates no valid lien as against creditors and subsequent purchasers, whether they have actual notice of the mortgage or not; but it is good as between the parties, and on breach of the condition of payment may be enforced against the mortgagor, and on his death against his administrator, in preference to his general creditors.<sup>3</sup>

**1443.** The registration of a conveyance, acknowledged or proved before an officer who has not been duly appointed or qualified, has no effect in rendering it operative against subsequent purchasers.<sup>4</sup> It is equally necessary that the officer should act within the limits of his jurisdiction.<sup>5</sup> A judge, or commissioner, or other officer empowered to take an acknowledgment, cannot act out of the State for which he was appointed.<sup>6</sup>

When, however, acknowledgments made before an officer not authorized to act are by statute declared to be good and effectual, in the same way that they would have been had they been taken and certified by an officer properly qualified, one purchasing after such statute has gone into effect is bound to take notice of the conveyance, though until that time the record would be notice to no one.<sup>7</sup>

**1444.** The taking of an acknowledgment is a ministerial act; therefore it may be done by one who is so related to the

<sup>1</sup> §§ 1181-1195; *Armstrong v. Ross*, 20 N. J. Eq. 109; *Allen v. Lenoir*, 53 Miss. 321; *Coleman v. Billings*, 89 Ill. 183; *Grove v. Zumbro*, 14 Gratt. 501; *Muir v. Galloway*, 61 Cal. 498.

<sup>2</sup> § 1115; *McDaniels v. Flower Brook Manuf. Co.* 22 Vt. 274; *McAdow v. Black*, 6 Mont. 601, 13 Pac. Rep. 377.

<sup>3</sup> *Haskill v. Sevier*, 25 Ark. 152; *Main v. Alexander*, 9 Ark. 112, 47 Am. Dec. 732.

<sup>4</sup> *Suddereth v. Smyth*, 13 Ired. L. 452; *Worsham v. Freeman*, 34 Ark. 55.

<sup>5</sup> *Jackson v. Colden*, 4 Cow. 266.

<sup>6</sup> *Jackson v. Humphrey*, 1 Johns. 498. A certificate of acknowledgment in which the officer describes himself as "a justice of the peace within and for *said county*," no county being named, except that in the body of the deed, where both the grantor and grantee resided, is not necessarily invalid. *Beckel v. Petticrew*, 6 Ohio St. 247; *Fuhrman v. Loudon*, 13 S. & R. 386, 15 Am. Dec. 608.

<sup>7</sup> *Journey v. Gibson*, 56 Pa. St. 57.

parties as to be disqualified as a judge or juror.<sup>1</sup> It has been held that a married woman may acknowledge a mortgage of her separate estate before her husband, he being a justice of the peace.<sup>2</sup> But a trustee in a deed of trust cannot take a valid acknowledgment of it.<sup>3</sup>

1445. In like manner, when a statute requires that a certificate of the official character of the officer before whom the acknowledgment was made shall accompany the certificate of acknowledgment, the filing of the mortgage for record without the latter certificate does not constitute a record of it.<sup>4</sup> If, however, this certificate is subsequently obtained and recorded in the registry where the deed is recorded, the mortgage will be treated as recorded from the date of the filing of this certificate.<sup>5</sup> Where a statute requires that an acknowledgment taken out of the State shall be certified by the clerk of the county court that the deed was executed and acknowledged according to the laws of that State, and such certificate is omitted, the deed is not entitled to record, and although it is copied into the record book the record is not constructive notice.<sup>6</sup>

1446. Upon the same principle, also, when a statute requires that the officer shall certify that he is personally acquainted with the party making the acknowledgment, the omission so to do renders null the acknowledgment and the record.<sup>7</sup> The requirement must be substantially complied with.<sup>8</sup> If the officer taking the acknowledgment certifies that he knows the parties by whom the instrument purports to be executed, when in fact he did not, his certificate, though *prima facie* valid, upon

<sup>1</sup> § 1127; *Lynch v. Livingston*, 6 N. Y. Fed. Rep. 437, 7 C. C. A. 293; *Lowry v. Harris*, 12 Minn. 255.

<sup>2</sup> *Truman v. Lore*, 14 Ohio St. 144; *Williamson v. Carskadden*, 36 Ohio St. 664. In other cases it is declared that the officer acts judicially. *Homœopathic Mut. L. Ins. Co. v. Marshall*, 32 N. J. Eq. 103; *Williams v. Baker*, 71 Pa. St. 476; *Heeter v. Glasgow*, 79 Pa. St. 79, 21 Am. Rep. 46.

<sup>3</sup> *Kimball v. Johnson*, 14 Wis. 674.

<sup>4</sup> *Darst v. Gale*, 83 Ill. 136.

<sup>5</sup> §§ 1153-1158.

<sup>6</sup> *Reasoner v. Edmundson*, 5 Ind. 393; *Ely v. Wilcox*, 20 Wis. 523, 91 Am. Dec. 436.

<sup>7</sup> *Prentice v. Duluth Storage Co.* 58

<sup>7</sup> §§ 1176-1180; *Kelsey v. Dunlap*, 7 Cal. 160; *Peyton v. Peacock*, 1 Humph. 135. In this case, although the improper registration was not insisted upon by the answer, the court upon the exhibition of the deed took notice of the defect. See, also, *Johnson v. Walton*, 1 Sneed, 258; *Bone v. Greenlee*, 1 Cold. 29; *Thurman v. Cameron*, 24 Wend. 87; *Livingston v. Kettelle*, 6 Ill. 116, 41 Am. Dec. 166.

<sup>8</sup> *Ritter v. Worth*, 58 N. Y. 627; *West Point Iron Co. v. Reymert*, 45 N. Y. 703; *Troup v. Haight*, Hopk. 239.

proof of this fact, is a nullity, both as entitling the paper to be recorded and as affording any proof of its execution, though in fact the instrument was acknowledged by the persons who executed it.<sup>1</sup> As between the parties themselves the mortgage would, of course, be valid upon proof of its execution and delivery.

A certificate of acknowledgment which simply describes the persons acknowledging as "grantors of the within indenture," without stating that they were known to the officer to be the same persons who are described in and who executed it, as prescribed by the statute, is insufficient to entitle the deed to be recorded.<sup>2</sup>

**1447. The certificate of acknowledgment is not conclusive;** but when it is correct in form, and is apparently executed by one authorized to act in the matter, and within his jurisdiction, it is sufficient to admit the deed to record, and is *prima facie* good.<sup>3</sup> It may be shown that the officer who made the certificate was not in fact authorized to act, or had become incompetent, or that he acted outside his jurisdiction.<sup>4</sup> It may be shown that the deed was never in fact executed or delivered;<sup>5</sup> or that the deed was void when acknowledged by reason of its containing material blanks;<sup>6</sup> and as a general rule these irregularities cannot be shown by parol to defeat the acknowledgment and the effect of the record.<sup>7</sup> The presumption of regularity must, however, be first overcome.<sup>8</sup> The officer is *prima facie* such as he is described to be, *de facto* and *de jure*. He is like an officer authorized to take testimony under a special commission. His return must stand until it is impeached by collateral proof. Until this is done his return is proof in itself of his official character, of his

<sup>1</sup> *Watson v. Campbell*, 28 Barb. 421. "This case," says Mr. Justice Ingraham, "shows the impropriety of a commissioner of deeds, in such an acknowledgment, certifying that he knows the parties, without any other knowledge than a mere introduction, or seeing the signature written. He thereby endangers the security, and exposes himself to liability for damages arising therefrom."

<sup>2</sup> *Fryer v. Rockefeller*, 63 N. Y. 268.

<sup>3</sup> §§ 1196-1216; *Holbrook v. Worcester Bank*, 2 Curtis, 244; *Jackson v. Schoonmaker*, 4 Johns. 161; *Morris v.*

*Keyes*, 1 Hill, 540; *People v. Snyder*, 41 N. Y. 397.

<sup>4</sup> *Lynch v. Livingston*, 6 N. Y. 422.

<sup>5</sup> *Jackson v. Perkins*, 2 Wend. 308; *Howell v. McCrie*, 36 Kans. 636, 14 Pac. Rep. 257, 59 Am. Rep. 584.

<sup>6</sup> *Drury v. Foster*, 1 Dill. 460. See *Roussain v. Norton*, 53 Minn. 560, 55 N. W. Rep. 747.

<sup>7</sup> *Roussain v. Norton*, 53 Minn. 560, 55 N. W. Rep. 747.

<sup>8</sup> *Johnson v. Van Velsor*, 43 Mich. 208, 5 N. W. Rep. 265; *Hourtienne v. Schnoor*, 33 Mich. 274; *Cameron v. Culkins*, 44 Mich. 531, 7 N. W. Rep. 157.

signature, and of his acting within his jurisdiction.<sup>1</sup> The fact that he does not recollect the transaction does not affect his certificate.<sup>2</sup>

A mistake in the certificate of acknowledgment, whereby the grantee instead of the grantor appeared to be the person who made the acknowledgment, cannot be corrected in a court of equity, so as to give the record of the deed legal effect from the beginning, because it cannot be determined from the face of the instrument whether the error consisted in inserting the wrong name, or in taking the acknowledgment of the wrong man.<sup>3</sup> A mistake in the date of an acknowledgment may be shown and the true date established.<sup>4</sup> A mistake arising from a technical omission in the certificate may be corrected.<sup>5</sup>

As to the statements of fact contained in a certificate of acknowledgment which is regular in form, such, for instance, as the fact that the grantor appeared and acknowledged the execution of the instrument, they can only be impeached for fraud. Evidence which is merely in contradiction of the facts certified to will not be received.<sup>6</sup> Under the statutes of some States, for the special protection of the homestead right, it is required that the wife should acknowledge before the officer that she had released the homestead right.<sup>7</sup> If, for instance, the certificate shows that a married woman was examined separate and apart from her husband, and voluntarily relinquished her rights of dower and homestead in the lands, it cannot be impeached by evidence that there was no private examination; that she did not acknowledge the deed as her act and deed; that the contents of the deed were not made known to her; or that she did not release her homestead right.

<sup>1</sup> Thurman v. Cameron, 24 Wend. 87, and cases cited; Canandarqua Academy v. McKechnie, 19 Hun, 62.

<sup>2</sup> Tooker v. Sloan, 30 N. J. Eq. 394.

<sup>3</sup> Wood v. Cochrane, 39 Vt. 544.

<sup>4</sup> Hoit v. Russell, 56 N. H. 559.

<sup>5</sup> Edmunds v. Leavell (Ky.), 3 S. W. Rep. 134.

<sup>6</sup> Williamson v. Carskadden, 36 Ohio St. 664; Russell v. Baptist Theological Union, 73 Ill. 337; Johnston v. Wallace, 53 Miss. 331, 338, 24 Am. Rep. 699; Paxton v. Marshall, 18 Fed. Rep. 361, 365, n. In some States, however, a certificate of acknowledgment is regarded only as *prima*

*facie* evidence of the matters therein stated, and it may be overthrown without showing fraud. Wannell v. Kem, 57 Mo. 478; Steffen v. Bauer, 70 Mo. 399. But the proof, to have this effect, must be clear, cogent, and convincing. Bohan v. Casey, 5 Mo. App. 101; Insurance Co. v. Nelson, 103 U. S. 544, 548; Young v. Duvall, 109 U. S. 573; Mather v. Jarel, 33 Fed. Rep. 366.

<sup>7</sup> As in Illinois, both under act of 1857 and that of 1869. Warner v. Crosby, 89 Ill. 320, 11 Chicago L. N. 224. In Indiana, under acts 1879, p. 129.

There must first be some allegation and proof of fraud or imposition practised upon her, or some fraudulent combination between the parties interested and the officer taking the acknowledgment.<sup>1</sup> There would be no certainty in titles if the officer's certificate could be contradicted by any other evidence. The law directs him to make his certificate in writing, and when he has made it the world is to look to that and to nothing else.<sup>2</sup> Parol evidence can only be admitted to show fraud or duress connected with the acknowledgment, not to contradict the officer's certificate.<sup>3</sup>

But it is held that the certificate of a magistrate to the deed of a married woman that she was of full age is not conclusive, and that she cannot ratify it after coming of age except by acknowledgment separate and apart from her husband.<sup>4</sup>

The exception, that the magistrate's certificate is not conclusive of the facts stated in it when fraud is shown, does not, however, extend to the case of one who has in good faith purchased without notice of the fraud; he is protected by the record notwithstanding the fraud.<sup>5</sup> If he has actual knowledge of fraud or duress in obtaining a wife's acknowledgment to a deed, or know-

<sup>1</sup> Insurance Co. v. Nelson, 103 U. S. 544. **Alabama**: Coleman v. Smith, 55 Ala. 368; Miller v. Marx, 55 Ala. 322. **Illinois**: Graham v. Anderson, 42 Ill. 514, 92 Am. Dec. 89; McPherson v. Sanborn, 88 Ill. 150; Monroe v. Poorman, 62 Ill. 523; Kerr v. Russell, 69 Ill. 666, 18 Am. Dec. 634; Crane v. Crane, 81 Ill. 165; Lowell v. Wren, 80 Ill. 238; Russell v. Baptist Theological Union, 73 Ill. 337; Blackman v. Hawks, 89 Ill. 512, 8 Cent. L. J. 196. **Indiana**: M'Neely v. Rucker, 6 Blackf. 391. **Maryland**: Ridgely v. Howard, 3 Har. & McH. 321; Bissett v. Bissett, 1 Har. & McH. 211. **Michigan**: Johnson v. Van Velsor, 43 Mich. 208, 5 N. W. Rep. 265. **Mississippi**: Johnston v. Wallace, 53 Miss. 331, 24 Am. Rep. 699. **Ohio**: Baldwin v. Snowden, 11 Ohio St. 203, 78 Am. Dec. 303. **Oregon**: Moore v. Fuller, 6 Oreg. 272, 25 Am. Rep. 524. **Pennsylvania**: Heeter v. Glasgow, 79 Pa. St. 79, 21 Am. Rep. 46; Jamison v. Jamison, 3 Whart. 457, 31 Am. Dec. 536; Singer Manuf. Co. v. Rook, 84 Pa. St. 442, 24 Am. Rep. 204; Oppenheimer v.

Wright, 106 Pa. St. 569; Lewars v. Weaver, 121 Pa. St. 268, 15 Atl. Rep. 514. **Texas**: Hartley v. Frosh, 6 Texas, 208, 55 Am. Dec. 772; Williams v. Pouns, 48 Texas, 141. **Wisconsin**: Lefebvre v. Druit, 51 Wis. 326, 37 Am. Rep. 833.

<sup>2</sup> Per Tilghman, C. J., in Jourdan v. Jourdan, 9 S. & R. 268, 11 Am. Dec. 724. And see Graham v. Anderson, 42 Ill. 514, 92 Am. Dec. 89.

<sup>3</sup> Heeter v. Glasgow, 79 Pa. St. 79, 21 Am. Rep. 46; Jamison v. Jamison, 3 Whart. 457, 31 Am. Dec. 536; Homœopathic Mut. L. Ins. Co. v. Marshall, 32 N. J. Eq. 103.

In a note to this case by the reporter the decisions of the various States upon the question, whether the officer's certificate is conclusively or only *prima facie* correct, are fully cited.

<sup>4</sup> Williams v. Baker, 71 Pa. St. 476; Ledger Building Asso. v. Cook, 7 Reporter, 409, 19 Alb. L. J. 281.

<sup>5</sup> Heeter v. Glasgow, 79 Pa. St. 79, 21 Am. Rep. 46; Hall v. Patterson, 51 Pa. St. 289.

ledge of such circumstances as would naturally lead him to inquiry, he is deprived of the protection accorded to an innocent and *bona fide* holder. Even less than actual duress will avoid a wife's acknowledgment of a mortgage in the hands of an assignee who ought to have inquired for defences and did not. It is enough if it be shown that she did it under moral constraint, as, for instance, by threats, persecution, and harshness on the part of her husband. These facts being known to the mortgagee, his assignee is affected by them in case he is not entitled to the protection accorded to one who takes negotiable paper for value before maturity. He should inquire of the mortgagors whether the mortgage is open to any defence.<sup>1</sup>

A substantial compliance with the requirements of such a statute is sufficient.<sup>2</sup>

**1448.** Delivery is another incident necessary to giving effect to the conveyance even as between the parties to it.<sup>3</sup> Although the deed be recorded, if it has not been delivered, or the delivery was unauthorized, a subsequent conveyance by the grantor, or a subsequent judgment against him, will take precedence.<sup>4</sup>

The fact of the acknowledgment of the deed at a certain date is not by itself evidence that it was delivered at that time, or was ever delivered,<sup>5</sup> though this has been said to be presumptive evidence.<sup>6</sup> The record of the deed is said to be evidence of delivery in a greater degree, but it is not conclusive of a delivery. It has sometimes been spoken of as a *prima facie* evidence of delivery.<sup>7</sup> It may be evidence for the jury to consider.<sup>8</sup>

<sup>1</sup> *McCandless v. Engle*, 51 Pa. St. 309; *Michener v. Cavender*, 38 Pa. St. 334, 337, 80 Am. Dec. 486; *Twitchell v. McMurtrie*, 77 Pa. St. 383.

<sup>2</sup> *Hornbeck v. Mut. Building Asso.* 88 Pa. St. 64.

<sup>3</sup> §§ 1217-1229; *Goodwin v. Owen*, 55 Ind. 243; *Hoadley v. Hadley*, 48 Ind. 452; *Woodbury v. Fisher*, 20 Ind. 387, 83 Am. Dec. 325; *Fitzgerald v. Goff*, 99 Ind. 28; *Henry v. Carson*, 96 Ind. 412; *Freeman v. Peay*, 23 Ark. 439; *Samson v. Thornton*, 3 Met. 275, 37 Am. Dec. 135; *Parker v. Hill*, 8 Met. 447; *Maynard v. Maynard*, 10 Mass. 456, 6 Am. Dec. 146; *Ward v. Small*, 90 Ky. 198; *Owings v. Tucker*, 90 Ky. 297.

<sup>4</sup> *Woodbury v. Fisher*, 20 Ind. 387, 83 Am. Dec. 325; *Goodsell v. Stinson*, 7 Blackf. 437.

<sup>5</sup> §§ 1286-1288; *Freeman v. Schroeder*, 43 Barb. 618, 29 How. Pr. 263; *Jackson v. Richards*, 6 Cow. 617.

<sup>6</sup> *Wyckoff v. Remsen*, 11 Paige, 564; *Portz v. Schantz*, 70 Wis. 497, 36 N. W. Rep. 249; *Pereau v. Frederick* (Iowa), 22 N. W. Rep. 235.

<sup>7</sup> *Kille v. Ege*, 79 Pa. St. 15; *Jackson v. Perkins*, 2 Wend. 308; *Knolls v. Barnhart*, 71 N. Y. 474; *Moody v. Dryden*, 72 Iowa, 461, 34 N. W. Rep. 210; *Peterson v. Kilgore*, 58 Tex. 88; *Sessions v. Sherwood*, 78 Mich. 234, 44 N. W. Rep. 263.

<sup>8</sup> *Jordan v. Farnsworth*, 15 Gray, 517.

But registration itself does not operate as a delivery, nor does it supersede the necessity of proof of a delivery.<sup>1</sup> In Massachusetts, by statute the record of a deed, or other instrument duly acknowledged affecting the title to lands, is conclusive evidence of the delivery of it.<sup>2</sup> A delivery to the register for record may be an effectual delivery to the grantee, where such delivery is made at the request of the grantee,<sup>3</sup> or where the register had authority from him to receive it and keep it, or it is so delivered pursuant to a previous agreement between the parties.<sup>4</sup>

Delivery to a grantee who is called by a wrong name in the deed identifies the grantee, and vests the title in him.<sup>5</sup>

A deed may be delivered by the grantor's agent. Thus a notary, with whom a note and mortgage are left by the mortgagor, after acknowledging the mortgage before him, will be presumed to have authority to deliver them, in the absence of instructions to the contrary; and a delivery by him to the mortgagee is a sufficient delivery.<sup>6</sup>

Of course a delivery to an agent of the grantee is a delivery to the grantee himself; as, for instance, a delivery to the secretary of a railroad company is sufficient.<sup>7</sup> A delivery of a mortgage made by a partner upon the dissolution of the firm to secure a note of the firm, which he has assumed, to the other partner, who is indemnified by the mortgage, is sufficient.<sup>8</sup>

Payment of the consideration of a mortgage may be a prerequisite to creating a valid lien. Thus, if one has notice of a prior unrecorded mortgage before he pays over money he has undertaken to loan upon a mortgage, the fact that he has recorded his own mortgage before receiving such notice does not make his mortgage the prior lien.<sup>9</sup>

**1449. Delivery after recording.** — Although a deed is of no

<sup>1</sup> § 1289; *Hawkes v. Pike*, 105 Mass. 560, 7 Am. Rep. 554; *Parker v. Hill*, 8 Met. 447; *Foley v. Howard*, 8 Iowa, 56; *Houfes v. Schultze*, 2 Bradw. 196; *Schultze v. Houfes*, 96 Ill. 335; *National State Bank v. Morse*, 73 Iowa, 174, 34 N. W. Rep. 803, 5 Am. St. Rep. 670.

<sup>2</sup> Acts 1892, ch. 256.

<sup>3</sup> *Dusenbury v. Hulbert*, 2 Thomp. & C. 177; *Thayer v. Stark*, 6 Cush. 11, 14.

<sup>4</sup> *Reid v. Abernethy*, 77 Iowa, 438, 42 N. W. Rep. 364.

<sup>5</sup> *Fisher v. Milmine*, 94 Ill. 328; *Beaver v. Slanker*, 94 Ill. 175.

<sup>6</sup> *Adams v. Adams*, 70 Iowa, 253, 30 N. W. Rep. 795.

<sup>7</sup> §§ 1240-1247; *Patterson v. Ball*, 19 Wis. 243; *Truman v. McCollum*, 20 Wis. 360.

<sup>8</sup> *Conwell v. McCowan*, 81 Ill. 285.

<sup>9</sup> §§ 1298-1300; *Schultze v. Houfes*, 96 Ill. 335.



effect until there has been a delivery of it to the grantee, yet if it is made for a good consideration, as, for instance, an existing debt, and is filed for record without delivery, a subsequent acceptance of the deed by the grantee has been held to ratify the making and recording of it, and to give it legal effect from the time of filing, as against intermediate incumbrancers.<sup>1</sup> When, for instance, one in debt to a bank executed a mortgage to it, and, without delivering it, sent it to the record office to be recorded, and then sent word to the officers of the bank of the execution of the mortgage, and that they could get it of the recorder, and they replied that "they were glad it was done," this was held a sufficient delivery of the deed to the bank to pass the title as against one to whom the mortgagor made and delivered another mortgage of the same property two days afterwards, but after such notification to the bank and reply.<sup>2</sup> There are cases which hold that a delivery may be made to a stranger in behalf of the mortgagee, and without his authority, and upon his subsequent acceptance of the mortgage the title is regarded as having vested in him from the time of such delivery. Such was held to be the case where one in failing circumstances made a mortgage to a creditor who resided out of the State, without the knowledge of his creditor, and delivered it to his own attorney for the benefit of the creditor, with the request that the attorney should cause it to be recorded and handed to the creditor. The mortgage was accordingly recorded, and afterwards received and accepted by the mortgagee; but after the delivery of it to the attorney and the recording of it, and before the attorney had delivered it to the mortgagee, the property was attached by another creditor of the mortgagor's. It was held that the mortgaged estate immediately vested in the mortgagee, whose title was therefore superior to that of the attaching creditor.<sup>3</sup> It has been held, moreover, that it may be presumed that a mortgagee, in whose favor a mortgage has been executed and placed on record, will assent to it on being notified of its existence; and therefore, although it be made and recorded without his knowledge, and the land is afterwards attached by creditors of the mortgagor before the mort-

<sup>1</sup> *Carnall v. Duval*, 22 Ark. 136.

<sup>2</sup> *Farmers' & Mechanics' Bank v. Drury*, 38 Vt. 426.

<sup>3</sup> *Merrills v. Swift*, 18 Conn. 257, 46

Am. Dec. 315, and cases cited. This is doubtful law. See *Johnson v. Farley*, 45 N. H. 505; *Jones on Chattel Mortgages*, §§ 104-113.

gagee has notice of the mortgage, which he afterwards assents to and ratifies, he may hold the mortgage lien against such attachments.<sup>1</sup>

There may be some slight presumption of delivery arising from the record of a deed; but when this is overcome, the burden is upon the party claiming title under it to show an actual delivery before a levy upon the land by attachment or execution.<sup>2</sup>

**1450. When a subsequent delivery becomes operative.**—Although a deed be inoperative at the time it is recorded, as when it is recorded before delivery, or is recorded as a deed when intended as a mortgage, and the statutes of the State where it is executed require that it shall be recorded in such case in separate mortgage books, upon a subsequent delivery in the one case, and in the other upon a purchase of the equity of redemption by the mortgagee, the record then becomes fully operative.<sup>3</sup> The delivery of the deed, or the purchase of the equity of redemption, is equivalent to a delivery of the deed for record at that time, in the same way as when a deed is recorded in anticipation of the completion of a sale. The mortgage is effectual only from the time of such delivery, and any one who has in the mean time before the delivery obtained a lien upon the property has a preference over such mortgagee. His assent to the mortgage makes the mortgage valid, and the record of it notice only from that time.<sup>4</sup> Where, for instance, a mortgage was recorded on the thirteenth day of May, 1870, and was held by the mortgagor ready for delivery when he should obtain a loan, and was not delivered until the seventh day of the following month, the latter date was held to be the date of its registry, as against one who in the mean time had acquired a mechanic's lien upon the property.

But if the mortgage be executed and acknowledged, and put upon record by the mortgagor, in pursuance of a prior contract for a loan upon it, which is afterwards made in pursuance of the contract, and the mortgage is then delivered upon the payment of

<sup>1</sup> *Ensworth v. King*, 50 Mo. 477. This case should not be relied upon in any other State.

<sup>2</sup> *Harmon v. Myer*, 55 Wis. 85, 12 N. W. Rep. 435.

<sup>3</sup> See §§ 85-87; *Warner v. Winslow*, 1 Sandf. Ch. 430.

<sup>4</sup> *Foster v. Beardsley Scythe Co.* 47 Barb. 505; *Jackson v. Richards*, 6 Cow. 617; *Hood v. Brown*, 2 Ohio, 266; *Mut. Benefit Life Ins. Co. v. Rowand*, 26 N. J. Eq. 389; *Houfes v. Schultze*, 2 Bradw. 196, 11 Chicago L. N. 75.

the money, it has priority in equity over liens of mechanics and material-men for work and materials furnished, after the mortgage is recorded, for a building which the mortgagor commenced to erect upon the premises after the recording of the mortgage and before its delivery, the mortgagee having no knowledge of this fact. In such case the mortgage upon delivery has relation to the agreement for the loan, and the registry takes effect and becomes operative as constructive notice before the delivery, and from the time the mortgage was left for record.<sup>1</sup>

## VII. *Requisites as to the Time and Manner of Recording.*

**1451.** The record is notice from the time of filing the deed for record. It is sometimes provided by statute that a deed shall be deemed to be recorded when it is filed for record, or noted in an entry book or index by the recorder as received. But, aside from any express statutory provision, the judicial interpretation of the effect of the filing is generally the same.<sup>2</sup> The

<sup>1</sup> § 1293; *Jacobus v. Mutual Benefit Life Ins. Co.* 27 N. J. Eq. 604. The doctrine of relation is fully considered in this case. See, also, *Pratt v. Potter*, 21 Barb. 589; *Judd v. Seekins*, 62 N. Y. 266, 3 T. & C. 266. See, *contra*, *Houfes v. Schultze*, 11 Chicago L. N. 75, 2 Bradw. 196.

<sup>2</sup> **Alabama**: *Mallory v. Stodder*, 6 Ala. 801; *Leslie v. Hinson*, 83 Ala. 266, 3 So. Rep. 443. **Arizona** T.: R. S. 1887, § 2603. **Arkansas**: Dig. of Stats. 1884, § 670; *Oats v. Walls*, 28 Ark. 244. **California**: Civ. Code, § 1213; *Watkins v. Wilhoit*, 104 Cal. 395, 35 Pac. Rep. 646. **Colorado**: Annot. Stats. 1891, ch. 29, § 446. **District of Columbia**: R. S. 1874, § 446. **Connecticut**: G. S. 1888, § 2961; *Lewis v. Hinman*, 56 Conn. 55; *Franklin v. Cannon*, 1 Root, 500. **Illinois**: R. S. 1889, ch. 30, § 30; *Haworth v. Taylor*, 108 Ill. 275; *Kiser v. Heuston*, 38 Ill. 252; *Merrick v. Wallace*, 19 Ill. 486; *Nattinger v. Ware*, 41 Ill. 245; *Brown v. Banner Coal & Oil Co.* 97 Ill. 214; *Tucker v. Shaw* (Ill.), 41 N. E. Rep. 914. **Indiana**: *Kessler v. State*, 24 Ind. 313. **Kansas**: G. S. 1889; *Lee v. Birmingham*, 30 Kans. 312, 1 Pac. Rep. 73; *Poplin v. Mundell*, 27 Kans. 138. **Kentucky**: *Bank v. Haggin*, 1 A. K. Marsh.

306. **Louisiana**: R. Civ. Code 1889, § 2266. **Massachusetts**: *Gillespie v. Rogers*, 146 Mass. 610, 16 N. E. Rep. 711; *Jacobs v. Denison*, 141 Mass. 117, 5 N. E. Rep. 526. **Michigan**: *Sinclair v. Slawson*, 44 Mich. 123, 6 N. W. Rep. 207, 38 Am. Rep. 235. **Mississippi**: *Mangold v. Barlow*, 61 Miss. 593, 48 Am. Rep. 84. **Missouri**: *Harrold v. Simonds*, 9 Mo. 323; *Bishop v. Schneider*, 46 Mo. 472, 2 Am. Dec. 533. **Montana**: Comp. Stats. 1887, ch. 20, § 259. **Nebraska**: Comp. Stats. 1885, ch. 73, § 15; *Perkins v. Strong*, 22 Neb. 725, 36 N. W. Rep. 292. **Nevada**: G. S. 1885, § 2594. **New York**: *Mutual L. Ins. Co. v. Dake*, 87 N. Y. 257; *Simonson v. Falihee*, 25 Hun, 570; *Bedford v. Tupper*, 30 Hun, 174. **North Carolina**: *Metts v. Bright*, 4 Dev. & B. 173, 32 Am. Dec. 683; *Parker v. Scott*, 64 N. C. 118, 121; *Davis v. Whitaker*, 114 N. C. 279, 19 S. E. Rep. 699. **Ohio**: *Mayham v. Coombs*, 14 Ohio, 428; *Magee v. Beatty*, 8 Ohio, 336; *Brown v. Kirkman*, 1 Ohio St. 116; *Fosdick v. Barr*, 3 Ohio St. 471; *Bloom v. Noggle*, 4 Ohio St. 45; *Tousley v. Tousley*, 5 Ohio St. 78; *Bercaw v. Cockerill*, 20 Ohio St. 163. **Pennsylvania**: *Brooke's Appeal*, 64 Pa. St. 127; *Clader v. Thomas*, 89 Pa.

record as notice dates from the moment the deed was left for record, and was indorsed by the recorder and entered upon the index or entry book, although it was not actually spread upon the record for months, or for any length of time afterwards,<sup>1</sup> or be lost and not recorded at all,<sup>2</sup> though according to some authorities the record is constructive notice from the time of filing the instrument for record only in case it is subsequently copied accurately upon the record book.<sup>3</sup> Even if the statute expressly provide that a deed when filed for record shall be notice to all the world, "as the filing is but one step in a series of steps, this language presupposes, and is in fact based upon the assumption, that the other, and in the order of time the subsequent, requirements of the law will be observed."<sup>4</sup> The entry in the entry book is constructive notice until the deed is spread in full upon the record.<sup>5</sup>

St. 343; *Glading v. Frick*, 88 Pa. St. 460. **Tennessee**: Code 1884, §§ 2887, 2888; *Woodward v. Boro*, 16 Lea, 678. **Texas**: R. S. 1879, § 4334; *Copelin v. Shuler*, (Tex.), 6 S. W. Rep. 668; *Belbaze v. Ratto*, 69 Tex. 636, 7 S. W. Rep. 501; *Harrison v. McMurray*, 71 Tex. 122, 8 S. W. Rep. 612; *Throckmorton v. Price*, 28 Tex. 605; *Lignoski v. Crooker*, 86 Tex. 324, 24 S. W. Rep. 278; *Hudson v. Randolph*, 66 Fed. Rep. 216, 13 C. C. A. 402. **Virginia**: *Horsley v. Garth*, 2 Gratt. 471, 44 Am. Dec. 393. **Washington**: R. Code 1881, § 2314. **Wisconsin**: *Pringle v. Dunn*, 37 Wis. 449, 19 Am. Rep. 772; *St. Croix Land & L. Co. v. Ritchie*, 73 Wis. 409, 41 N. W. Rep. 345; *Shove v. Larsen*, 22 Wis. 142. But in this State the mere filing of the deed, without entering it in the index or reception book, is not a record; *International L. Ins. Co. v. Scales*, 27 Wis. 640; though the deed be transcribed at length upon the record. *Lombard v. Culbertson*, 59 Wis. 537, 18 N. W. Rep. 399. The making of an index to each volume of the records, though required by statute, is not necessary. *Oconto Co. v. Jerrard*, 46 Wis. 317, 50 N. W. Rep. 591. **Wyoming**: R. S. 1887, § 17.

<sup>1</sup> *Wood's Appeal*, 82 Pa. St. 116; *Kiser v. Heuston*, 38 Ill. 252; *Franklin v. Cannon*, 1 Root, 500; *Throckmorton v. Price*,

28 Tex. 605, 91 Am. Dec. 334; *Crews v. Taylor*, 56 Tex. 461; *Brooke's Appeal*, 64 Pa. St. 127; *Musser v. Hyde*, 2 W. & S. 314; *Bank v. Haggin*, 1 A. K. Marsh. 306; *Sinclair v. Slawson*, 44 Mich. 123, 38 Am. Rep. 235; *Lane v. Duchac*, 73 Wis. 646, 41 N. W. Rep. 962. In **Texas** the cases of *Taylor v. Harrison*, 47 Tex. 454, 26 Am. Rep. 304, and *Woodson v. Allen*, 54 Tex. 551, are not consistent with the decisions in the same State cited above. It has been suggested that the apparent conflict in these decisions may have arisen from the fact that, in the cases first cited, the deeds remained in the recorder's hands, but in the last-named cases may have been taken away by the grantees. *Webb on Record of Title*, § 16. In **Georgia**, under the Code, §§ 267, 1957, a mortgage is not recorded until it is actually spread upon the record. *Benson v. Callaway*, 80 Ga. 230, 4 S. E. Rep. 851.

<sup>2</sup> *Lee v. Birmingham*, 30 Kans. 312, 1 Pac. Rep. 73; *Perkins v. Strong*, 22 Neb. 725, 36 N. W. Rep. 292; *Vaughn v. Moore*, 89 Va. 925, 17 S. E. Rep. 326.

<sup>3</sup> §§ 515, 516.

<sup>4</sup> Judge Dillon, in *Barney v. McCarty*, 15 Iowa, 510, 519.

<sup>5</sup> *Sinclair v. Slawson*, 44 Mich. 123, 38 Am. Rep. 235; *Deming v. Miles*, 35 Neb. 739, 53 N. W. Rep. 665.

It may be kept in the office and referred to until it is transcribed, and the original deed so filed is notice to all the world.<sup>1</sup> When it is spread upon the record, however, it is notice of only what appears upon the record.<sup>2</sup> A presumption in favor of the record will prevail against the testimony of a subsequent purchaser or mortgagee that, at the time of filing his deed for record, no incumbrance upon the property appeared of record.<sup>3</sup>

The record is not defective for the reason that a portion of it was printed instead of being written with pen and ink.<sup>4</sup>

**1452.** A deed is sufficiently recorded by depositing it with the person in charge of the registration office, though such person be neither the official recorder nor a deputy of his, for the recorder is responsible for the acts of the person whom he has placed in charge of the office, and the acts of such person in custody of the records are the acts of the recorder.<sup>5</sup> The registration of a conveyance being purely a ministerial act, the recorder is not disqualified from acting by reason of his being a party to the deed.<sup>6</sup> The recorder is usually required by statute to attest the record by his signature, but in the absence of such requirement a copy of the record is admissible in evidence though this has not been signed by the officer.<sup>7</sup>

**1453.** The payment of the recording fees is not a prerequisite to a valid record of a deed if the recorder receives it for record. If he waives his right to a prepayment of such fees, he is bound to make a proper record of the deed.<sup>8</sup> Even a provision of statute, that no deed shall be admitted to record until the fee for recording is paid, is regarded as directory merely, and the record is valid. The recorder in such case assumes the fee or tax.<sup>9</sup> But if a deed is sent to a recorder by mail or otherwise to be recorded, without the fee for recording, and the recorder in conse-

<sup>1</sup> *Nichols v. Reynolds*, 1 R. I. 30, 36 Am. Dec. 238; *Bigelow v. Topliff*, 25 Vt. 273, 60 Am. Dec. 264.

<sup>2</sup> §§ 549, 550; *Potter v. Dooley*, 55 Vt. 512.

<sup>3</sup> *Vandercook v. Baker*, 48 Iowa, 199.

<sup>4</sup> *Maxwell v. Hartmann*, 50 Wis. 660, 8 N. W. Rep. 103.

<sup>5</sup> *Cook v. Hall*, 6 Ill. 575; *Bishop v. Cook*, 13 Barb. 326; *Dodge v. Potter*, 18 Barb. 193. See, however, in regard to entry made by an unauthorized person,

*Pearson v. Powell*, 100 N. C. 86, 6 S. E. Rep. 188. See *Johnson v. Burden*, 40 Vt. 567.

<sup>6</sup> *Brockenborough v. Melton*, 55 Tex. 493; *Tessier v. Hall*, 7 Martin, 411.

<sup>7</sup> *Witt v. Cutler*, 38 Mich. 189.

<sup>8</sup> *People v. Bristol*, 35 Mich. 28; *Bussing v. Crain*, 8 B. Mon. 593; *Ridley v. McGehee*, 2 Dev. 40.

<sup>9</sup> *Lucas v. Clafflin*, 76 Va. 269; *Hoffman v. Mackall*, 5 Ohio St. 124, 64 Am. Dec. 637.

quence of not receiving the fee "pigeon-holes" it, the deed is not lodged for record so as to be notice to a subsequent *bona fide* creditor of the vendor.<sup>1</sup> But if the recorder receives the deed without the fees being paid and enters it as a deed received, or indorses such entry upon the deed, and he allows the entry to stand, he cannot be heard to contradict such entry upon finding that his fees are not in fact paid.<sup>2</sup>

1454. A schedule, memorandum, or map referred to in a deed, and annexed to it, is a part of the deed, and must be recorded as a part of it.<sup>3</sup> If such schedule, memorandum, or map be not annexed, indorsed, or otherwise made a part of the deed, it need not be recorded although referred to in the deed.<sup>4</sup> The addition, to the record or copy of a deed, of a map or plan which was not on the original, for the purpose of making the claim of the grantee more specific, but without any fraudulent intent, or purpose to make it appear as part of the original deed, does not render the grant inoperative.<sup>5</sup> On the other hand, a schedule, memorandum, or map annexed to or indorsed upon a deed is not ordinarily the deed or part of it unless it is referred to in the deed.<sup>6</sup> If an additional provision or agreement be indorsed upon a deed or mortgage after its execution, or be embraced in a separate paper, this should be acknowledged as a separate deed; and it is not necessary to record the deed or mortgage again in order to con-

<sup>1</sup> *Dickerson v. Bowers*, 42 N. J. Eq. 295, 11 Atl. Rep. 142; *Burnham v. Farmers' Loan & Trust Co.* (Neb.) 63 N. W. Rep. 45.

A deed was left with a register, who made an indorsement that it was "filed for registration at 12 o'clock m., July 27, 1889, subject to the annexed facts;" that, no fees having been paid, it was left open to the inspection of the public until December 30, 1889, when the fees were paid, and it was duly filed and recorded. The register and others testified that he expressly refused to receive the deed till the fees were paid. It was held that the deed was not filed for registration until the last-named date. *Cunninggim v. Peterson*, 109 N. C. 33, 13 S. E. Rep. 714.

<sup>2</sup> *Ridley v. McGehee*, 2 Dev. 40. The record being for the protection of the grantee, it is for him to see that the record

is made, and the recording fees paid. Even in case of a mortgage, though it may be customary for a borrower to pay all the expenses attending the loan, including the fees for registering the mortgage securing the loan, the mortgagee cannot hold the mortgagor liable for such fees in the absence of an agreement to pay them. *Simon v. Sewell*, 64 Ala. 241. A stipulation in the mortgage, that the mortgagor shall pay such fees, creates a valid lien for them. *Boutwell v. Steiner*, 84 Ala. 307, 309, 4 So. Rep. 184, 5 Am. St. Rep. 375.

<sup>3</sup> *Sawyer v. Pennell*, 19 Me. 167.

<sup>4</sup> *Shirras v. Caig*, 7 Cranch, 34; *Chapin v. Cram*, 40 Me. 561.

<sup>5</sup> *Winnipisiogee Paper Co. v. N. H. Land Co.* 59 Fed. Rep. 542.

<sup>6</sup> *McKean & Elk Land Imp. Co. v. Mitchell*, 35 Pa. St. 269, 78 Am. Dec. 335.

nect it with such additional provision, if this duly refers to the original deed or mortgage which it affects or qualifies.<sup>1</sup>

1455. As to the time when a deed was left for record, the certificate of the register is conclusive as between the grantee and a subsequent purchaser or creditor who has attached the mortgaged land subsequently to the time stated in the certificate.<sup>2</sup> If the recording officer has failed to note the time of receiving a deed for record, this may be shown by parol evidence.<sup>3</sup> The requirement that the recording officer shall note the time of recording a deed is directory merely, when there is no question of rights depending on priority of record. His failure to perform his legal duty does not defeat the effect of the delivery for record.<sup>4</sup> If the deed be left at the registry in the absence of the recorder, and it is received and filed by a clerk in charge of the office, the filing is sufficient, though the clerk has no authority to perform the duties of the register. It is the duty of the recording officer to enter and number the deed, and the rights of the grantee cannot be impaired by his omission to do so.<sup>5</sup> The certificate is not, however, conclusive of anything beyond the time of the receipt of the instrument for record, as, for instance, it is not conclusive that it is duly recorded.<sup>6</sup>

If a deed be left with a register with no directions to record it,<sup>7</sup> or with directions that it shall not be placed on record until further directions should be given, and it is recorded without such directions ever having been given, there is no effectual recording of it.<sup>8</sup> In such case, if directions should be subsequently re-

<sup>1</sup> *Choteau v. Thompson*, 2 Ohio St. 114; *Munson v. Ensor*, 94 Mo. 504, 7 S. W. Rep. 108.

<sup>2</sup> *Tracy v. Jenks*, 15 Pick. 465; *Adams v. Pratt*, 109 Mass. 59; *Fuller v. Cunningham*, 105 Mass. 442; *Ames v. Phelps*, 18 Pick. 314; *Hatch v. Haskins*, 17 Me. 391; *Edwards v. Barwise*, 69 Tex. 84, 6 S. W. Rep. 677; *Bullock v. Wallingford*, 55 N. H. 619.

<sup>3</sup> *Boyce v. Stanton*, 15 Lea, 346; *Metts v. Bright*, 4 Dev. & B. 173, 32 Am. Dec. 683; *Cunninggim v. Peterson*, 109 N. C. 33, 13 S. E. Rep. 714.

<sup>4</sup> *Thorn v. Mayer*, 12 Misc. Rep. 487, 33 N. Y. Supp. 664. And see *Dodge v. Potter*, 18 Barb. 193, relating to a chat-

tel mortgage; *Goodman v. Baerlocher*, 88 Wis. 287, 293, 60 N. W. Rep. 415, relating to the filing of a mechanic's lien.

<sup>5</sup> *Dodge v. Potter*, 18 Barb. 193; *Houghton v. Burnham*, 22 Wis. 301.

<sup>6</sup> *New York Life Ins. Co. v. White*, 17 N. Y. 469; *Thorp v. Merrill*, 21 Minn. 336; *Worcester Nat. Bank v. Cheeney*, 87 Ill. 602; *Jackson v. Phillips*, 9 Cow. 94; *Wing v. Hall*, 47 Vt. 182; *Dubose v. Young*, 10 Ala. 365.

<sup>7</sup> *Horsley v. Garth*, 2 Gratt. 471, 44 Am. Dec. 393.

<sup>8</sup> *Haworth v. Taylor*, 108 Ill. 275; *Moore v. Ragland*, 74 N. C. 343; *Davis v. Whitaker*, 114 N. C. 279, 19 S. E. Rep. 699.

ceived to record the deed, the record should be made as of the time when such instructions are received, and not as of the time when the deed was left, nor of the time when it was recorded without authority.<sup>1</sup>

When the time of receiving an instrument for record as entered in the index book shows upon its face that it was not made at the time of such reception, the presumption of the correctness of the register's entry is lost,<sup>2</sup> and parol evidence is admissible to show when the deed was actually received for record. The filing of a mortgage for record affords no notice if the deed be withdrawn before it is recorded.<sup>3</sup>

If the statute is such that no notice is imparted until the conveyance is actually spread upon the record, though when this is done the notice relates back to the time of the deposit of the deed for record, where there is a conflict of dates between the time of the actual record as it appears upon the record book and the constructive record by the indorsement made upon the deed when it was deposited, the recorded date prevails over the true date.<sup>4</sup>

As between two mortgagees, whose mortgages are executed and recorded on the same day, that which was first delivered for record has priority,<sup>5</sup> and parol evidence is admissible to show which was first deposited for record.<sup>6</sup> To ascertain which is prior, the fractional parts of a day are considered.<sup>7</sup> In case no entry is made upon the record of the time of the recording of the mortgage, when the law of a State required no such entry, and it appears from the record to have been recorded at an early day, it will be presumed that the record was made within the time required by law after the execution of it.<sup>8</sup>

**1456. A mortgage may be recorded after the death of the mortgagor, if he has in his lifetime made delivery of it. His general creditors cannot for that reason claim that the mortgage**

<sup>1</sup> *Brigham v. Brown*, 44 Mich. 59, 6 N. W. Rep. 97; *Bowen v. Fassett*, 37 Ark. 507; *Yerger v. Barz*, 56 Iowa, 77, 8 N. W. Rep. 769; *Town v. Griffith*, 17 N. H. 165.

<sup>2</sup> *Hay v. Hill*, 24 Wis. 235; *Metts v. Bright*, 4 Dev. & B. 173, 32 Am. Dec. 683.

<sup>3</sup> *Worcester Nat. Bank v. Cheeney*, 87

Ill. 602; *Hickman v. Perrin*, 6 Cold. 135; *Clamorgan v. Lane*, 9 Mo. 442; *Lawton v. Gordon*, 37 Cal. 202.

<sup>4</sup> *Donald v. Beals*, 57 Cal. 399.

<sup>5</sup> *Brookfield v. Goodrich*, 32 Ill. 363.

<sup>6</sup> *Spaulding v. Scanland*, 6 B. Mon. 353; *Boone v. Telles*, 2 Bradw. 539.

<sup>7</sup> *Lemon v. Staats*, 1 Cow. 592.

<sup>8</sup> *Hall v. Tunnell*, 1 Houst. 320.



was inoperative as against them.<sup>1</sup> The recording of a deed is no part of its execution. Neither does a lien attach to the real estate of a debtor in favor of his general creditors immediately upon his death, as against the specific lien of the mortgage which was good against the mortgagor. His heirs take the estate upon his decease subject to the incumbrance; and the lien of the general creditors, which is merely a right to have the real estate in the hands of the heirs applied for their benefit upon a deficiency of the personal assets, attaches to it in the same condition.<sup>2</sup> In like manner a mortgage executed and delivered before a general assignment of the mortgagor for the benefit of his creditors, or before his bankruptcy, if valid in other respects is valid against the assignment or the bankruptcy, though not recorded until afterwards.<sup>3</sup>

1457. The registration must be made in the registry district within which the land lies, which is generally a county, but in Connecticut and Vermont is a town. In some of the new States and Territories in which there is territory which is not yet organized into counties, special provision is made for the recording of deeds of lands lying within such unorganized territory, as by providing that the record shall be made in the county to which such unorganized territory is attached for judicial purposes.<sup>4</sup> After the organization of a new county, a deed properly recorded under the law as it existed at the time of the record need not be recorded anew,<sup>5</sup> for the record already made does not cease to be constructive notice;<sup>6</sup> but a deed that had been executed, but not recorded, at the time of the organization of a new county, should be recorded in that county.<sup>7</sup>

<sup>1</sup> *Gill v. Pinney*, 12 Ohio St. 38; *Haskell v. Bissell*, 11 Conn. 174.

<sup>2</sup> *Gill v. Pinney*, 12 Ohio St. 38.

<sup>3</sup> *Mellon's Appeal*, 32 Pa. St. 121; *Wyckoff v. Remsen*, 11 Paige, 564.

<sup>4</sup> Where an unorganized county was attached in general terms to an organized county, without any specification of the purposes for which it was so attached, and afterwards it was attached to another county "for election, revenue, and judicial purposes," a deed should be recorded in the last-named organized county, because for all general purposes the un-

organized county became a part of that county. *Meagher v. Drury* (Iowa), 56 N. W. Rep. 531, reversing 53 N. W. Rep. 313. See *Harris v. Monroe Cattle Co.* 84 Tex. 674, 677, 19 S. W. Rep. 869.

<sup>5</sup> *McKissick v. Colquhoun*, 18 Tex. 148; *Lumpkin v. Muncy*, 66 Tex. 311, 17 S. W. Rep. 732.

<sup>6</sup> *Thomas v. Hanson* (Minn.), 61 N. W. Rep. 135.

<sup>7</sup> *Astor v. Wells*, 4 Wheat. 466; *Garrison v. Haydon*, 1 J. J. Marsh. 222, 19 Am. Dec. 70.

1458. If the land embraced in a deed is situated in more than one county, the deed should be recorded in each county in which any part of the land is situated.<sup>1</sup> It is intended that the registry laws shall enable a person interested in the title to land to ascertain from the records of the county, or other registry district within which the land is situate, what conveyances there are affecting that land. The recording of a deed in a county other than that in which the land is situated does not operate as constructive notice.<sup>2</sup> Thus, where a new county had been created, and a grantee, not being advised of the change, recorded his deed in the old county instead of the new, the registration was declared worthless as notice.<sup>3</sup> A subsequent change of the county boundaries by which the land becomes a part of another county does not impose upon the grantee the duty of recording his deed again in such other county.<sup>4</sup> But if the county lines have never been established, the grantee must at his peril ascertain in what county the land is situated.<sup>5</sup> If a county is divided into two registry districts, a deed recorded in one district of land situated in the other is not properly recorded, and the record is not constructive notice.

When a deed already recorded is recorded in another county, the certificate of the recorder of the prior record is not a part of the deed, and need not be copied in the second record.<sup>6</sup>

<sup>1</sup> *Van Meter v. Knight*, 32 Minn. 205, 20 N. W. Rep. 142. Under provisions of statute in Texas that all deeds shall be recorded in the county where the land, "or a part thereof," is situated (R. St. art. 4333), and that any conveyance delivered to be recorded shall take effect from the time of delivery (art. 4334), a deed of trust describing the land as being in one county, when a part of it is actually in another, if recorded in the former county, is sufficient notice to creditors levying on land outside such county. *Brown v. Lazarus*, 5 Tex. Civ. App. 81, 25 S. W. Rep. 71.

<sup>2</sup> *Lewis v. Baird*, 3 McLean, 56; *Perrin v. Reed*, 35 Vt. 2; *Adams v. Hayden*, 60 Tex. 223; *Harper v. Tapley*, 35 Miss. 506, 509, per Handy, J.; *Stewart v. McSweeney*, 14 Wis. 468, 471; *King v. Portis*, 77 N. C. 25; *Hawley v. Bullock*, 29 Tex.

216; *Oberholtzer's App.* 124 Pa. St. 583, 17 Atl. Rep. 143; *St. John v. Conger*, 40 Ill. 535; *Horsley v. Garth*, 2 Gratt. 471, 44 Am. Dec. 393; *Pollard v. Lively*, 2 Gratt. 216; *Kennedy v. Harden*, 92 Ga. 230, 18 S. E. Rep. 542.

<sup>3</sup> *Astor v. Wells*, 4 Wheat. 466.

<sup>4</sup> *Koerper v. St. Paul & N. P. Ry. Co.* 40 Minn. 132, 41 N. W. Rep. 656; *Melton v. Turner*, 38 Tex. 81; *Jones v. Powers*, 65 Tex. 207; *Garrison v. Haydon*, 1 J. J. Marsh. 222, 19 Am. Dec. 70; *Chambers v. Haney*, 45 La. Ann. 447, 12 So. Rep. 621; *Beaver v. Frick Co.* 53 Ark. 18, 13 S. W. Rep. 134. Delivery of a deed in one district to the clerk or his deputy, without instructions, is *prima facie* delivery for record in the district where delivered.

<sup>5</sup> *Jones v. Powers*, 65 Tex. 207.

<sup>6</sup> *Stinnett v. House*, 1 Tex. Un. Cas. 484.

1459. When a new county is created, the act of the legislature merely provides for its organization; and until the new county is actually organized, or attached to some other county or district, transfers of land located in it should be registered in the county in which the registration would have been made before the organization of the new county.<sup>1</sup>

Where, at the time of the execution of a deed, the land conveyed was in a county which was divided before the deed was recorded, it should be recorded in the county in which the land is situated at the time of the recording.<sup>2</sup>

In case it is impossible to determine from the acts of the legislature whether certain land now within a certain county was formerly within an adjoining county, it will be presumed that a patent of land issued by the State which described the land as being in such adjoining county, and recorded in such adjoining county, was properly recorded, it appearing that the boundary between the counties was afterwards established without reference to the exact boundary previously existing.<sup>3</sup>

1460. In most of the States all instruments relating to the title to real estate are recorded in the same books of record, but in several States it is provided that all mortgages shall be recorded in separate books kept for this purpose only.<sup>4</sup> A record not made in the proper book does not operate as constructive notice.<sup>5</sup>

<sup>1</sup> Lumpkin v. Muncey, 66 Tex. 311, 17 S. W. Rep. 732; Clark v. Goss, 12 Tex. 395.

<sup>2</sup> Green v. Green (Cal.), 37 Pac. Rep. 188.

<sup>3</sup> Ballaster v. Mann, 86 Tex. 643, 26 S. W. Rep. 494. See, also, Broussard v. Dull, 3 Tex. Civ. App. 59, 21 S. W. Rep. 937.

<sup>4</sup> California: Civ. Code, § 1171. Idaho: R. S. 1887, § 2999. Michigan: Annot. Stats. 1882, § 567. See, as to what instrument should be recorded as a mortgage, Balen v. Mercier, 75 Mich. 42, 42 N. W. Rep. 666. Nebraska: Comp. Stats. 1885, ch. 18, § 82. New Mexico: Laws 1887, ch. 10, § 5. New York: R. S. 1889, pt. 2, ch. 3, §§ 2, 3. North Dakota: Civ. Code 1887, § 3274. Ohio: R. S. 1892, § 1143. South Dakota: Civ. Code 1887,

§ 3274. Texas: Rev. Civ. Stats. 1889, art. 4304; Cavanaugh v. Peterson, 47 Tex. 197. But a mechanic's lien need not be recorded. Quinn v. Logan, 67 Tex. 600, 4 S. W. Rep. 247.

Mortgages of personal property are generally recorded separately from mortgages and other instruments relating to real property. In some States separate books are required for releases of mortgages and other liens, for mechanics' liens, for marriage contracts, and in a few States separate books are required for each class of instruments relating to real property.

<sup>5</sup> Parsons v. Lent, 34 N. J. Eq. 67; Deane v. Hutchinson, 40 N. J. Eq. 83, 2 Atl. Rep. 292; Van Thorniley v. Peters, 26 Ohio St. 471; Gossett v. Tolen, 61 Ind. 388.

The record of a deed in the mortgage record is not constructive notice of the deed to subsequent purchasers.<sup>1</sup>

1461. Usage may determine the validity of a record. Thus, where mortgages of real and personal property are required to be recorded in separate books, and a mortgage embracing both real and personal property is recorded only in the book of real estate mortgages, it is held to be sufficiently recorded to make it constructive notice of the lien upon the personal property, if it appear that it is the custom to record such mortgages in this manner without making a double record.

The record of a deed of standing timber made in a book called "Miscellaneous Records," in which it is customary in the State to record exceptional instruments offered for record, such as contracts of sale, leases, and various other kinds of papers, is constructive notice of the rights of the parties claiming under such deed.<sup>2</sup>

The record of an assignment for the benefit of creditors, embracing real property, is not void as to non-consenting creditors because it was not transcribed by the recorder into the proper book of records, but was transcribed into a book marked "Miscellaneous," and the only question that can arise by reason of the improper record is as to its effect on subsequent purchasers and mortgagees in good faith. As to them the record would seem to be good under a statute providing that an instrument is deemed to be recorded when it is deposited in the recorder's office with the proper officer for record.<sup>3</sup>

1462. When it is provided that mortgages shall be recorded in books kept for that purpose separate from other instruments, a mortgage recorded as a deed is not effectual as against subsequent *bona fide* purchasers or mortgagees, even if the mortgage be in form an absolute deed, but intended as security for a loan of money.<sup>4</sup> If a mortgage is not recorded in the mortgage

<sup>1</sup> Neslin v. Wells, 104 U. S. 428, 438; Luch's Appeal, 44 Pa. St. 519; Colomer v. Morgan, 13 La. Ann. 202; Drake v. Reggel, 10 Utah, 376, 37 Pac. Rep. 583; Abraham v. Mayer, 7 Misc. Rep. 250, 27 N. Y. Supp. 264; Gillig v. Maass, 28 N. Y. 191, 215.

<sup>2</sup> Mee v. Benedict, 98 Mich. 260, 57 N. W. Rep. 175.

<sup>3</sup> Watkins v. Wilhoit, 104 Cal. 395, 38 Pac. Rep. 53.

<sup>4</sup> Louisiana: Colomer v. Morgan, 13 La. Ann. 202; Cordeviolle v. Dawson, 26 La. Ann. 534. New York: Warner v. Winslow, 1 Sandf. Ch. 430; Brown v. Dean, 3 Wend. 208; White v. Moore, 1 Paige, 551; Grimstone v. Carter, 3 Paige, 421, 24 Am. Dec. 230; James v. Morey,

books, it cannot be found by means of the index to those books, and therefore is not regarded as properly recorded.<sup>1</sup> Such a deed is of course valid as between the parties,<sup>2</sup> and, though the record is a nullity, it becomes operative in case the mortgagee afterwards acquires the equity of redemption.<sup>3</sup> A subsequent purchaser or mortgagee, who has actual notice of a mortgage which is improperly recorded as an absolute conveyance, of course takes a title subject to such mortgage, just as he would if the mortgage were not recorded at all. A statute which is merely directory to the recorder in this respect would not invalidate a record of the mortgage not made in the record books especially used for mortgages.<sup>4</sup>

Except in States whose statutes require a different construction, the record of a conveyance in the form of an absolute deed, in a book kept for the recording of deeds, ought to be held to impart effectual notice of the rights or interests conveyed, although a statute requires mortgages to be recorded in separate books.<sup>5</sup>

**1463. The recording acts of several States provide that**

2 Cow. 246, 6 Johns. Ch. 417, 14 Am. Dec. 475; *Clute v. Robison*, 2 Johns. 595; *Dey v. Dunham*, 2 Johns. Ch. 182, 15 Johns. 555. The statute providing for the recording of mortgages in separate books expressly includes, also, conveyances absolute in terms, but intended as mortgages. 4 Rev. Stats. 1889, pt. 2, ch. 3, §§ 2, 3; *Purdy v. Huntington*, 42 N. Y. 334, 1 Am. Rep. 532. The statute applies to an agreement creating a lien in the nature of a mortgage. *Edwards v. Meader*, 11 N. Y. Supp. 285. **Pennsylvania:** *Calder v. Chapman*, 52 Pa. St. 359, 362, 91 Am. Dec. 163. **Wisconsin:** *Knowlton v. Walker*, 13 Wis. 264.

<sup>1</sup> *Luch's Appeal*, 44 Pa. St. 519.

<sup>2</sup> *James v. Morey*, 6 Johns. Ch. 417, 2 Cow. 246, 14 Am. Dec. 475; *Swepton v. Exch. & Dep. Bank*, 9 Lea, 713.

<sup>3</sup> *Warner v. Winslow*, 1 Sandf. Ch. 430; *Grellet v. Heilshorn*, 4 Nev. 526; *Parsons v. Lent*, 34 N. J. Eq. 67.

<sup>4</sup> *Smith v. Smith*, 13 Ohio St. 532.

<sup>5</sup> *Kennard v. Mabry*, 78 Tex. 151, 14 S. W. Rep. 272. Chief Justice Slayton said: "Every person is presumed to know

that a deed absolute on its face may have been intended by the parties to it only as a mortgage, and that the courts will so hold it to be, if executed only for the purpose of securing a debt. So knowing, every person ought to be held to be affected with notice of every right, less than absolute ownership, the person holding under a deed so recorded has. If the record shows an absolute conveyance, it gives notice of the fact that the vendor has parted with all interest he had in the land, and such notice ought to be binding on a subsequent purchaser or mortgagee, who must know that, as between the parties, on proof of the fact that it was executed to secure a debt, the courts will hold it to be only a mortgage. The decisions which take this view of the question we think the better. *Clemons v. Elder*, 9 Iowa, 272; *Haseltine v. Espey*, 13 Ore. 301, 10 Pac. Rep. 423; *Nicklin v. Betts Spring Co.* 11 Ore. 406, 5 Pac. Rep. 51; *Young v. Thompson*, 2 Kans. 83; *Grellet v. Heilshorn*, 4 Nev. 526; *Ruggles v. Williams*, 1 Head, 141."

deeds and mortgages shall be recorded within a specified time after execution.<sup>1</sup> The effect of this provision is not to invalidate

<sup>1</sup> **Alabama**: Unconditional deeds and mortgages to secure debts, created at the date thereof, are void as to purchasers, mortgagees, and judgment creditors without notice, unless recorded within thirty days from date. Other conveyances and mortgages have priority from the time they are recorded. Code 1886, §§ 1810-1812, 1797; *Coster v. Bank*, 24 Ala. 37; *De Vendal v. Malone*, 25 Ala. 272; *Cook v. Parham*, 63 Ala. 456; *Steiner v. Clisby*, 95 Ala. 91, 10 So. Rep. 240. Actual notice to a judgment creditor of a conveyance, within thirty days from its date, does not obviate the necessity of its record, and validate it as to such creditor. *Hodges v. Winston*, 95 Ala. 514, 15 So. Rep. 528. **Delaware**: A mortgage for purchase-money recorded within thirty days after its execution has precedence of any judgment or other lien of prior date. Other deeds and mortgages must be recorded within three months after delivery in order to avail against a subsequent fair creditor, mortgagee, or purchaser for a valuable consideration without notice. R. Code 1874, pp. 504, 505, § 21; Laws 1881, ch. 520; Laws 1883, p. 509. **Georgia**: Deeds must be recorded within one year and mortgages within thirty days from date, or they will be postponed to other liens or purchases made prior to the record without notice of the unrecorded conveyance. The record of mortgage not made within the time prescribed is notice from the time of record. Code 1882, §§ 1959, 1960, 2705; *Benson v. Green*, 80 Ga. 230, 4 S. E. Rep. 851; *Myers v. Picquet*, 61 Ga. 260; *Adair v. Davis*, 71 Ga. 769. **Indiana**: Deeds and mortgages not recorded within forty-five days from their execution are fraudulent and void as against subsequent purchasers, lessees, or mortgagees in good faith and for a valuable consideration. R. S. 1888, §§ 2931, 2932. As to proof of recording, see *Moore v. Glover*, 115 Ind. 367, 16 N. E. Rep. 163. **Kentucky**: Deeds other than

deeds of trust and mortgages by residents of the State, sixty days from date; by persons residing out of the State in the United States, four months; by persons out of the United States, twelve months. G. S. 1888, p. 315, § 14. **Maryland**: Deeds and mortgages, within six months from date. P. G. Laws 1888, art. 21, §§ 13-15. When so recorded they take effect as between the parties from their date; otherwise they are not valid for the purpose of passing the title. No title passes until the deed is recorded. *Nickel v. Brown*, 75 Md. 172, 23 Atl. Rep. 736. A mortgage not recorded within six months has priority over general creditors at its date, but not over subsequent creditors. *Sixth Ward Building Assn. v. Willson*, 41 Md. 506; *Pfeaff v. Jones*, 50 Md. 263; *Dyson v. Simmons*, 48 Md. 207. **Oregon**: Deeds and mortgages must be recorded within five days after execution. 2 Annot. Laws 1887, § 3027. **Pennsylvania**: Act May 19, 1893, Laws 1893, p. 108, amending act March 18, 1775, fixes the time within which conveyances must be recorded at ninety days, instead of six months, the period prescribed by the act of 1775; and provides that, if the holder of the deed fails to record it within ninety days after execution, it shall be deemed void as to subsequent purchasers, subsequent mortgagees, and subsequent creditors of the grantor. But, as a judgment cannot be recorded in the recorder's office, the provision as to "creditors" cannot be carried into effect, and the act must be construed as if the word "creditors" were not in it. *Davey v. Ruffell*, 162 Pa. St. 443, 29 Atl. Rep. 894. Deeds made and acknowledged out of the State must be recorded within six months. Laws 1893, p. 108. By recent statute, applicable to Philadelphia alone, deeds and other conveyances are valid as against subsequent purchasers only from the date of record. *Purdon's Ann. Dig.* p. 2110, § 5.

A mortgage for purchase-money, if re-

the conveyance or mortgage, as between the parties, if not recorded within the time specified. It is admissible in evidence, and is an equitable lien, although not so recorded.<sup>1</sup> The failure to comply with this requirement only goes to the effect of the conveyance as to subsequent purchasers. As to purchasers whose conveyances are registered before a deed recorded after the expiration of the limited time, the deed is ineffectual.<sup>2</sup> Of two conveyances of equal equity, recorded within the time limited after execution, that which is first recorded has priority.<sup>3</sup>

The effect of these provisions is that the record, when made within the prescribed time, relates back to the date of delivery of the instrument, and gives it priority over an instrument of subsequent date or delivery, although this has already been recorded.<sup>4</sup>

recorded within sixty days from its execution, has priority. *Brightly's Purdon's Dig.* p. 588; *Bratton's Appeal*, 8 Pa. St. 164; *Parke v. Neeley*, 90 Pa. St. 52. Of two mortgages for purchase-money recorded within the sixty days, that which is first recorded has priority. *Dungan v. Am. L. Ins. & Trust Co.* 52 Pa. St. 253. With the exception of mortgages for purchase-money, no mortgage is a lien until left for record; but when recorded, the priority of lien is according to the priority of record. *Brooke's Appeal*, 64 Pa. St. 127; *Foster's Appeal*, 3 Pa. St. 79; *Brightly's Dig.* 1872, p. 478. If two or more deeds are left on the same day, they have priority according to the time they were left at the office for record. *Brooke's Appeal*, 64 Pa. St. 127. If the mortgage remain unrecorded at the time of the death of the mortgagor, though good against him while he lived, it is not good against his creditors after his decease, but must then come in with his general debts. *Brightly's Purdon's Dig.* p. 588; *Nice's Appeal*, 54 Pa. St. 200; *Adams's Appeal*, 1 Pa. 447. **South Carolina**: Deeds, deeds of trust and mortgages, and statutory liens are valid, so as to affect subsequent creditors or purchasers for valuable consideration without notice, only when recorded within forty days from the time of execution. P. S. 1882, § 1776. **Virginia**: Any conveyance recorded within

twenty days from the day of its acknowledgment shall, unless it be a mortgage, or a deed of trust not in consideration of marriage, be as valid as to creditors and subsequent purchasers as if recorded on the day of acknowledgment. Code 1887, § 2467.

In several States, provisions allowing time for recording instruments have been repealed recently, as in **California**, **District of Columbia**, **Mississippi**, **New Jersey**, **North Carolina**, and **Ohio**, and it is not probable that like provisions now remaining upon the statute books will remain many years longer.

<sup>1</sup> *Sixth Ward Building Asso. v. Willson*, 41 Md. 506; *Den v. Watkins*, 6 N. J. L. 445; *Ashe v. Livingston*, 2 Bay, 80; *Penman v. Hart*, 2 Bay, 251; *Ash v. Ash*, 1 Bay, 304; *Rootes v. Holliday*, 6 Munf. 251; *Plume v. Bone*, 13 N. J. L. 63; *Charter v. Graham*, 56 Ill. 19.

<sup>2</sup> *Cowan v. Green*, 2 Hawks, 384.

<sup>3</sup> *Dungan v. Am. Life Ins. & Trust Co.* 52 Pa. St. 253; *Den v. Roberts*, 4 N. J. L. 315; *Wood v. Lordier*, 115 Ind. 519, 18 N. E. Rep. 34; *Gibson v. Keyes*, 112 Ind. 568, 14 N. E. Rep. 591, modifying or reversing *Cain v. Hanna*, 63 Ind. 408; *Meikel v. Borders*, 129 Ind. 529, 29 N. E. Rep. 29; *Pierce v. Spear*, 94 Ind. 127; *Nitche v. Earle*, 88 Ind. 375; *Earle v. Fiske*, 103 Mass. 491.

<sup>4</sup> *Clarke v. White*, 12 Pet. 178; *Betz v. Mullin*, 62 Ala. 365; *Clairborne v. Holmes*,

But the record will not relate back to the date of the delivery of the instrument if this was not then completely executed, ready to be recorded. It will not so relate back in case the deed was not attested and acknowledged as required by statute to entitle it to be recorded.<sup>1</sup>

1464. A record made after the prescribed time operates as notice only from the time of delivery of the instrument for record.<sup>2</sup> As between conveyances neither of which is recorded within the prescribed time, the ordinary rule of priority of record prevails, and preference is given to the instrument first recorded.<sup>3</sup> The terms of the statute may determine the question of priority between instruments not recorded within the prescribed time.

If the second deed is executed after the first deed has been recorded, though not within the time limited, the first deed has priority.<sup>4</sup> If the second deed be made before the first deed is recorded, and the second deed be recorded within the time limited, but the first deed be not so recorded, though recorded before the second deed, the second deed has priority by virtue of relation back to the time of its execution.<sup>5</sup>

51 Miss. 146; *Breckenridge v. Todd*, 3 T. B. Mon. (Ky.) 52, 16 Am. Dec. 83; *Nichols v. Hampton*, 46 Ga. 253; *Anderson v. Dugas*, 29 Ga. 440; *Northrup v. Brehmer*, 8 Ohio, 392.

<sup>1</sup> *White v. Magarahan*, 87 Ga. 217, 13 S. E. Rep. 509.

<sup>2</sup> *De Lane v. Moore*, 14 How. 253; *Wyman v. Russell*, 4 Biss. 307; *Meni v. Rathbone*, 21 Ind. 454; *Gilchrist v. Gough*, 63 Ind. 576, 30 Am. Rep. 250; *Anderson v. Dugas*, 29 Ga. 440; *Adair v. Davis*, 71 Ga. 769; *McGuire v. Barker*, 61 Ga. 339; *Mallory v. Stodder*, 6 Ala. 801; *McNamee v. Huckabee*, 20 S. C. 190; *Steele v. Mansell*, 6 Rich. 437; *South Carolina Loan Co. v. McPherson*, 26 S. C. 431, 2 S. E. Rep. 267; *King v. Fraser*, 23 S. C. 543; *Hockenhull v. Oliver*, 80 Ga. 89, 4 S. E. Rep. 328; *Sanborn v. Adair*, 29 N. J. Eq. 338; *Clairborne v. Holmes*, 51 Miss. 146; *Harding v. Allen*, 70 Md. 395. In *South Carolina*, prior to January 1, 1877, a valid record could not be made after the time limited. *Bloom v. Simms*, 27 S. C. 90, 3 S. E. Rep. 45.

<sup>3</sup> *Fleschner v. Sumpter*, 12 Oreg. 161, 6 Pac. Rep. 506; *Adair v. Davis*, 71 Ga. 769; *Northrup v. Brehmer*, 8 Ohio, 392; *Pennsylvania Salt Manuf. Co. v. Neel*, 54 Pa. St. 7, 19; *Souder v. Morrow*, 33 Pa. St. 83; *Collins v. Aaron*, 162 Pa. St. 539, 29 Atl. Rep. 724; *McNamee v. Huckabee*, 20 S. C. 190; *Reasoner v. Edmundson*, 5 Ind. 393.

<sup>4</sup> *Steele v. Mansell*, 6 Rich. 437; *Adair v. Davis*, 71 Ga. 769.

<sup>5</sup> *Leger v. Doyle*, 11 Rich. 109, 119, 70 Am. Dec. 240, per *Wardlaw, J.*; *McNamee v. Huckabee*, 20 S. C. 190, 198, per *McGowan, J.*

In a recent decision in *Pennsylvania* it was held that the first deed has priority in such case. *Fries v. Null*, 154 Pa. St. 573, 26 Atl. Rep. 554. *Mitchell, J.*, dissenting, said: "By the construction now adopted, a vendee may lie in wait for years until a second purchaser has paid his money in good faith for an apparently clear title, and then cut him out by getting first on the record. Against this danger a purchaser has no safeguard but by immediate



Such a provision is a pernicious one, and is the source of much more inconvenience and fraud than it can possibly prevent. It practically amounts to a withdrawal of the protection of the registry law for the period allowed for registration. A purchaser is never sure of his own priority until he has waited for the prescribed time to elapse after the recording of the deed to himself.

Where recording is essential to the introduction of a deed or mortgage in evidence, it may be recorded after action upon it is brought, and at any time before trial. This rule is equally applicable to the case of an assignment of a mortgage, which may be recorded after the assignee has brought an action to foreclose, and at any time before trial and judgment.<sup>1</sup>

1465. It is sometimes provided by statute that a power of attorney, under which a conveyance is executed, shall be recorded with the deed, which owes its existence to the power, and when this is the case the record of the deed without the power has no legal effect.<sup>2</sup> But, aside from this requirement, it is not necessary that a power should be recorded with the deed, or that it should be recorded at all, in order that the deed when recorded should be notice to all the world.<sup>3</sup>

The record of a power of attorney, when the law does not require it to be recorded, does not amount to constructive notice.<sup>4</sup> The law does not intend that to be known for the existence of which there is no legal necessity.<sup>5</sup>

Powers of attorney conferring authority to convey property are acknowledged and recorded in the same manner, and are received as evidence to the same extent, as conveyances duly recorded.<sup>6</sup>

In some States it is provided not only that the power of attorney may be recorded, but also that no power shall be deemed to

record, although the statute delusively offers him six months in which to bring up his searches, keep a lookout for mechanics' liens, and complete his arrangements in safety. Such an interpretation is unsupported by any adjudicated case, completely nullifies the express privilege of six months given by the statute, and overturns the settled contemporaneous construction for a century past, which is always said to be *fortissima in lege*."

This case well illustrates the danger, if not the absurdity, of a statute allowing time for recording.

<sup>1</sup> Wolcott v. Winchester, 15 Gray, 461.

<sup>2</sup> Carnall v. Duval, 22 Ark. 136.

<sup>3</sup> Wilson v. Troup, 2 Cow. 195, 14 Am. Dec. 458.

<sup>4</sup> Williams v. Birbeck, Hoff. 359.

<sup>5</sup> James v. Morey, 2 Cow. 246, 296, 6 Johns. Ch. 417, 14 Am. Dec. 475.

<sup>6</sup> § 1022, n. 7.

be revoked until the revocation shall be deposited for record in the same office in which the power is recorded.<sup>1</sup>

**1466. Record of separate defeasance.** — When an absolute deed is given in the way of security, with a written defeasance back, the rights of the mortgagee are in general fully protected without any record of the defeasance. The recorded deed is sufficient notice of his interest.<sup>2</sup> In fact it is notice of a greater interest than he actually has. But this does not matter except in those States in which the recording of the defeasance with the deed is expressly required as a condition upon which the mortgagee shall derive any benefit from the record of the deed.<sup>3</sup> When the defeasance is not recorded, the obvious effect of the record of the deed alone is to make the grantee the apparent absolute owner of the estate, and the person who holds the defeasance may be barred of all right of redemption by a sale by the mortgagee to one who buys in good faith and without notice of such defeasance.

<sup>1</sup> § 1022, n. 8.

<sup>2</sup> **Connecticut:** *Newberry v. Bulkley*, 5 Day, 384; *Ives v. Stone*, 51 Conn. 446. **Georgia:** *Gibson v. Hough*, 60 Ga. 588. **Illinois:** *Christie v. Hale*, 46 Ill. 117. **Iowa:** *Clemons v. Elder*, 9 Iowa, 272. **Kansas:** *Young v. Thompson*, 2 Kans. 83. **Maine:** *Shaw v. Wilshire*, 65 Me. 485. **Maryland:** *Ing v. Brown*, 3 Md. Ch. 521. **Minnesota:** *Benton v. Nicoll*, 24 Minn. 221; *Marston v. Williams*, 45 Minn. 116, 47 N. W. Rep. 644. **Mississippi:** *Bank v. Tishomingo Sav. Inst.* 62 Miss. 250. **Nebraska:** *Livesey v. Brown*, 35 Neb. 111, 52 N. W. Rep. 838. **Nevada:** *Grellet v. Heilshorn*, 4 Nev. 526. **Ohio:** *Kemper v. Campbell*, 44 Ohio St. 210, 6 N. E. Rep. 566. **Oregon:** *Haseltine v. Espey*, 13 Oreg. 301, 10 Pac. Rep. 423. **Tennessee:** *Ruggles v. Williams*, 1 Head, 141. **Vermont:** *Gibson v. Seymour*, 4 Vt. 518. **Wisconsin:** *Knowlton v. Walker*, 13 Wis. 264.

<sup>3</sup> There are such statutes in the following named States: **Maryland:** 2 Pub. Gen. Laws 1888, art. 66, § 1. The deed is not made void by neglect to record the defeasance, but the grantee derives no benefit from the record as against subsequent

purchasers. *Owens v. Miller*, 29 Md. 144. **Nebraska:** Comp. Stats. 1885, ch. 73, § 25. In **New Hampshire:** The defeasance must be embodied in the conveyance itself. G. L. 1878, ch. 136, § 2. **New Jersey:** R. S. 1877, p. 706, § 21. **New York:** 4 R. S. 8th ed. p. 247. **North Dakota:** Comp. Laws 1887, § 4371. **South Dakota:** Comp. Laws 1887, § 4371.

The same rule is judicially established in **Pennsylvania:** *Calder v. Chapman*, 52 Pa. St. 359; *Edwards v. Trumbull*, 50 Pa. St. 509; *Luch's Appeal*, 44 Pa. St. 519; *Corpman v. Baccastow*, 84 Pa. St. 363; *Friedley v. Hamilton*, 17 S. & R. 70; *Jaques v. Weeks*, 7 Watts, 261, 287. "A mortgage," says Mr. Justice Black, in *Hendrickson's Appeal*, 24 Pa. St. 363, "when in the shape of an absolute conveyance with a separate defeasance, the former being recorded, the latter not, gives the holder no rights against a subsequent incumbrance. It is good for nothing as a conveyance, because it is in fact not a conveyance; and it is equally worthless as a mortgage, because it does not appear by the record to be a mortgage."

A judgment creditor of the grantor in such case cannot claim that the conveyance is of the character of an unrecorded mortgage, so as to render the property subject to his judgment.<sup>1</sup>

Such absolute deed is in law regarded as merely a deed, and it is only in equity that effect is given to the intention of the parties that it shall operate as a security only. But judgments against such grantor or mortgagor are liens upon his equity of redemption in the premises, and an equitable action to have them so declared may be maintained against a subsequent purchaser having knowledge of the facts, and holding the land under a deed direct from the grantee or mortgagee.<sup>2</sup>

As to third persons, the absolute conveyance is not defeated or affected unless the defeasance is also recorded; and an express declaration to this effect has been made by statute in several States.<sup>3</sup> The object of such statutes is to protect innocent pur-

<sup>1</sup> *Mobile Bank v. Tishomingo Sav. Inst.* 62 Miss. 250.

In *Connecticut*, also, unless the defeasance is recorded with the deed, the instruments being intended to operate as a mortgage, a creditor of the grantor may attach the property as his, for the transaction is regarded as invalid as against the grantor's creditors. *Ives v. Stone*, 51 Conn. 446. *Carpenter, J.*, delivering the opinion of the court, after reviewing the *Connecticut* decisions which require the debt secured to be fully and accurately described, said: "This transaction, the defeasance being unrecorded, is contrary to the spirit of all decisions. The record, so far from disclosing the true state of the title, shows it to be an absolute deed instead of a mortgage; it represents the grantee as the owner of the property, whereas the grantor owns it subject to the grantee's debt, and the equity of redemption is concealed and placed apparently beyond the reach of creditors, while a secret trust exists in favor of the grantor. So far from describing the debt with reasonable certainty, the record is entirely silent on the subject, and places it within the power of the parties, by collusion, if they are so disposed, to set up any claim, and for any amount, as a substitute for

the one really intended to be secured. If this transaction can be sustained as a valid mortgage against creditors, it will not only destroy all the benefits of the recording system as respects mortgages, but will enable the parties, by a change in the form of the mortgage, to convert the system itself into an instrument of fraud." See, also, *Stearns v. Porter*, 46 Conn. 313; *Hart v. Chalker*, 14 Conn. 77. The same rule is adopted in *North Carolina*: *Gulley v. Macy*, 84 N. C. 434; *Dukes v. Jones*, 6 Jones, 14; *Gregory v. Perkins*, 4 Dev. 50.

<sup>2</sup> *Marston v. Williams*, 45 Minn. 116, 47 N. W. Rep. 644, 22 Am. St. Rep. 719.

<sup>3</sup> *Alabama*: Code 1886, § 1812. *California*: Civ. Code 1885, § 2950. *Delaware*: Within sixty days. R. Code 1893, p. 629, § 18. *Dakota*: Comp. Laws 1887, § 4371. *Indiana*: Within ninety days from date of deed. R. S. 1888, § 2932. *Kansas*: G. S. 1889, § 3885. *Maine*: R. S. 1883, ch. 73, §§ 8, 9. *Massachusetts*: P. S. 1882, ch. 120, § 23. *Michigan*: 2 Annot. Stats. 1882, § 5686. *Minnesota*: R. S. 1881, ch. 40, § 23. *Oregon*: Annot. Laws 1887, § 3029. *Pennsylvania*: Within sixty days. Laws 1881, p. 84; *Sankey v. Hawley*, 118 Pa. St. 30, 13 Atl. Rep. 208. *Rhode Island*: P. S. 1882, ch. 176,

chasers from the mortgagee, who has apparently an indefeasible title; while the provision whereby the record of the defeasance is enforced, in the States before named, is made for the protection of the mortgagor.

These requirements of statute have no application when the conveyance to which the defeasance relates does not purport upon its face to be absolute and unconditional.<sup>1</sup> While a purchaser in good faith and without notice, from a mortgagee by an absolute conveyance, obtains a title not subject to redemption, yet if the purchaser has notice of the original transaction he takes only the mortgagee's title; and if there are successive mutations, but always coupled with such notice, the original conveyance continues as a mortgage.<sup>2</sup> The fact that the grantor remains in possession of the property has been held sufficient to charge the purchaser with such notice.<sup>3</sup> The instrument of defeasance has full effect between the parties without being recorded.<sup>4</sup>

1467. A purchaser may rely upon the legal title as it appears of record. These provisions of statute are only the enactment of a principle that is necessarily deduced from the general provisions of the registry system, and which had already been established by judicial construction.<sup>5</sup> "It is regarded," says Chief Justice Redfield, "as more in conformity to just principles of equity and fair dealing, that the estate of the *cestui que trust* should be extinguished by the deed of the trustee, than that the equal equity of the purchaser should be defeated, and thus the free and fair transmission of estates be embarrassed and placed under a cloud of suspicion and doubt. The equities of the parties being equal, the legal estate is allowed to prevail, and a rule of policy is at the same time subserved by leaving the transmission of titles unembarrassed as far as practicable, thus inspiring confidence, rather than distrust, in the transmission of titles to real estate."<sup>6</sup>

§§ 1, 2. Wisconsin: R. S. 1878, § 2243.  
Wyoming: R. S. 1887, §§ 21, 22.

<sup>1</sup> Russell v. Waite, Walk. (Mich.) 31;  
Noyes v. Sturdivant, 18 Me. 104.

<sup>2</sup> Brown v. Gaffney, 28 Ill. 149; Shaver  
v. Woodward, 28 Ill. 277; Hall v. Savill,  
3 Greene (Iowa), 37, 54 Am. Dec. 485;  
Williams v. Thorn, 11 Paige, 459.

<sup>3</sup> Mann v. Falcon, 25 Tex. 271, 274.

<sup>4</sup> Bayley v. Bailey, 5 Gray, 505, 510.

<sup>5</sup> Newhall v. Burt, 7 Pick. 157; New-  
hall v. Pierce, 5 Pick. 450; Harrison v.  
Phillips Academy, 12 Mass. 456; Mills v.  
Comstock, 5 Johns. Ch. 214; Whittick  
v. Kane, 1 Paige, 202; Stoddard v. Rot-  
ton, 5 Bosw. 378; Columbia Bank v.  
Jacobs, 10 Mich. 349, 81 Am. Dec. 792.

<sup>6</sup> Hart v. Farmers' & Mechanics' Bank,  
33 Vt. 252, 265.

When the mortgage is by a deed absolute in form, and the defeasance is not recorded, the grantee can of course convey a good title to a *bona fide* purchaser.<sup>1</sup> The position of the parties is quite the same when the holder of a mortgage duly recorded has taken a conveyance of the equity of redemption, and has then assigned the mortgage to one who does not record the assignment and has then conveyed the fee to another. Apparently the mortgagee, at the time of his conveyance in fee, had the complete title by merger of the mortgage in the fee, just as the mortgagee by an absolute deed has it; and the prior assignment of the mortgage by an assignment not recorded amounts to the defeasance not being recorded.<sup>2</sup>

As elsewhere noticed, in some States neither an attaching creditor nor a judgment creditor is regarded as a purchaser, and therefore he acquires by his attachment or judgment no lien upon the land in the hands of the mortgagee holding the title absolutely, as against the equitable *cestui que trust*, or grantor equitably entitled to the equity of redemption.<sup>3</sup>

### VIII. *Errors in the Record.*

1468. If the record of a deed be defective, it is in many States constructive notice of only what the record contains, in case the record is not an accurate transcript of the instrument.<sup>4</sup> This is the view sustained by a great number of cases and perhaps by the greater weight of reason, as distinguished from the view that the filing of the deed operates as a record of it, and that it is constructive notice from such time of the actual contents of the deed. These different views depend somewhat upon the different terms used by the statutes in regard to the effect of filing or recording of deeds as constructive notice. Thus, under statutes which re-

<sup>1</sup> *Bailey v. Myrick*, 50 Me. 171; *Pico v. Gallardo*, 52 Cal. 206; *Tufts v. Tapley*, 129 Mass. 380; *Turman v. Bell*, 54 Ark. 273, 15 S. W. Rep. 886.

<sup>2</sup> *Mills v. Comstock*, 5 Johns. Ch. 214. See *Purdy v. Huntington*, 42 N. Y. 334, 1 Am. Rep. 532, 46 Barb. 389, reversed.

<sup>3</sup> *Hart v. Farmers' & Mechanics' Bank*, 33 Vt. 252.

<sup>4</sup> *New York*: 2 *Pomeroy's Eq. Jur.* §§ 653, 654; *White v. McGarry*, 2 Flipp. 572; *New York Life Ins. Co. v. White*, 17

N. Y. 469; *Frost v. Beekman*, 1 Johns. Ch. 288, 18 Johns. 544; *Ford v. James*, 4 Keyes, 300; *Peck v. Mallams*, 10 N. Y. 509. See, however, not in accord with these decisions, *Simonson v. Falihee*, 25 Hun, 570; *Bedford v. Tupper*, 30 Hun, 174, and others, § 1472. *Maryland*: *Brydon v. Campbell*, 40 Md. 331; *Johns v. Scott*, 5 Md. 81. *Pennsylvania*: *Schell v. Stein*, 76 Pa. St. 398, 18 Am. Rep. 416; *Heister v. Fortner*, 2 Binn. 40, 4 Am. Dec. 417. See § 1472.

quire instruments to be recorded according to law before constructive notice of their contents is imparted, though when so recorded the notice relates back to the date of the deposit of the deed, the record is notice of the deed as recorded, and not of its contents as received for record.<sup>1</sup> It is true, however, that there is a conflict of decisions under statutes substantially the same.<sup>2</sup>

Of course, a record is not invalidated by a mere clerical error in transcribing the instrument, not affecting the sense or obscuring its meaning.<sup>3</sup>

Every requirement of statute in relation to the execution and acknowledgment or proof of a deed or mortgage must be complied with in order to gain priority by the record of it.<sup>4</sup> Moreover, the deed as it stands must be spread upon the record correctly. Persons interested in a title have a right to resort to the records to find out the contents of a deed, and can be considered as having notice of it only as it appears of record. The rule that the deed is notice from the time it is left for record is subject to the qualification that it is correctly transcribed.

1469. When the record itself is defective, it is notice of only what appears upon it.<sup>5</sup> If, for instance, a mortgage for three

<sup>1</sup> Donald v. Beals, 57 Cal. 399; Watkins v. Wilhoit (Cal.), 35 Pac. Rep. 646.

<sup>2</sup> St. Croix Land & Lumber Co. v. Ritchie, 73 Wis. 409, 41 N. W. Rep. 345, 1064.

<sup>3</sup> Such as giving the quantity of land as two hundred acres instead of two thousand acres, the boundaries correctly describing the larger quantity. Kennedy v. Boykin, 35 S. C. 61, 14 S. E. Rep. 809.

<sup>4</sup> Thompson v. Mack, Harr. (Mich.) 150; Weed v. Lyon, Harr. (Mich.) 363.

<sup>5</sup> California: Chamberlain v. Bell, 7 Cal. 292, 68 Am. Dec. 260; Page v. Rogers, 31 Cal. 293; Donald v. Beals, 57 Cal. 399; Watkins v. Wilhoit (Cal.), 35 Pac. Rep. 646. Indiana: Gilchrist v. Gough, 63 Ind. 576, 30 Am. Rep. 250; Smith v. Lowry, 113 Ind. 37, 15 N. E. Rep. 17; State v. Davis, 96 Ind. 539. Iowa: Disque v. Wright, 49 Iowa, 538; Miller v. Ware, 31 Iowa, 524; Miller v. Bradford, 12 Iowa, 14; Howe v. Thayer, 49 Iowa,

154. Maine: Stedman v. Perkins, 42 Me. 130; McLarren v. Thompson, 40 Me. 284; Hill v. McNichol, 76 Me. 314. Maryland: Brydon v. Campbell, 40 Md. 331. Michigan: Barnard v. Campau, 29 Mich. 162. See People v. Bristol, 35 Mich. 28. Minnesota: Parret v. Shau-bhut, 5 Minn. 323. See, however, Gorham v. Summers, 25 Minn. 81. Missouri: Terrell v. Andrew Co. 44 Mo. 309; Bishop v. Schneider, 46 Mo. 472, 2 Am. Rep. 533. New Jersey: Crosby v. Vleet, 3 N. J. L. J. 86. Vermont: Potter v. Dooley, 55 Vt. 512; Sanger v. Craigie, 10 Vt. 555; Sawyer v. Adams, 8 Vt. 172, 30 Am. Dec. 459. But see, *contra*, Ferris v. Smith, 24 Vt. 27; Bigelow v. Topliff, 25 Vt. 273, 60 Am. Dec. 264; Curtis v. Lyman, 24 Vt. 334, 58 Am. Dec. 174. Washington: Ritchie v. Griffiths, 1 Wash. St. 429, 25 Pac. Rep. 341. Wisconsin: Pringle v. Dunn, 37 Wis. 449, 19 Am. Rep. 772.

thousand dollars be, by mistake of the recorder, registered as for three hundred dollars, or a mortgage for four hundred dollars be registered as two hundred dollars, it is notice to subsequent *bona fide* purchasers of a lien of only that amount.<sup>1</sup> And so if a mortgage for five thousand dollars be recorded as for five hundred dollars, although indexed as a mortgage for five thousand dollars, it is a lien as against a *bona fide* subsequent mortgagee only for the smaller amount; and the knowledge of such subsequent mortgagee that the mortgage was indexed as a mortgage for the larger amount is not sufficient to charge him with knowledge of the true amount.<sup>2</sup> And if a material part of the description be omitted from the record, the record is constructive notice of only what appears upon it.<sup>3</sup> It is no part of the subsequent purchaser's duty to search the original papers to find out whether the recorder has correctly spread their contents upon the record. The obligation of giving notice rests upon the party holding the title. If the recorder occasions a loss to the owner by incorrectly transcribing the deed, the latter may recover damages of the recorder for such loss.<sup>4</sup>

**1470.** Third persons are not required to go beyond the registry to ascertain whether the title is good. If there is any error or omission in the registry of a deed or mortgage, the grantee must suffer for it rather than others who afterwards consult the records. "It is not the attempt to record a deed that the law requires, but it is the recording of the deed. It would be an empty benefit, indeed, that would accrue to the buying public if the attempt to record were held to take the place of the record. The obligation rests upon the grantee to give the notice required by the law. He controls the deed. He can put it on record or not, as he pleases. He has the right and the opportunity to see that the work is done as he directs it to be done, in legal manner. No one else has this opportunity, and if, from any cause, he fails to give the notice required by law, the consequences must fall on him. It may be a hardship; but, where one of two innocent

<sup>1</sup> Frost v. Beekman, 1 Johns. Ch. 288; Peck v. Mallams, 10 N. Y. 509; Terrell v. Andrew Co. 44 Mo. 309; Jennings v. Wood, 20 Ohio, 261, where a mistake was made in the grantor's name; Stevens v. Bachelder, 28 Me. 218; Hill v. McNichol, 76 Me. 314.

<sup>2</sup> Gilchrist v. Gough, 63 Ind. 576, 19 Alb. L. J. 276, 30 Am. Rep. 250.

<sup>3</sup> Disque v. Wright, 49 Iowa, 538, 13 West. Jur. 34, 158.

<sup>4</sup> Terrell v. Andrew Co. 44 Mo. 309.

persons must suffer, the rule is that the misfortune must rest on the person in whose business, and under whose control, it happened, and who had it in his power to avert it."<sup>1</sup> He may in some cases have recourse against the recorder for damages occasioned by his errors or omissions in recording, but otherwise the loss so occasioned must fall upon him.<sup>2</sup>

1471. The burden is upon the grantee to see that the registry laws are complied with, that every step is taken and every act done which these laws prescribe for making the record proper notice to subsequent purchasers or incumbrancers.<sup>3</sup> Whether the one rule or the other shall prevail in any State depends very much upon the terms of the statute. Thus, under statutes which expressly or impliedly make the lodging of the instrument to be recorded with the recording officer constructive notice of it, the grantee is not responsible for any neglect, mistake, or fraud of the recorder in spreading the instrument upon record. But, under statutes which provide that a conveyance certified and recorded as prescribed by law shall be notice from the time it is filed for record, no notice is imparted until the instrument is actually placed on record in the proper book, and then it relates back to the date of the deposit for record.

Even under a statute which merely provides that the recorder shall note the time of filing in an index book, with a reference to the book where recorded, and with names of parties, description of property, and the like, it is held that, without compliance with these provisions, the record affects no party with notice.<sup>4</sup>

1472. The other view prevails under statutes and constructions of statutes which make the deed operative as a record from the time it is filed for record, and holds that any error in transcribing the deed, as, for instance, in the date of the deed or of the acknowledgment,<sup>5</sup> or in the sum secured by a mortgage, or recording it in the wrong book,<sup>6</sup> does not prejudice the grantee

<sup>1</sup> *Ritchie v. Griffiths*, 1 Wash. St. 429, 25 Pac. Rep. 341, per Dunbar, J.

<sup>2</sup> *Taylor v. Hotchkiss*, 2 La. Ann. 917.

<sup>3</sup> *Watkins v. Wilhoit* (Cal.), 35 Pac. Rep. 646; *Terrell v. Andrew Co.* 44 Mo. 309; *Sawyer v. Adams*, 8 Vt. 175; *Ritchie v. Griffiths*, 1 Wash. St. 429, 25 Pac. Rep. 341.

<sup>4</sup> *Ritchie v. Griffiths*, 1 Wash. St. 429, 25 Pac. Rep. 341.

<sup>5</sup> *Wood's Appeal*, 82 Pa. St. 116, 16 Am. Law Reg. N. S. 255; *Brooke's Appeal*, 64 Pa. St. 127; *Musser v. Hyde*, 2 W. & S. 314.

<sup>6</sup> *Watkins v. Wilhoit* (Cal.), 35 Pac. Rep. 646; *Deming v. Miles*, 35 Neb. 739, 53 N. W. Rep. 665.



or mortgagee.<sup>1</sup> The grantee is then regarded as having discharged his entire duty when he has delivered his deed, properly executed and acknowledged, to the recording officer, and as being in the same attitude as if the deed were at that moment correctly spread upon the record book. No subsequent mistake can deprive the deed of its operation as a recorded instrument.<sup>2</sup> The omission of the name of the mortgagee from the record, after it had been

<sup>1</sup> *Mims v. Mims*, 35 Ala. 23; *Dubose v. Young*, 10 Ala. 365; *Simonson v. Falihee*, 25 Hun, 570; *Bedford v. Tupper*, 30 Hun, 174.

A similar view was taken under a statute of Illinois providing that deeds "shall take effect and be in force from and after the time of filing the same for record." *Merrick v. Wallace*, 19 Ill. 486, 497; *Polk v. Cosgrove*, 4 Biss. 437; *Riggs v. Boylan*, 4 Biss. 445.

So, also, in Ohio, where the statute provides that a deed "shall take effect and have preference from the time the same is delivered to the recorder." *Tousley v. Tousley*, 5 Ohio St. 78.

So in Michigan: *Sinclair v. Slawson*, 44 Mich. 123, 38 Am. Rep. 235.

<sup>2</sup> **Alabama**: *Fouche v. Swain*, 80 Ala. 151; *Mims v. Mims*, 35 Ala. 23. **Arkansas**: *Case v. Hargadine*, 43 Ark. 144; *Oats v. Walls*, 28 Ark. 244. **California**: *Watkins v. Wilhoit*, 104 Cal. 395, 35 Pac. Rep. 646. **Connecticut**: *Hine v. Roberts*, 8 Conn. 342, 347, 40 Am. Rep. 170; *Lewis v. Hinman*, 56 Conn. 55, 13 Atl. Rep. 143; *Franklin v. Cannon*, 1 Root, 500; *Judd v. Woodruff*, 2 Root, 298. **Georgia**: *Chatham v. Bradford*, 50 Ga. 327, 15 Am. Rep. 692. See, however, *Shepherd v. Burkhalter*, 13 Ga. 443, 58 Am. Dec. 523. **Illinois**: *Polk v. Cosgrove*, 4 Biss. 437; *Merrick v. Wallace*, 19 Ill. 486; *Kiser v. Heuston*, 38 Ill. 252; *Riggs v. Boylan*, 4 Biss. 445. **Kansas**: *Lee v. Birmingham*, 30 Kans. 372, 1 Pac. Rep. 73; *Poplin v. Mundell*, 27 Kans. 138. **Kentucky**: *Bank v. Haggins*, 1 A. K. Marsh. 306; *Hiatt v. Callo-way*, 7 B. Mon. 178. **Louisiana**: *Payne v. Pavay*, 29 La. Ann. 116; *Swan v. Vogle*, 31 La. Ann. 38; *Taylor v. Hotchkiss*, 2 La. Ann. 917; *Falconer's Succession*, 4 Rob.

5. **Massachusetts**: *Gillespie v. Rogers*, 146 Mass. 610; *Ames v. Phelps*, 18 Pick. 314; *Tracy v. Jenks*, 15 Pick. 465; *Wood v. Simons*, 110 Mass. 116; *Fuller v. Cunningham*, 105 Mass. 442; *Farnsworth v. Jordain*, 15 Gray, 517. **Mississippi**: *Man-gold v. Barlow*, 61 Miss. 593, 48 Am. Rep. 84. **Nebraska**: *Perkins v. Strong*, 22 Neb. 725, 36 N. W. Rep. 292. **New Hampshire**: *Converse v. Porter*, 45 N. H. 385, 399, per Bellows, J. **New York**: *Mutual Ins. Co. v. Dake*, 87 N. Y. 257, per Earl, J.; *Bedford v. Tupper*, 30 Hun, 174; *Simonson v. Falihee*, 25 Hun, 570. Otherwise, it seems, in the earlier cases in this State. *Frost v. Beekman*, 1 Johns. Ch. 288, 18 Johns. 544; *Peck v. Mallams*, 10 N. Y. 509, 519. **Ohio**: *Brown v. Kirkman*, 1 Ohio St. 116; *Tousley v. Tousley*, 5 Ohio St. 78; *Green v. Garrington*, 16 Ohio St. 548. See *Jennings v. Wood*, 20 Ohio, 261. **Oregon**: *Board of Commrs. v. Babcock*, 5 Oreg. 472. **Pennsylvania**: *Wood's Appeal*, 82 Pa. St. 116; *Glading v. Frick*, 88 Pa. St. 460; *Brooke's Appeal*, 64 Pa. St. 127; *Musser v. Hyde*, 2 W. & S. 314; *Schell v. Stein*, 76 Pa. St. 398, 8 Am. Rep. 416; *Clader v. Thomas*, 89 Pa. St. 343. **Rhode Island**: *Nichols v. Reynolds*, 1 R. I. 30, 36 Am. Dec. 238. **Tennessee**: *Woodward v. Boro*, 16 Lea, 678; *Swepson v. Bank*, 9 Lea, 713, 723; *Flowers v. Wilkes*, 1 Swan, 408. See, however, *Lally v. Holland*, 1 Swan, 396. **Texas**: *Freiberg v. Magale*, 70 Tex. 116, 7 S. W. Rep. 684; *Throckmorton v. Price*, 28 Tex. 606, 91 Am. Dec. 334; *Woodson v. Allen*, 54 Tex. 551; *Lignoski v. Crooker*, 86 Tex. 324, 24 S. W. Rep. 278. See, however, *McLouth v. Hurt*, 51 Tex. 115. **Virginia**: *Beverley v. Ellis*, 1 Rand. 102.

properly entered in the entry book, does not defeat the mortgage as to subsequent purchasers.<sup>1</sup> A mistake of the officer in transcribing a mortgage, by which it is made to appear to be a security for a smaller amount than is actually provided for by it, does not impair the mortgage as a security for the amount for which it was actually given, although subsequent purchasers and creditors relying upon the record have taken the incumbrance to be only the amount there disclosed. The lien of a deed or mortgage begins when it is left for record and entered in a proper entry book, required to be kept for the purpose of showing what deeds or mortgages are left for record. The grantee is under no obligation to supervise the work of the recorder, and see that he spreads the deed upon record, or that he puts it upon the index.<sup>2</sup>

If, however, the record is such that it suggests a probable mistake in recording, it puts purchasers upon inquiry and charges them with notice of what the deed contains.<sup>3</sup>

1473. If the grantee is himself guilty of any negligence or irregularity with reference to the recording of his deed, whereby his deed does not appear of record, he cannot claim priority as against a subsequent *bona fide* purchaser. Thus, where a grantee took his deed out of the recorder's office before it was recorded, without noticing that it did not contain the recorder's certificate of recording required by law, the loss was held to fall on him whose want of care and caution made it possible.<sup>4</sup>

<sup>1</sup> Sinclair v. Slawson, 44 Mich. 123, 38 Am. Rep. 235.

<sup>2</sup> Wood's Appeal, 82 Pa. St. 116; Payne v. Pavey, 29 La. Ann. 116.

<sup>3</sup> Lewis v. Hinman, 56 Conn. 55, 13 Atl. Rep. 143.

<sup>4</sup> Turman v. Bell, 54 Ark. 273, 15 S. W. Rep. 886. Hemmingway, J., said: "If the grantee remove his deed before it is recorded, he places it in the power of the grantor to exhibit a clear title, and thus to mislead and deceive subsequent purchasers. By the exercise of slight care and caution he could have averted such a possibility, but, if he fails to do it, persons ignorant of the deed, who have examined the records, may be induced to purchase, when they have exhausted all usual means of inquiry and information. If they do

thus purchase, a loss must be borne. Where should it fall? Upon him whose care and caution did not prevent it, or upon him whose slight care and caution would have prevented it? The question implies its own answer." Oats v. Walls, 28 Ark. 244, holding that, when the deed is once placed in the hands of the recorder, the grantee has no further responsibility, is referred to at length and disposed of as follows: "In so far as that case holds that a deed is notice of its provisions from the time it is filed for record, and that the effect of such notice cannot be impaired by the misconduct of the officer, it is approved; but in so far as it holds that the notice continues as against those who in good faith and for value acquire adverse interests after the deed, unrecorded and

1474. If the grantee withdraws his deed from the recorder's office before it is copied into the record, its effect as notice is destroyed,<sup>1</sup> and it does not matter what his purpose was in withdrawing it.<sup>2</sup> If the deed is subsequently returned for record, constructive notice is afforded by the record from the time the deed is returned to the recorder.<sup>3</sup> If the deed be withdrawn without the consent of the grantee, by mistake of his agent, and the grantee immediately returns it to the recorder, the record is notice from the first delivery for record as against one who attached the property while the deed was absent from the office with knowledge of the facts.<sup>4</sup>

1475. Parol evidence is admissible to show that a deed was not correctly recorded.<sup>5</sup> Of course, if the original deed is produced, the record is verified or corrected by that; but if the original deed has been lost or destroyed, secondary evidence of the error in the record is admissible. Thus one relying upon a deed which has been lost may show that it was signed by Samuel H. Turrill and not by James H. Turrill, as it appeared of record.<sup>6</sup> The record is presumptively correct.<sup>7</sup>

1476. A register may correct an error in the record at any time subsequent to the registration. If he has omitted to indicate the seal or scroll opposite the grantor's signature, he may afterwards supply the omission, or may record the deed anew.<sup>8</sup> Where the doctrine prevails that the record is notice of only what appears of record, though this be defective, a correction of a mistake in the record made by the register cannot affect the rights of a purchaser without notice of the mistake who has become such after the record was made, but before the making of the correction.<sup>9</sup>

There are authorities, however, to the effect that the register has

without a certificate of record, is withdrawn from the files, it is overruled."

<sup>1</sup> *Johnson v. Burden*, 40 Vt. 567, 49 Am. Dec. 436.

<sup>2</sup> *Worcester Nat. Bank v. Cheeney*, 87 Ill. 602, where the alleged purpose was to have a government stamp placed upon the deed.

<sup>3</sup> *Worcester Nat. Bank v. Cheeney*, 87 Ill. 602.

<sup>4</sup> *Jones on Chattel Mortgages*, § 269; *Swift v. Hall*, 23 Wis. 532.

<sup>5</sup> *Booth v. Tiernan*, 109 U. S. 205; *Wells*

*v. Jackson Iron Co.* 48 N. H. 491, 534; *Harvey v. Thorpe*, 28 Ala. 250; *Sexsmith v. Jones*, 13 Wis. 565; *Nixon v. Cobleigh*, 52 Ill. 387; *Nattinger v. Ware*, 41 Ill. 245.

<sup>6</sup> *Nixon v. Cobleigh*, 52 Ill. 387.

<sup>7</sup> *Devereux v. McMahon*, 108 N. C. 134, 145, 12 S. E. Rep. 902.

<sup>8</sup> *Sellers v. Sellers*, 98 N. C. 13, 3 S. E. Rep. 917.

<sup>9</sup> *Chamberlain v. Bell*, 7 Cal. 292, 68 Am. Dec. 260; *Harrison v. Wade*, 3 Cold. 505; *Baldwin v. Marshall*, 2 Humph. 116.

no authority to correct the record. Thus where the record was of a deed by "Nathan" wherever the grantor's name appeared, it was held that an attempted correction by the register by a marginal entry in the record that "the word 'Nahum' was recorded 'Nathan' by mistake in the annexed record," was without authority of law.<sup>1</sup>

**1477.** The effect of a record as notice or as evidence is not confined to the first recording of a deed, but at least equal weight is to be given to a later record properly made. When there are two records, which differ only in one or two material points in the description of the property, and the date, grantors, grantee, consideration, acknowledgment, and signature of the notary are the same in each, the presumption is, not that the first record is the correct record and the other the record of some other deed, or of the original deed after a change in the description has been made, but that they are records of the same deed, with mistakes in one of them; and, in seeking to determine in which of the two the mistakes are, the original deed being lost, the court will consider the evidence afforded by the records themselves as to which has been more carefully registered, the situation of the property as described in each, and the conduct of the parties in reference to the property in dispute.<sup>2</sup>

**1478.** A deed or mortgage defectively recorded, or not recorded at all, is in some States a good equitable lien, so that, while it has no effect as against subsequent purchasers in good faith, yet it is superior to the claims of creditors under subsequent judgments, and is superior to the claims of general creditors who were such at the date of the mortgage,<sup>3</sup> and is superior to a subsequent voluntary assignment by the mortgagor for the benefit of creditors.<sup>4</sup> In like manner a mortgage defectively executed, as, for instance, attested by only one witness when two are required, is a good equitable mortgage.<sup>5</sup> According to the authorities in

<sup>1</sup> *Jennings v. Dockham*, 99 Mich. 253, 58 N. W. Rep. 66; *Burton v. Martz*, 38 Mich. 761; *Farmers' & Mechanics' Bank v. Bronson*, 14 Mich. 361; *Foster v. Dugan*, 8 Ohio, 87, 107; *Elliott v. Peirsol*, 1 Pet. 328, 341.

<sup>2</sup> *Stinson v. Doolittle*, 50 Fed. Rep. 12.

<sup>3</sup> *Lake v. Doud*, 10 Ohio, 415; *Bank v. Carpenter*, 7 Ohio, 21, 28 Am. Rep. 616.

Otherwise, however, under later cases in Ohio: *White v. Denman*, 1 Ohio St. 110; *Bloom v. Noggle*, 4 Ohio St. 45; *Sixth Ward Build. Asso. v. Willson*, 41 Md. 506. And see *Price v. McDonald*, 1 Md. 403, 54 Am. Dec. 657; *Phillips v. Pearson*, 27 Md. 242; *Bibb v. Baker*, 17 B. Mon. 292.

<sup>4</sup> *Nice's Appeal*, 54 Pa. St. 200.

<sup>5</sup> *Abbott v. Godfroy*, 1 Mich. 178.

some States, however, a mortgage defectively recorded, or not recorded at all, is subject to the lien of a judgment or attaching creditor.<sup>1</sup> As against third parties having notice, such mortgage is also a good specific lien which will be enforced in equity.<sup>2</sup>

Such an equitable mortgage has been held to be superior to the claims of the mortgagor's general creditors. This was the rule in South Carolina before the act of 1843, now embodied in the Revised Statutes of that State. A legal mortgage not recorded, or an equitable mortgage incapable of record, was preferred to a subsequent creditor without notice. The consequence of imparting validity to an unrecorded mortgage is said to have wrought much injury by impairing confidence in titles, and thereby depreciating the value of real estate. The act above referred to placed subsequent creditors and purchasers upon the same footing.<sup>3</sup>

### IX. *Whether the Index is a Part of the Record.*

1479. The index is no part of the record, and a mistake in it does not invalidate the notice afforded by a record otherwise properly made.<sup>4</sup> Although a deed be omitted from the index, there is constructive notice of it which affects all subsequent purchasers from the time it was left for record.<sup>5</sup> The general policy of the recording acts is to make the filing of a deed, duly exe-

<sup>1</sup> Henderson v. McGhee, 6 Heisk. 55.

<sup>2</sup> Raconillat v. Sansevain, 32 Cal. 376; Russum v. Wanser, 53 Md. 92; Dyson v. Simmons, 48 Md. 207.

<sup>3</sup> Boyce v. Shiver, 3 S. C. 515, 530. "There is not a single modern writer, whose opinion carries weight, who does not regret that the courts ever favored the introduction of secret liens."

<sup>4</sup> Green v. Garrington, 16 Ohio St. 548, 91 Am. Dec. 103; Chatham v. Bradford, 50 Ga. 327, 15 Am. Rep. 692; Lincoln Building & Saving Asso. v. Hass, 10 Neb. 581; Gilchrist v. Gough, 63 Ind. 576, 30 Am. Rep. 250; Barrett v. Prentiss, 57 Vt. 297; Curtis v. Lyman, 24 Vt. 338, 58 Am. Dec. 174; Nichol v. Henry, 89 Ind. 54; Mutual L. Ins. Co. v. Dake, 87 N. Y. 257; Bedford v. Tupper, 30 Hun, 174; Musgrove v. Bonser, 5 Oreg. 313; Board of Commrs. v. Babcock, 5 Oreg. 472; Bishop

v. Schneider, 46 Mo. 472, 2 Am. Rep. 533; Stockwell v. McHenry, 107 Pa. St. 237, 52 Am. Rep. 475; Semon v. Terhune, 40 N. J. Eq. 364, 2 Atl. Rep. 18; Ely v. Wilcox, 20 Wis. 523, 91 Am. Dec. 436; Fal-las v. Pierce, 30 Wis. 443; Oconto Co. v. Jerrard, 46 Wis. 317; Swan v. Vogel, 31 La. Ann. 38; Davis v. Whitaker, 114 N. C. 279, 19 S. E. Rep. 699.

<sup>5</sup> Curtis v. Lyman, 24 Vt. 338, 58 Am. Dec. 174; Sawyer v. Adams, 8 Vt. 172, 30 Am. Dec. 459; Schell v. Stein, 76 Pa. St. 398, 18 Am. Rep. 416; Stockwell v. McHenry, 107 Pa. St. 237, 52 Am. Rep. 475; Board of Commrs. v. Babcock, 5 Oreg. 472; Throckmorton v. Price, 28 Tex. 605, 91 Am. Dec. 334; Bishop v. Schneider, 46 Mo. 472, 2 Am. Rep. 533; Chatham v. Bradford, 50 Ga. 327, 15 Am. Rep. 692; Perkins v. Strong, 22 Neb. 725, 36 N. W. Rep. 292.

cuted and acknowledged, with the proper recording officer, constructive notice from that time ; and although it be provided that the register shall make an index for the purpose of affording a correct and easy reference to the books of record in his office, the index is designed, not for the protection of the party recording his conveyance, but for the convenience of those searching the records ; and, instead of being a part of the record, it only shows the way to the record. It is in no way necessary that a conveyance shall be indexed, as well as recorded, in order to make it a valid notice.<sup>1</sup>

When a grantee has delivered his deed to the recorder, notice of its contents is imparted from that time, if it is correctly spread upon the record. He has done all the law requires of him for his

<sup>1</sup> Davis v. Whitaker, 114 N. C. 279, 19 S. E. Rep. 699, quoting text ; Mutual Life Ins. Co. v. Dake, 87 N. Y. 257, 1 Abb. N. C. 381, 384. In the latter case, Mr. Justice Smith, delivering the opinion of the Supreme Court, said : " It is not a little surprising to find that a question so likely to come up frequently has not arisen in any reported case in this State. I suppose the usual practice in searching the records in the clerk's office is to consult the index, and to rely upon it. That is obviously the most convenient way ; and if the index is full and accurate, it saves the necessity of going through the records themselves. But if the index is imperfect and misleads the searcher, as appears to have been the case here, who is to suffer, — the party who duly transcribed his mortgage in the record book, or the party who, relying on the index, omitted to look at the record ? The question is to be answered by determining whether the index is an essential part of the record, — that is to say, whether it is necessary to the completeness and efficiency of the record as a notice to after purchasers." After examining the statutes, and reaching the conclusion that the index is no part of the record, he continues : " In reaching this conclusion, I have not overlooked the practical inconveniences that may result from it in searching records. But the

duty of the court is only to declare the law as the legislature has laid it down. Arguments *ab inconvenienti* may sometimes throw light upon the construction of ambiguous or doubtful words ; but where, as here, the language of the law makes it plain, they are out of place. Inconveniences in practice will result whichever way the question shall be decided. The power to remedy them is in the legislature, and not in the courts. Even as the law now stands, the party injured by the omission of the clerk is not without remedy, for he has his action against the clerk." Affirmed by the Court of Appeals, 87 N. Y. 257, and the first part of this section quoted with approval. See this case commented upon and approved, 4 Cent. L. J. 340. And see Bishop v. Schneider, 46 Mo. 472, 2 Am. Rep. 533.

The same rule was applied under analogous statutes in New York relating to the filing of chattel mortgages. Dodge v. Potter, 18 Barb. 193 ; Dikeman v. Puckhafer, 1 Abb. Pr. N. S. 32. These cases hold that the mortgagee, by filing and depositing his mortgage with the clerk, did all that he could do, and all that he was required to do, in order to perfect his claim, and that the omission of the mortgage from the index, being without his fault or knowledge, did not prejudice him.

protection. The purpose of the index is only to point to the record, but constitutes no part of it.<sup>1</sup>

In Pennsylvania, however, under statutes not materially different from those in New York, the reasoning of Mr. Chief Justice Woodward in a late case was, that the mortgage not duly indexed was not constructive notice to third persons; that, as a guide to inquirers, the index is an indispensable part of the recording; and that without it the record affects no party with notice.<sup>2</sup> In this case the purchaser had actual notice of the existence of the mortgage, and therefore could not complain of the want of record; and in that view what was said by the court as to the sufficiency of the record was not material to the result.

1480. The recording officer is liable in damages for errors and omissions made in recording or indexing a deed; but whether his liability is to the grantee in the deed, or to any third person who is injured by the error or omission, is a question that has given rise to some discussion. In those States in which the rule is adopted that a deed is constructive notice from the time it is left for record, whether it is in fact recorded or not, and is notice of the contents of the deed itself, the grantee could not ordinarily be injured by the omission or error, and consequently the liability of the recorder would be to the subsequent purchaser, who has purchased relying upon the correctness of the record. But without reference to this rule, the recorder should be liable to any third person injured by his negligence.<sup>3</sup> "Whether the party who deposits a deed for record is the aggrieved party, whose remedy is against the recorder in case it is not properly recorded, depends upon a solution of the question above considered and answered. If the mere deposit of his deed with the recorder by the grantee or assignee is to be deemed a recording, and to have the full legal effect of a record, though not afterwards actually recorded as required by law, then such grantee or assignee is not

<sup>1</sup> Bishop v. Schneider, 46 Mo. 472, 2 Am. Rep. 533.

<sup>2</sup> Speer v. Evans, 47 Pa. St. 141. See Schell v. Stein, 76 Pa. St. 398, 18 Am. Rep. 416.

<sup>3</sup> Hunter v. Windsor, 24 Vt. 327; Mangold v. Barlow, 61 Miss. 593, 48 Am. Rep. 84; Bishop v. Schneider, 46 Mo. 472, 2 Am. Rep. 533; Crews v. Taylor, 56 Tex.

461, 465; Gilchrist v. Gough, 63 Ind. 576; State v. Davis, 96 Ind. 539; Fox v. Thibault, 33 La. Ann. 32; Board of Commrs. v. Babcock, 5 Oreg. 472; Mutual Life Ins. Co. v. Dake, 87 N. Y. 257, 264, 1 Abb. N. C. 381, per Earl, J.; Lee v. Bermingham, 30 Kans. 312; Poplin v. Mundell, 27 Kans. 138.

aggrieved by the negligence or fraud of the recorder; otherwise he is."<sup>1</sup> In those States where no notice is imparted until the instrument is actually spread upon the record in the proper book, though it then relates back to the date of the deposit of the deed, as against subsequent purchasers and mortgagees, and as to non-consenting creditors in cases of assignment for benefit of creditors, it is the duty of the grantee, not only to deposit his deed with the recorder, but to see that it is actually recorded in the proper book, as prescribed by law; and, if not so recorded, it has no effect whatever against such purchasers, mortgagees, or creditors. Consequently they are not aggrieved by failure to record, or by errors in the record; but the grantee in the deed not recorded, or erroneously recorded, is the party injured.<sup>2</sup>

The recorder is not liable for recording a forged deed unless he knew it was forged.<sup>3</sup> It is not required of the recorder that he shall determine the genuineness or validity of an instrument before recording it.<sup>4</sup>

One who in good faith has taken a subsequent deed or mortgage of the property, on the faith of finding no incumbrance upon the index, has a remedy for damages against the register, whose duty it was under the law to make the index.<sup>5</sup> In Missouri a statute provides that a recorder who neglects or refuses to keep an index to the books of record shall pay to the party aggrieved double the damages which may be occasioned thereby; but the court has suggested that, before a purchaser can recover for the failure of the recorder to index a prior mortgage upon the property, he must show that the damage arose from the recorder's neglect, and not from other causes; as, for instance, his own reliance upon false outside representations as to the title without an examination of the index, or from his mistaken reliance upon the covenants of the grantor.<sup>6</sup>

**1481.** In Iowa, Washington, and Wisconsin the index is an essential part of the record, and a deed filed but not indexed,<sup>7</sup>

<sup>1</sup> *Watkins v. Wilhoit* (Cal.), 35 Pac. Rep. 646, per Vanclef, C.

<sup>2</sup> *Watkins v. Wilhoit* (Cal.), 35 Pac. Rep. 646.

<sup>3</sup> *Ramsey v. Riley*, 13 Ohio, 157.

<sup>4</sup> *Lacerdote v. Duralde*, 1 La. 485.

<sup>5</sup> *Mutual Life Ins. Co. v. Dake*, 87 N. Y. 257, 1 Abb. N. C. 381, per Smith, J.

<sup>6</sup> *Bishop v. Schneider*, 46 Mo. 472, 2 Am. Rep. 533.

<sup>7</sup> *Whalley v. Small*, 25 Iowa, 184; *Oconto Co. v. Jerrard*, 46 Wis. 317, 50 N. W. Rep. 591. Nor is the record admissible in evidence until the names of the grantors are entered in alphabetical order in such index. *Hiles v. Atlee*, 80 Wis. 219, 49



or even one copied into the record but not indexed,<sup>1</sup> does not impart constructive notice.

The laws require a descriptive index to be kept, and prescribe the requisites of the index, and the index is regarded as an integral part of a complete and valid registration.<sup>2</sup>

But the omission of the description in such index is cured by the recording of the deed at length in the proper record.<sup>3</sup>

A recital in a mortgage for purchase-money, that the premises are the same conveyed to the mortgagor by the mortgagee by deed of even date, is generally sufficient notice of the mortgage when recorded, although by mistake the lot described is an entirely different lot. Yet in Iowa this recital is held to be an insufficient notice of the conveyance of the lot referred to in the recital, inasmuch as the lot described would appear in the index, and not the lot referred to in the recital.<sup>4</sup> If, however, a deed recites the existence of a prior mortgage of the same land, the grantee is charged with constructive notice of such prior mortgage, though it is not indexed on the records.<sup>5</sup> It is not necessary, however, that the descriptive part of the index should contain more than a reference to the record; and where a description by plan or survey is impracticable, a reference to "certain lots of land,"<sup>6</sup> or "see record,"<sup>7</sup> has been held sufficient; but where the mortgage covered two lots of land, but the description of one of them only was entered in the descriptive column of the index, it was held that the record did not impart constructive notice of

N. W. Rep. 816, 27 Am. St. Rep. 32; *Ritchie v. Griffiths*, 1 Wash. St. 429, 25 Pac. Rep. 341.

In a recent case in **Kentucky** it was declared that record books without indexes are not entitled to the conclusive force of public records as to notice, and that a searcher of records which have no index is not bound to turn the leaves of the record book, page by page, to find a conveyance. *Elliott v. Harris*, 81 Ky. 470.

<sup>1</sup> *Barney v. McCarty*, 15 Iowa, 510, 83 Am. Dec. 427, where the court say: "A deed might as well be buried in the earth as in a mass of records without a clue to its whereabouts."

<sup>2</sup> *Barney v. McCarty*, 15 Iowa, 510;

*Greenwood v. Jenswold*, 69 Iowa, 53, 28 N. W. Rep. 433.

<sup>3</sup> *St. Croix Land & L. Co. v. Ritchie*, 73 Wis. 409, 41 N. W. Rep. 345; *Oconto Co. v. Jerrard*, 46 Wis. 317; *Pringle v. Dunn*, 37 Wis. 449.

<sup>4</sup> *Scoles v. Wilsey*, 11 Iowa, 261; *Breed v. Conley*, 14 Iowa, 269, 81 Am. Dec. 485; *Whalley v. Small*, 25 Iowa, 184; *Calvin v. Bowman*, 10 Iowa, 529.

<sup>5</sup> *Ætna L. Ins. Co. v. Bishop*, 69 Iowa, 645, 29 N. W. Rep. 761.

<sup>6</sup> *Bostwick v. Powers*, 12 Iowa, 456; *American Emigrant Co. v. Call*, 22 Fed. Rep. 765.

<sup>7</sup> *White v. Hampton*, 13 Iowa, 259; *Oconto Co. v. Jerrard*, 46 Wis. 317, 50 N. W. Rep. 591.

the lot not described, and that the consequences of the recorder's error should fall upon the mortgagee, rather than upon subsequent purchasers.<sup>1</sup> The record, though complete in every other respect except that it is not properly indexed, does not operate as constructive notice.<sup>2</sup>

Yet, while an index is insufficient if it would mislead an inquirer by giving a totally wrong description, a mistake in the index reference to the page of the book where the instrument is recorded, the names of the grantor and the grantee being correctly given, does not prevent its operating as constructive notice of the acts which would be disclosed by an examination of the record. The record book and the index book are not considered detached and independent books, but are related and connected, and a party is affected with notice of the contents of the record when an ordinarily diligent search will bring him to a knowledge of such contents. Though the index be imperfect, if there is nothing misleading about it, and it furnishes all the information that an ordinarily prudent man would need to find the full record of the deed, the index is sufficient.<sup>3</sup> To a competent examiner of the records, finding the name of one entered upon the index as having made a mortgage, it would occur that it was much more likely that the recorder should make an error in entering the page of the record than that he should mistake the name of the mortgagor, or should enter his name at all if he had not recorded the deed.<sup>4</sup>

### X. *The Effect of a Record duly made.*

1482. The record of a deed or mortgage is constructive notice to all subsequent purchasers and mortgagees of the same interest or title from the same grantor, or from one deriving title from him.<sup>5</sup> As to them the instrument takes effect, not because

<sup>1</sup> Noyes v. Horr, 13 Iowa, 570.

<sup>2</sup> Gwynn v. Turner, 18 Iowa, 1; Howe v. Thayer, 49 Iowa, 154.

<sup>3</sup> Land & River Imp. Co. v. Bardon, 45 Fed. Rep. 706.

<sup>4</sup> Barney v. Little, 15 Iowa, 527. See comments upon this and other Iowa cases, 4 Cent. L. J. 387.

<sup>5</sup> California: Dennis v. Burritt, 6 Cal. 670; McCabe v. Grey, 20 Cal. 509; Messick v. Sunderland, 6 Cal. 297; Hager v.

Spect, 52 Cal. 579. Connecticut: Bolles v. Chauncey, 8 Conn. 389; Peters v. Goodrich, 3 Conn. 146; Orvill v. Newell, 17 Conn. 97; Bush v. Golden, 17 Conn. 594. Illinois: Buchanan v. International Bank, 78 Ill. 500. Kansas: Ogden v. Walters, 12 Kans. 282. Maine: Humphreys v. Newman, 51 Me. 40; Hall v. McDuff, 24 Me. 311; Banton v. Shorey, 77 Me. 48. Maryland: Clabaugh v. Byerly, 7 Gill, 354, 48 Am. Dec. 575. Michigan: Doyle

of its prior execution, but by reason of its prior record. Subsequent purchasers are bound conclusively by the record of a deed, or other conveyance in the line of their title, as much as the mortgagor himself.<sup>1</sup> It is notice only to subsequent purchasers and incumbrancers under the same grantor, or through one who is the common source of title in the line of title to which the recorded deed belongs.<sup>2</sup> The registry of a conveyance of an equitable title is not notice to a purchaser of the legal title from a person who appears by the record to be the real owner.<sup>3</sup> It is not notice to those who have prior rights of record, or even to those whose rights are contemporaneous with those of the grantor, as, for instance, to his cotenants; therefore a mortgage by one tenant in common, though duly recorded, is no notice to his cotenant of its existence, or of the claim of the mortgagor to the exclusive ownership of the land.<sup>4</sup>

*v. Stevens*, 4 Mich. 87. **New York**: *Johnson v. Stagg*, 2 Johns. 510; *Parkist v. Alexander*, 1 Johns. Ch. 394; *Youngs v. Wilson*, 27 N. Y. 351; *McPherson v. Rollins*, 107 N. Y. 316, 14 N. E. Rep. 411, 1 Am. St. Rep. 826. **Pennsylvania**: *Souder v. Morrow*, 33 Pa. St. 83; *Hetherington v. Clark*, 30 Pa. St. 393. **Rhode Island**: *Barbour v. Nichols*, 3 R. I. 187. **Texas**: *Edwards v. Barwise*, 69 Tex. 84, 6 S. W. Rep. 677. **Utah**: *Wells v. Smith*, 2 Utah, 39.

<sup>1</sup> *Tripe v. Marcy*, 39 N. H. 439; *Grandin v. Anderson*, 15 Ohio St. 286. And see *Leiby v. Wolf*, 10 Ohio, 83; *North v. Knowlton*, 23 Fed. Rep. 163.

<sup>2</sup> **California**: *McCabe v. Grey*, 20 Cal. 509; *Dennis v. Burritt*, 6 Cal. 670; *Long v. Dollarhide*, 24 Cal. 218; *Hager v. Spect*, 52 Cal. 579. **Georgia**: *Whittington v. Wright*, 9 Ga. 23. **Illinois**: *Doolittle v. Cook*, 75 Ill. 354; *Iglehart v. Crane*, 42 Ill. 261; *Kerfoot v. Cronin*, 105 Ill. 609. **Maine**: *Tilton v. Hunter*, 24 Me. 29; *Roberts v. Bourne*, 23 Me. 165, 39 Am. Dec. 614. **Massachusetts**: *George v. Wood*, 9 Allen, 80, 85 Am. Dec. 741; *Bates v. Norcross*, 14 Pick. 224. **Michigan**: *James v. Brown*, 11 Mich. 25; *Cooper v. Bigly*, 13 Mich. 463. **Mississippi**: *Baker v. Griffin*, 50 Miss. 158;

*Harper v. Bibb*, 34 Miss. 472. **Missouri**: *Odle v. Odle*, 73 Mo. 289; *Draude v. Bohrer Manuf. Co.* 9 Mo. App. 249. **Nebraska**: *Traphagen v. Irwin*, 18 Neb. 195. **New Jersey**: *Hoy v. Bramhall*, 19 N. J. Eq. 563, 97 Am. Dec. 687; *Hill v. McCarter*, 27 N. J. Eq. 41; *Ward v. Hague*, 25 N. J. Eq. 397; *Blair v. Ward*, 10 N. J. Eq. 119; *Vanorden v. Johnson*, 14 N. J. Eq. 376; *Losey v. Simpson*, 11 N. J. Eq. 246. **New York**: *Tarbell v. West*, 86 N. Y. 280; *Wheelwright v. Depyster*, 4 Edw. Ch. 232; *Howard Ins. Co. v. Halsey*, 8 N. Y. 271, 59 Am. Dec. 478; *Stuyvesant v. Hall*, 2 Barb. Ch. 151; *Page v. Waring*, 76 N. Y. 463. **Ohio**: *Leiby v. Wolf*, 10 Ohio, 83; *Kyle v. Thompson*, 11 Ohio St. 616; *Blake v. Graham*, 6 Ohio St. 580, 67 Am. Dec. 360. **Pennsylvania**: *Maul v. Rider*, 59 Pa. St. 167; *Keller v. Nutz*, 5 S. & R. 246; *Woods v. Farmere*, 7 Watts, 382; *King v. McCully*, 38 Pa. St. 76; *Taylor v. Maris*, 5 Rawle, 51; *Calder v. Chapman*, 52 Pa. St. 359. **Tennessee**: *Simpkinson v. McGee*, 4 Lea, 432. **Wisconsin**: *Helms v. Chadbourne*, 45 Wis. 60.

<sup>3</sup> *Tarbell v. West*, 86 N. Y. 280; *Odle v. Odle*, 73 Mo. 289.

<sup>4</sup> *Leach v. Beattie*, 33 Vt. 195.

When a mortgage is recorded prior to another conveyance from the mortgagor, it does not matter that this conveyance was made in pursuance of a contract entered into after the execution of the mortgage, and before the record of it, if nothing had been done towards carrying the contract into execution at the time of the filing of the mortgage for record.<sup>1</sup> From that time it is constructive notice to all who may afterwards acquire any interest in the same property.

1483. A deed or mortgage duly recorded is notice not only of the existence of the deed or mortgage, but of all its contents, so far as these fall within the line of the chain of title.<sup>2</sup> It is notice, too, of the covenants contained in it.<sup>3</sup> It is notice of any easements or privileges created by the deed, or referred to in it.<sup>4</sup> It is notice that trustees in a trust deed should have an estate in fee simple in order to execute its provisions, and therefore that an estate in fee passes although words of inheritance have been inadvertently omitted.<sup>5</sup> Although the debt or the property be not fully described, the record is notice of all that is said about it, and a purchaser is bound by the statements made, and by the information he is put upon the inquiry to find out.<sup>6</sup> It is notice of the statements in it regarding the debt, whether the description be fully set out, or consists of references to other instruments.<sup>7</sup> It is notice not only to purchasers, but to subsequent creditors as well. They cannot complain that the transaction is fraudulent unless they can show that the object of the conveyance was to avoid subsequent indebtedness.<sup>8</sup>

The record of a mortgage containing a power of sale puts subsequent purchasers upon inquiry whether any proceedings have been had thereunder; so that if there has been a sale under the power, although the deed has not been recorded, a subsequent purchaser from the mortgagor, instead of acquiring an equity of

<sup>1</sup> *Kyle v. Thompson*, 11 Ohio St. 616.

<sup>8</sup> *Morris v. Wadsworth*, 17 Wend.

<sup>2</sup> *Thomson v. Wilcox*, 7 Lans. 376; *McPherson v. Rollins*, 107 N. Y. 316, 14 N. E. Rep. 411, 1 Am. St. Rep. 826; *Grandin v. Anderson*, 15 Ohio St. 286; *Kyle v. Thompson*, 11 Ohio St. 616; *Leiby v. Wolf*, 10 Ohio, 83; *Bancroft v. Consen*, 13 Allen, 50; *George v. Kent*, 7 Allen, 16; *Harrison v. Cachelin*, 23 Mo. 117; *Sowden v. Craig*, 26 Iowa, 156, 96 Am. Dec. 125.

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<sup>4</sup> *Bellas v. Lloyd*, 2 Watts, 401.

<sup>5</sup> *Randolph v. New Jersey W. L. R. Co.* 28 N. J. Eq. 49.

<sup>6</sup> *Youngs v. Wilson*, 27 N. Y. 351, reversing 24 Barb. 510; *Bright v. Buckman*, 39 Fed. Rep. 243.

<sup>7</sup> *Dimon v. Dunn*, 15 N. Y. 498.

<sup>8</sup> *Hickman v. Perrin*, 6 Coldw. 135.

redemption, may find that this has been cut off by sale under the power.<sup>1</sup> The deed executing the power of sale relates back to the execution of the mortgage; and when the mortgage is recorded, it is not necessary to record the deed under the power in order to protect the grantee against attaching creditors of the mortgagor.<sup>2</sup>

1484. Priority once gained cannot be lost. The registry of a deed or mortgage is equivalent to a notice of it to all persons who may subsequently become interested in the property, and fully protects the grantee's rights. A mortgage having once obtained priority by record does not lose its place by being held by any one under an unrecorded assignment.<sup>3</sup> And although the mortgagee had notice of a prior unrecorded mortgage, or there are equities such that his own mortgage is in his hands subject to them, yet if he assigns his mortgage for a valuable consideration to one who has no notice of the earlier mortgage or of such equities, the assignee is entitled to hold the mortgage as a prior lien upon the land, solely upon the ground that it was first recorded.<sup>4</sup>

Having recorded his mortgage, the mortgagee is not bound to give personal notice of his mortgage to one who purchases of the mortgagor; and a delay of ten years, or for any other period less than the statute period of limitation, to make any claim of the purchaser under the mortgage, does not impair his rights under the mortgage either at law or in equity; and the fact that the mortgagor has in the mean time become insolvent does not prejudice his claim upon the property.<sup>5</sup>

A mortgage being duly recorded, the subsequent dealings of the mortgagor and others claiming under him have no effect whatever upon it. If, for instance, the mortgagor subsequently sells the land and reserves a right of way, this right remains subject to the title of the mortgagee, and a sale under a mortgage destroys this, as well as the title to the remainder of the land.<sup>6</sup>

In accordance with these principles, it follows that a junior

<sup>1</sup> *Heaton v. Prather*, 84 Ill. 330.

<sup>2</sup> *Farrar v. Payne*, 73 Ill. 82.

<sup>3</sup> *Brinckerhoff v. Lansing*, 4 Johns. Ch. 65, 8 Am. Dec. 538; *Jackson v. Dubois*, 4 Johns. 216; *Parkist v. Alexander*, 1 Johns. Ch. 394; *Campbell v. Vedder*, 3 Keyes, 174, 1 Abb. App. Dec. 295. And

see *Douglass v. Peele Clarke*, 563; *Johnson v. Stagg*, 2 Johns. 510.

<sup>4</sup> *Corning v. Murray*, 3 Barb. 652.

<sup>5</sup> *Dick v. Balch*, 8 Pet. 30; *Rice v. Dewey*, 54 Barb. 455; *Mason v. Philbrook*, 69 Me. 57.

<sup>6</sup> *King v. McCully*, 38 Pa. St. 76.

deed or mortgage duly recorded, without notice of a prior unrecorded deed or mortgage, has precedence of it;<sup>1</sup> in other words, deeds and mortgages take precedence in the order of the record. This precedence follows them through any subsequent transfer, or through any proceedings to enforce the liens. When the mortgage first recorded is foreclosed, a purchaser at the foreclosure sale obtains a complete and absolute title. But a purchaser at a foreclosure sale, under the mortgage recorded next in order of time, obtains only an equity of redemption of the prior mortgage.<sup>2</sup>

1485. The destruction of the record in no manner affects the constructive notice afforded by the recording of the deed.<sup>3</sup> If the deed itself has been preserved, the recorder's certificate of its having been duly recorded is of the highest class of evidence.<sup>4</sup> So, also, the index book in which the deed is described, and its record certified in the proper book, are good evidence of the fact that the deed was recorded.<sup>5</sup> Other secondary evidence may show that the deed was filed for record;<sup>6</sup> and when this is the case, the testimony of an attorney of a purchaser, that he examined an abstract of the title to the property, which purported to be a full and complete abstract, and did not find a prior deed of trust upon the premises, is not sufficient to show that there was

<sup>1</sup> *Taylor v. Thomas*, 5 N. J. Eq. 331; *Grant v. Bissett*, 1 Caines Cas. 112; *Pomet v. Scranton*, 1 Walk. 406; *Harrington v. Allen*, 48 Miss. 492; *Routh v. Spencer*, 38 Ind. 393; *Psychaud v. Citizens' Bank*, 21 La. Ann. 262; *Harang v. Plattsmier*, 21 La. Ann. 426; *Burns v. Berry*, 42 Mich. 176, 3 N. W. Rep. 924; *Cook v. Stone*, 63 Iowa, 352, 19 N. W. Rep. 280; *Ramsey v. Jones*, 41 Ohio St. 685; *Allen v. Bolen*, 114 N. C. 560, 18 S. E. Rep. 964.

<sup>2</sup> *Tice v. Annin*, 2 Johns. Ch. 125; *Mathews v. Aikin*, 1 N. Y. 595; *Vanderkemp v. Shelton*, 11 Paige, 28; *Gilbert v. Averill*, 15 Barb. 20; *Buchanan v. International Bank*, 78 Ill. 500.

<sup>3</sup> *Paxson v. Brown*, 61 Fed. Rep. 874; *Taylor v. Franklin Sav. Bank*, 50 Fed. Rep. 289; *Thomas v. Hanson* (Minn.), 61 N. W. Rep. 135; *Steele v. Boone*, 75 Ill.

457; *Gammon v. Hodges*, 73 Ill. 140; *Tucker v. Shaw* (Ill.), 41 N. E. Rep. 914; *Franklin Sav. Bank v. Taylor*, 131 Ill. 376, 23 N. E. Rep. 397, followed; *Heaton v. Prather*, 84 Ill. 330; *Curyea v. Berry*, 84 Ill. 600; *Shannon v. Hall*, 72 Ill. 354; *Deming v. Miles*, 35 Neb. 739, 53 N. W. Rep. 665; *Armentrout v. Gibbons*, 30 Gratt. 632; *Myers v. Buchanan*, 46 Miss. 397; *Addis v. Graham*, 88 Mo. 197; *Fitch v. Boyer*, 51 Tex. 336; *Hyatt v. Cochran*, 69 Ind. 436.

<sup>4</sup> *Alvis v. Morrison*, 63 Ill. 181, 14 Am. Rep. 117; *Paxson v. Brown*, 61 Fed. Rep. 874.

<sup>5</sup> *Alvis v. Morrison*, 63 Ill. 181, 14 Am. Rep. 117; *Smith v. Lindsey*, 89 Mo. 76, 1 S. W. Rep. 88.

<sup>6</sup> *Stebbins v. Duncan*, 108 U. S. 32; *Cowles v. Hardin*, 91 N. C. 231; *Smith v. Lindsey*, 89 Mo. 76, 1 S. W. Rep. 88.

no record of it, as it does not follow that the abstract was what it purported to be.<sup>1</sup>

Where the registry office and its records have been destroyed by fire, evidence of the execution of a mortgage and of its loss, with slight circumstances in regard to the recording of it, have been held enough to sustain a presumption that it was recorded, as against another mortgagee who claims priority on the ground that such mortgage was never recorded.<sup>2</sup>

A landowner, in order to protect his rights, need not, unless he choose, or unless a statute requires a re-recording,<sup>3</sup> incur the trouble and expense of restoring the record under an act providing for the restoration of burnt records.<sup>4</sup> A mortgagee may foreclose his mortgage, although in the mean time the mortgagor has sold and conveyed the mortgaged premises to one who had no knowledge of the existence of the mortgage, and who took possession and retained it several years with the knowledge of the mortgagee, who did not file his bill to foreclose his mortgage for six years afterwards.<sup>5</sup> A restoration of the record may be had, if desired, upon proof of proceedings for foreclosure of a mortgage in a court of general jurisdiction, a decree of sale, a sale under it, and its approval by the court, and the delivery of a certificate of purchase; and the court will thereupon order the execution of a deed to the purchaser, and a surrender of possession to him.<sup>6</sup>

<sup>1</sup> *Steele v. Boone*, 75 Ill. 457.

<sup>2</sup> *Alston v. Alston*, 4 S. C. 116; *Harrison v. McMurray*, 71 Tex. 122, 8 S. W. Rep. 612; *Heacock v. Lubuke*, 107 Ill. 396; *Hunt v. Innis*, 2 Woods, 103.

<sup>3</sup> In *Texas*, unless a deed is re-recorded within four years, the first record does not constitute notice as against a *bona fide* purchaser. *Magee v. Merriman*, 85 Tex. 105, 19 S. W. Rep. 1002; *O'Neal v. Petrus*, 79 Tex. 254, 14 S. W. Rep. 1065; *Weber v. Moss*, 3 Tex. Civ. App. 13, 21 S. W. Rep. 609; *Salmon v. Huff*, 80 Tex. 133, 15 S. W. Rep. 257; *Barcus v. Bringham*, 84 Tex. 538, 19 S. W. Rep. 703. If the record of a deed is partially destroyed, so as not to show that the deed was properly acknowledged for registration, such record does not charge subsequent purchasers with constructive notice of the

deed. *Weber v. Moss*, 3 Tex. Civ. App. 13, 21 S. W. Rep. 609.

<sup>4</sup> *Gammon v. Hodges*, 73 Ill. 140; *Evans v. Templeton*, 69 Tex. 375, 6 S. W. Rep. 843.

The provisions of the burnt record act of *Illinois* seem to be sufficiently broad to authorize the court to determine and establish a title even as against a party holding or claiming a contingent interest. *McC Campbell v. Mason*, 151 Ill. 500, 38 N. E. Rep. 672.

<sup>5</sup> *Shannon v. Hall*, 72 Ill. 354, 22 Am. Rep. 146; *Hall v. Shannon*, 85 Ill. 473.

<sup>6</sup> *Curyea v. Berry*, 84 Ill. 600. See, as to effect of decree reestablishing a record under a statute, *Hunt v. Innis*, 2 Woods, 103.

A delay of five years by a mortgagee, without attempting to restore a burnt record of the mortgage, as authorized by G.

**1486.** Any one purchasing land in good faith, without notice of an unrecorded mortgage, takes it discharged of the lien;<sup>1</sup> and he can convey a good title to it although the mortgage is recorded before he conveys and his vendee has notice of it.<sup>2</sup> Having no actual notice of the mortgage, the purchaser is not bound to look beyond the line of title in his grantor, and, finding that he acquired a good title, he is not bound to look further; he acquires all the right and title that his grantor acquired. His grantor being entitled to protection against a prior unrecorded mortgage, he is entitled to the same protection, notwithstanding the notice he himself has of such mortgage, and although he is not a purchaser for a valuable consideration.<sup>3</sup>

Not only is a purchaser without notice of a prior unrecorded mortgage, or of other equitable claim to the property, entitled to protection, even though he takes the title from one who had actual notice of such claim, but also a purchaser with notice from one who was entitled to protection as a *bona fide* purchaser without notice is himself entitled to protection against the previous equitable claim upon the estate; for otherwise a *bona fide* purchaser might be deprived of the power of selling his property for its full value. This protection extends to all persons claiming through the mortgage, whether they had notice at the time of the purchase or not.<sup>4</sup>

**1487.** If one having no title to land conveys it with covenants of warranty, and this is duly recorded, and afterwards the grantor acquires title to the land, the estoppel by which he is bound under the covenants is turned into a good estate in interest in the grantee, so that by operation of law the title is considered

S. ch. 72, § 4, is such negligence on his part as to defeat the lien of the mortgage, as against innocent purchasers for value from the mortgagors after the destruction of the record. *Tolle v. Alley* (Ky.), 24 S. W. Rep. 113.

<sup>1</sup> *Neslin v. Wells*, 104 U. S. 428; *Huebsch v. Scheel*, 81 Ill. 281; *Holbrook v. Dickenson*, 56 Ill. 497; *Hodgen v. Guttery*, 58 Ill. 431; *Ohio Life Ins. & Trust Co. v. Ledyard*, 8 Ala. 866; *Burke v. Allen*, 3 Yeates, 351; *Burns v. Berry*, 42 Mich. 176, 3 N. W. Rep. 924; *Riley v. Hoyt*, 29 Hun, 114; *Westbrook v. Gleason*, 89 N. Y. 641.

<sup>2</sup> *Jackson v. McChesney*, 7 Cow. 360, 17 Am. Dec. 521; *Jackson v. Van Valkenburgh*, 8 Cow. 260; *Bush v. Lathrop*, 22 N. Y. 535, 549; *Jackson v. Given*, 8 Johns. 137, 5 Am. Dec. 328; *Cook v. Travis*, 20 N. Y. 400; *Tarbell v. West*, 86 N. Y. 280; *Losey v. Simpson*, 11 N. J. Eq. 246.

<sup>3</sup> *Wood v. Chapin*, 13 N. Y. 509, 67 Am. Dec. 62; *Webster v. Van Steenberg*, 46 Barb. 211; *Crane v. Turner*, 7 Hun, 357; *Clark v. Mackin*, 30 Hun, 411.

<sup>4</sup> *Varick v. Briggs*, 6 Paige, 323; *Cook v. Travis*, 22 Barb. 338, 20 N. Y. 400.



as vested in him in the same manner as if it had been conveyed to the grantor before he executed the deed. The grantor is estopped to say he was not then seised. Then, if the grantor executes another conveyance, and this and the deed by which the grantor acquired his title are both recorded together, which grantee has the better title? The estoppel binds not only the grantor and his heirs, but his assigns as well. A second grantee is therefore estopped to aver that the grantor was not seised at the time of his making the first conveyance, and that conveyance being first recorded must have priority.<sup>1</sup>

But if a mortgagor has title at the time of executing two mortgages, the fact that one contains covenants of warranty does not give it priority over the other which contains no such covenants, if the latter be first filed for record.<sup>2</sup>

A quitclaim deed or other deed without warranty does not have the effect of estopping the grantor from setting up a superior right and title subsequently acquired from another source.<sup>3</sup>

1488. To sustain a deed made before the grantor acquires title is certainly a violation of the spirit of the registry system, under which a record is notice only to subsequent purchasers and incumbrancers in the line of the title to which the recorded deed belongs. It has been insisted, therefore, with much force, that a second grantee, under a deed made after the grantor had acquired title and recorded his deed to himself, should be preferred to the first grantee, whose deed the second grantee, in fol-

<sup>1</sup> Jones on Mortgages, §§ 679, 782, 825, 1483, 1656, 1671. **California**: Kirkaldie v. Larrabee, 31 Cal. 455, 89 Am. Dec. 205; Christy v. Dana, 34 Cal. 548, 42 Cal. 174. **Connecticut**: Salisbury Sav. Soc. v. Cutting, 50 Conn. 113. **Indiana**: Boone v. Armstrong, 87 Ind. 168. **Iowa**: Warburton v. Mattox, Morris, 367. **Maine**: Pike v. Galvin, 29 Me. 183. **Massachusetts**: White v. Patten, 24 Pick. 324; Somes v. Skinner, 3 Pick. 52; Knight v. Thayer, 125 Mass. 25; Russ v. Alpaugh, 118 Mass. 369, 376. **Mississippi**: Edwards v. Hillier, 70 Miss. 803, 13 So. Rep. 692; Kaiser v. Earhart, 64 Miss. 492, 1 So. Rep. 635; McInnis v. Pickett, 65 Miss. 354, 3 So. Rep. 660; Bramlett v. Roberts, 68 Miss. 325, 10 So. Rep. 56. **New Hampshire**: Gotham v. Gotham, 55 N. H. 440; Wark

v. Willard, 13 N. H. 389; Kimball v. Blaisdell, 5 N. H. 533, 22 Am. Dec. 476. **New Jersey**: Semon v. Terhune, 40 N. J. Eq. 364; Cooke v. Watson, 30 N. J. Eq. 345. **New York**: Tefft v. Munson, 57 N. Y. 97; Farmers' Loan & Trust Co. v. Maltby, 8 Paige, 361; Doyle v. Peerless Petroleum Co. 44 Barb. 239; Crane v. Turner, 67 N. Y. 437. **Ohio**: Philly v. Sanders, 11 Ohio St. 490, 78 Am. Dec. 316; Douglass v. Scott, 5 Ohio, 194. **Vermont**: Jarvis v. Aikens, 25 Vt. 635. See, however, White & Tudor's Lead. Cases in Eq. 4th Am. ed. vol. 2, pt. 1, p. 212.

<sup>2</sup> Vandercook v. Baker, 48 Iowa, 199.

<sup>3</sup> Smith v. Pollard, 19 Vt. 272; Doswell v. Buchanan, 3 Leigh, 365, 23 Am. Dec. 280.

lowing the title back to the time his grantor acquired title, would not find of record. In this view of the question, a subsequent purchaser or creditor is not bound to take notice of a conveyance not lying in the line of the title, though actually recorded; and he is not bound to search for conveyances as against his grantor previous to the time when the grantor obtained his title to the land.<sup>1</sup> "A recorded deed by one who has no title, but who afterwards acquires the title by recorded deed, is not constructive notice to a subsequent purchaser in good faith from the common grantor. We think, when he searches till he finds the deed by which his grantor acquires the title, he is not bound to look for deeds made prior to that time. Such prior deeds are not 'in the line of title,' as that term is used by conveyancers and searchers."<sup>2</sup> But notwithstanding the objections, the title by estoppel in such cases is sometimes sustained; and if a purchaser fails to examine the record, to ascertain whether the grantor had made a conveyance prior to the time of receiving and recording the conveyance to himself, he runs the risk of acquiring an imperfect title.<sup>3</sup>

1489. After the mortgage is made and recorded, the record of any deeds subsequently made by the mortgagor is not notice to the mortgagee; <sup>4</sup> and if he has no actual knowledge of any

<sup>1</sup> *Calder v. Chapman*, 52 Pa. St. 359; *Wood v. Farmere*, 7 Watts, 382; *M'Lanahan v. Reeside*, 9 Watts, 508; *Farmers' Loan & Trust Co. v. Maltby*, 8 Paige, 361; *Salisbury Sav. Soc. v. Cutting*, 50 Conn. 113, and note 122; *Prince v. Case*, 10 Conn. 381; *Way v. Arnold*, 18 Ga. 181. See, also, *Rawle on Covenants*, 4th ed. 428; *Bigelow on Estoppel*, 331; *McCusker v. McEvey*, 9 R. I. 528, 10 R. I. 606.

<sup>2</sup> *Ford v. Unity Church Soc.* 120 Mo. 498, 25 S. W. Rep. 394. Also, *Crockett v. Maguire*, 10 Mo. 34; *Dodd v. Williams*, 3 Mo. App. 278. See § 1503.

<sup>3</sup> *Digman v. McCollum*, 47 Mo. 372; *Buckingham v. Hanna*, 2 Ohio St. 551, and cases in §§ 1487, 1504, n. 3.

<sup>4</sup> *Jones on Mortgages*, § 723; *Bright v. Buckman*, 39 Fed. Rep. 243. **Arkansas**: *Birnie v. Main*, 29 Ark. 591. **Illinois**: *Doolittle v. Cook*, 75 Ill. 354; *Heaton v. Prather*, 84 Ill. 330; *Iglehart v.*

*Crane*, 42 Ill. 261; *Meacham v. Steele*, 93 Ill. 135; *Small v. Stagg*, 95 Ill. 39. **Kentucky**: *Halstead v. Bank*, 4 J. J. Marsh. 554, 558. **Massachusetts**: *George v. Wood*, 9 Allen, 80, 85 Am. Dec. 741. **Michigan**: *James v. Brown*, 11 Mich. 25; *Cooper v. Bigly*, 13 Mich. 463. **New Hampshire**: *Brown v. Simons*, 44 N. H. 475. **New Jersey**: *Cogswell v. Stout*, 32 N. J. Eq. 240; *Kipp v. Merselis*, 30 N. J. Eq. 99; *Hill v. McCarter*, 27 N. J. Eq. 41; *Blair v. Ward*, 10 N. J. Eq. 119, 126; *Vanorden v. Johnson*, 14 N. J. Eq. 376, 82 Am. Dec. 254; *Hoy v. Bramhall*, 19 N. J. Eq. 563, 97 Am. Dec. 687. **New York**: *King v. McVickar*, 3 Sandf. Ch. 192; *Westbrook v. Gleason*, 14 Hun, 245; *Truscott v. King*, 6 Barb. 346; *Stuyvesant v. Hall*, 2 Barb. Ch. 151; *Raynor v. Wilson*, 6 Hill, 469; *Howard Ins. Co. v. Halsey*, 8 N. Y. 271, 59 Am. Dec. 478; *Wheelwright v. De Peyster*, 4 Edw. Ch.

such subsequent deed, he may, without receiving anything upon the mortgage debt, release any portion of the mortgaged property to the mortgagor without impairing his security upon the remainder for the whole mortgage debt; although, if he had notice of a sale of any part of the remaining land, he might be obliged to abate a proportionate part of the mortgage debt in order to protect the purchaser.<sup>1</sup> The equity which entitles a subsequent mortgage incumbrancer to the benefit of such a release arises only when the first mortgagee gives it with knowledge at the time of the existence of the subsequent incumbrance. If the subsequent incumbrance be a mechanic's lien, the mere fact that the building was commenced after the mortgage was given, and that the mortgagee knew this, is not sufficient to charge him with knowledge of the lien.<sup>2</sup>

An agreement between a prior mortgagee and the mortgagor, by which insurance money received by the former was used by the latter in rebuilding, does not affect the priority of his lien as against a subsequent mortgage of which he had no actual knowledge.<sup>3</sup>

1490. Whatever may be the equities of the subsequent mortgagee, a prior mortgagee is not bound by them unless he has actual notice, or such notice as should put him upon inquiry.<sup>4</sup> There can be no retrospective effect to the record. A mortgagee, having recorded his deed, secures the protection of the registry laws, and he is not required to search the record from time to time to see whether other conveyances have been put upon the record. While the law requires every man to deal with his own so as not to injure another, it imposes a greater obligation on the second mortgagee to take care of his own interests than upon the first mortgagee to take care of them for him. To make it the duty

232; *Talmadge v. Wilgers*, 4 Edw. Ch. 239, n.; *Stuyvesant v. Hone*, 1 Sandf. Ch. 419. **North Dakota**: *Sarles v. McGee*, 1 N. Dak. 365, 48 N. W. Rep. 231. **Ohio**: *Ranney v. Hardy*, 43 Ohio St. 157; *Leiby v. Wolf*, 10 Ohio, 83. **Pennsylvania**: *Taylor v. Maris*, 5 Rawle, 51. **South Carolina**: *Lake v. Shumate*, 20 S. C. 23. **Vermont**: *Johnson v. Valido Marble Co.* 64 Vt. 337, 25 Atl. Rep. 441. **Wisconsin**: *Straight v. Harris*, 14 Wis. 509.

<sup>1</sup> *Hall v. Edwards*, 43 Mich. 473, 5 N.

W. Rep. 652; *Cogswell v. Stout*, 32 N. J. Eq. 240.

<sup>2</sup> *Ward v. Hague*, 25 N. J. Eq. 397; *McIlvain v. Mut. Assur. Co.* 93 Pa. St. 30.

<sup>3</sup> *Johnson v. Valido Marble Co.* 64 Vt. 337, 25 Atl. Rep. 441.

<sup>4</sup> *Duester v. McCamus*, 14 Wis. 307; *Straight v. Harris*, 14 Wis. 509; *Dewey v. Ingersoll*, 42 Mich. 17, 3 N. W. Rep. 235.

of the first mortgagee to inquire before he acts, lest he may injure some one, would be to reverse this rule, and make it his duty to do for the second mortgagee what the latter should do for himself.<sup>1</sup>

In like manner, the recording of a mortgage affords no notice whatever to a prior purchaser of the land who is in possession under a bond for a deed, so that the mortgagee had constructive notice of his rights, and without actual notice he may lawfully complete his payments to his vendor without becoming liable to such mortgagee.<sup>2</sup>

**1491. The extent of the lien.** — The record of the mortgage is notice of an incumbrance for the amount specified in it, or so referred to as to put subsequent purchasers upon inquiry as to the extent of the lien.<sup>3</sup> It is not notice of any claim which is not so specified or referred to.<sup>4</sup> Subsequent purchasers are bound by nothing more than is disclosed by record, unless express notice is proved. As against them, if the mortgage debt is not payable with interest, they cannot be prejudiced by any change of interest, although, in case there be other security for the debt, they cannot object to the application of that to the payment of interest in the first place.<sup>5</sup> But actual notice of the amount secured by a mortgage is binding upon a subsequent purchaser although there be a mistake in the record.<sup>6</sup>

**1492. Extension of mortgage.** — An agreement for further time, and a higher rate of interest, is not binding upon the property, or upon subsequent purchasers, unless duly executed and recorded. It is merely a personal obligation between the parties, and the increased indebtedness cannot operate as a lien upon the land.<sup>7</sup> An agreement for extension duly recorded, but which does not identify the mortgage by any sufficient reference, has no greater effect by reason of the record.<sup>8</sup>

**1493. Rate of interest.** — The mortgage is a lien only for the rate of interest specified in it, or for the rate established by law

<sup>1</sup> *James v. Brown*, 11 Mich. 25 ; *Birnie v. Main*, 29 Ark. 591. See *Jones on Mortgages*, § 372.

<sup>2</sup> *Doolittle v. Cook*, 75 Ill. 354.

<sup>3</sup> *Youngs v. Wilson*, 27 N. Y. 351 ; *Dean v. De Lezardi*, 24 Miss. 424.

<sup>4</sup> *Hinchman v. Town*, 10 Mich. 508.

<sup>5</sup> *Lash v. Edgerton*, 13 Minn. 210.

<sup>6</sup> *Frost v. Beekman*, 1 Johns. Ch. 288.

<sup>7</sup> See *Jones on Mortgages*, § 361 ; *Davis v. Jewett*, 3 Greene (Iowa), 226 ; *Gardner v. Emerson*, 40 Ill. 296.

<sup>8</sup> *Bassett v. Hathaway*, 9 Mich. 28.

when it is simply made payable with interest.<sup>1</sup> If the parties to the mortgage subsequently agree upon an advanced rate, this agreement is not binding upon subsequent purchasers unless it is executed with the formalities which entitle it to be recorded, and it is in fact duly recorded before others acquire any interest in the property.

In like manner, where a mortgage was given without interest, but with a verbal agreement that the mortgagee should receive certain rents in lieu of interest, he cannot, as against a subsequent mortgagee who had no notice of this agreement, enlarge his demand beyond what appeared of record, and claim a lien upon the property for the payment of interest as well as principal.<sup>2</sup>

After the making of a mortgage, the parties to it cannot make an agreement for the payment of a higher rate of interest than that stipulated for in the mortgage, that will be a lien upon the premises as against a purchaser of the property before such agreement was made, or after it was made but without notice of it.<sup>3</sup>

But in case of a mortgagee for the purchase-money, the wife having no right of dower except in the surplus above the mortgage, an agreement to pay a higher rate of interest in consideration of an extension of time may be enforced against the property, so far as the wife's dower is concerned.<sup>4</sup>

**1494.** The recording acts have no application to deeds or mortgages executed and recorded simultaneously.<sup>5</sup> Neither have they any application to deeds or mortgages executed at the same time and held by the same person, for he has, of necessity, notice of both.<sup>6</sup> The record of one before the other is in such case without effect. Mortgages executed and recorded simultaneously are concurrent liens, whether in the hands of the mortgagee or in the hands of assignees. Nor have the acts application when the mortgages expressly declare that neither is to have precedence of the other, but are to be alike security for

<sup>1</sup> See Jones on Mortgages, § 361; *Whittacre v. Fuller*, 5 Minn. 508.

<sup>2</sup> *St. Andrew's Church v. Tompkins*, 7 Johns. Ch. 14.

<sup>3</sup> *Bassett v. McDonel*, 13 Wis. 444.

<sup>4</sup> *Thompson v. Lyman*, 28 Wis. 266.

<sup>5</sup> *Stafford v. Van Rensselaer*, 9 Cow. 316, affirming *Hopk.* 569; *Douglass v. Peele, Clarke*, 563.

<sup>6</sup> *Gausen v. Tomlinson*, 23 N. J. Eq. 405; *Vredenburg v. Burnet*, 31 N. J. Eq. 229.

the several debts.<sup>1</sup> Nor have they any application as between two mortgages given for purchase-money at the same time; and when this fact appears upon the face of the deeds, the prior record of one gives it no priority over the other.<sup>2</sup> The rights of the parties in such cases may sometimes be controlled by other considerations; and if there be any priority of one over the other, that priority is determined by considerations of equity. Equitable rights and agreements as to priority are recognized and enforced only in courts of equity.<sup>3</sup>

When two deeds or mortgages executed at different dates are recorded on the same day, and there is nothing to show which was in fact first recorded, the presumption of law is that the recording of them was concurrent, and each party stands charged with notice of the equities of the other on that day, at the same moment; though in such case the deed or mortgage which is prior in execution has sometimes been regarded as having the superior equity.<sup>4</sup> But in case the equities, aside from the date of execution, are equal, the maxim *qui prior est tempore, potior est jure* does not apply.<sup>5</sup>

1495. The chief effect of recording an assignment of a mortgage is to protect the assignee from a subsequent sale of the mortgage.<sup>6</sup> The assignment when not recorded is void as against a subsequent purchaser of the mortgage. Therefore, when two simultaneous mortgages of the same land are made under an

<sup>1</sup> Howard v. Chase, 104 Mass. 249.

<sup>2</sup> Greene v. Deal, 1 N. Y. W. Dig., reversing 4 Hun, 703.

<sup>3</sup> Jones v. Phelps, 2 Barb. Ch. 440.

<sup>4</sup> Houfes v. Schultze, 2 Bradw. 196, 11 Chicago L. N. 75; Deininger v. McConnel, 41 Ill. 227. In Alabama, however, the senior mortgage has no priority. This result is based upon the provision of the Code, § 1811, declaring all mortgages to be void as to purchasers for a valuable consideration and mortgagees without notice, unless recorded before the accrual of the rights of such purchasers or mortgagees. In the case of mortgages simultaneously recorded, though the execution of one was prior to the execution of the other, it is said that, at the time of the accrual of the right of the junior mortgagee, the prior mortgage was inop-

erative and void as to him, unless he had notice of it. Wood v. Lake, 62 Ala. 489. "The fact that both mortgages were filed for record at the same time does not change the effect of the statute of registration. It does not require the second mortgage to be recorded before the first is recorded in order to preserve its preference. It simply declares the unrecorded prior mortgage inoperative and void as against the subsequent mortgagees, when their mortgage is executed and received without notice of the first." Steiner v. Clisby, 95 Ala. 91, 10 So. Rep. 240, per Clopton, J.; Coster v. Bank, 24 Ala. 37.

<sup>5</sup> Neslin v. Wells, 104 U. S. 428; Sterner v. Clisby, 95 Ala. 91, 10 So. Rep. 240.

<sup>6</sup> § 1423.

agreement that they shall be equal liens, the prior record of one gives it no preference over the other. Such a mortgage is not within the terms of a statute declaring an unrecorded conveyance void against a *subsequent* conveyance *first* recorded. A simultaneous conveyance is not a subsequent conveyance. An assignment is a conveyance of a mortgage, and if it be not recorded it is void against a subsequent purchaser of the mortgage.<sup>1</sup> There is a further use in recording an assignment in the indirect protection that the record affords the holder of the mortgage as against innocent subsequent purchasers of the mortgaged land; for there may be grounds for the purchaser's believing that the mortgage had been paid, and, the assignment not being recorded, the purchaser would be prevented from making inquiries of the real owner of the mortgage.<sup>2</sup>

If an assignee of one of two simultaneous mortgages be regarded as a subsequent purchaser of some interest in the real estate, then he is affected by the record of the other mortgage, as well as that of which he has taken an assignment; and if either or both contain a recital showing that they are simultaneous, or that both were given for the purchase-money of the same land, then the prior record of one can give it no preference over the other.<sup>3</sup>

If one of two simultaneous mortgages made to the same person be assigned with the representation that it is a first lien upon the premises, this representation will make it so as against the assignor. But, as against a subsequent assignee of the other without notice, such representation is a secret equity by which he is not bound.<sup>4</sup>

**1496. Simultaneous mortgages for purchase-money.**—Where two or more mortgages are made simultaneously to different persons, and are so connected with each other that they may be regarded as one transaction, each mortgagee having notice of the other mortgage, they will be held to take effect in such order of priority or succession as shall best carry into effect the inten-

<sup>1</sup> *Greene v. Warnick*, 64 N. Y. 220.

<sup>2</sup> *Brownback v. Ozias*, 117 Pa. St. 87, 11 Atl. Rep. 301.

<sup>3</sup> *Greene v. Warnick*, 64 N. Y. 220; *Van Aken v. Gleason*, 34 Mich. 477.

<sup>4</sup> *Vredenburg v. Burnet*, 31 N. J. Eq. 229. In *Lane v. Nickerson*, 17 Hun, 148, it was held such representation would give priority even as against the purchaser of the other mortgage.

tion and best secure the rights of all the parties.<sup>1</sup> When the equities of the two mortgages are equal in point of merit, the oldest in point of time will prevail.<sup>2</sup> If there be no intention to give any preference to either, no preference as between the mortgagees can be obtained by priority of record.<sup>3</sup> The recording acts in such case have no application. But if one of such mortgages be assigned to a purchaser in good faith without notice of any superior equity in the holder of the other mortgage, such assignee is entitled to the priority gained by an earlier record of his mortgage, even if the other mortgage was superior in equity.<sup>4</sup> Upon a foreclosure sale under such mortgage, the purchaser would be entitled to the same priority which the assignee would have.<sup>5</sup>

If two mortgages be made to the same person to secure purchase-money, though in the mortgagee's hands one has no priority over the other, he may assign one in such a way to give it priority over the other subsequently assigned by him.

A foreclosure, under a power of sale, of one of two mortgages designed to be simultaneous, is not effectual to settle the relative rights of the purchaser and the holder of the other mortgage, a bill in equity being necessary to determine them and to marshal the assets. To effect this a sale is necessary, unless one of the parties take up the other's mortgage.<sup>6</sup>

**1497. Simultaneous mortgages of which one is for purchase-money.** — If a purchaser of land, at the instant of receiving his deed, executes and delivers two mortgages of it, one to his grantor to secure a payment of a part of the purchase-money, and the other to a third person, and all the deeds are entered for record at the same moment, the mortgage to his grantor takes precedence. The deed and the mortgage for the purchase-money are parts of one transaction, and give the purchaser only an instantaneous seisin. Moreover, the deed and mortgages being all delivered at the same time, the several grantees must be considered as knowing all that took place concerning them, and the

<sup>1</sup> *Pomeroy v. Latting*, 15 Gray, 435; *Koevenig v. Schmitz*, 71 Iowa, 175, 32 Jones v. Phelps, 2 Barb. Ch. 440; *Douglass v. Peele*, Clarke, 563. N. W. Rep. 320.

<sup>2</sup> *Houfes v. Schultze*, 2 Bradw. 196.

<sup>3</sup> *Rhoades v. Canfield*, 8 Paige, 545; *Decker v. Boice*, 19 Hun, 152, 83 N. Y. 215; *Westbrook v. Gleason*, 79 N. Y. 23. <sup>4</sup> *Decker v. Boice*, 19 Hun, 152, 83 N. Y. 215.

*Sparks v. State Bank*, 7 Blackf. 469; *Van Aken v. Gleason*, 34 Mich. 477;

<sup>6</sup> *Van Aken v. Gleason*, 34 Mich. 477.



third person, therefore, as knowing of the mortgage for the purchase-money, to which his own became subject as effectually, by his knowledge of its existence, as it would have been if it had been posterior in time of entry for record.<sup>1</sup>

A vendor of real estate who records his mortgage at the same instant that the deed from him is recorded has no occasion to examine the records for incumbrances created by his vendee upon the property prior to the recording of his deed. If there be delay in recording such deed and mortgage, and the vendee executes another mortgage of the same property to a stranger, and this is recorded before the deed to the vendee and his mortgage for the purchase-money are recorded, the recording of the mortgage to such third person is not notice to the vendor, because at that time the deed to the vendee had not been recorded.<sup>2</sup>

For the same reason, a purchase-money mortgage has precedence of mechanics' liens placed upon a building between the execution of the contract of purchase and the conveyance, although the conveyance and mortgage are made when the building is almost finished.<sup>3</sup>

But if a purchase-money mortgage and another mortgage be executed and delivered at the same time, so that they take effect upon the estate at the same instant, and the recording of the purchase-money mortgage is delayed and the other is first recorded, the latter will, in the absence of any notice of the purchase-money mortgage, be held to be superior in right.<sup>4</sup>

**1498. The English doctrine of tacking**<sup>5</sup> has no application to registered mortgages. These are payable according to the priority of their record.<sup>6</sup> Another kind of tacking arises when the mort-

<sup>1</sup> *Clark v. Brown*, 3 Allen, 509; *Brasted v. Sutton*, 29 N. J. Eq. 513; *Heffron v. Flanigan*, 37 Mich. 274; *City Nat. Bank App.* 91 Pa. St. 163.

<sup>2</sup> *Boyd v. Mundorf*, 30 N. J. Eq. 545; *Losey v. Simpson*, 11 N. J. Eq. 246.

<sup>3</sup> *Gibbs v. Grant*, 29 N. J. Eq. 419; *Paul v. Hoeft*, 28 N. J. Eq. 11; *Lamb v. Cannon*, 38 N. J. L. 362; *Strong v. Van Deursen*, 23 N. J. Eq. 369; *Macintosh v. Thurston*, 25 N. J. Eq. 242.

<sup>4</sup> *Dusenbury v. Hulbert*, 2 Thomp. & C. 177; *Houston v. Houston*, 67 Ind. 276.

<sup>5</sup> Tacking in England was abolished by the Vendor and Purchaser Act of 1874. The dimensions to which the learning on this subject had grown may be gathered from the fact that in Mr. Coventry's edition of *Powell on Mortgages*, published in 1822, it occupies one hundred and twenty-five pages.

<sup>6</sup> See *Jones on Mortgages*, § 360; *Grant v. U. S. Bank*, 1 Caines Cas. 112; *Wing v. McDowell*, Walk. (Mich.) 175; *Chandler v. Dyer*, 37 Vt. 345.

It is prohibited by statute in Georgia. Code 1873, § 1962. See § 1082.

gagee attaches to the mortgage lien other debts not included in the mortgage. This he may do, so far as the mortgagor is concerned, where an express or implied agreement exists allowing him to do so; but he cannot tack other debts to his mortgage as against intervening mortgagees and judgment creditors.<sup>1</sup>

<sup>1</sup> *Orvis v. Newell*, 17 Conn. 97; *Colquhoun v. Atkinson*, 6 Munf. 550; *Siter v. M'Clanachan*, 2 Gratt. 280; *Towner v. Wells*, 8 Ohio, 136; *Hughes v. Worley*, 1 Bibb, 200; *Chase v. M'Donald*, 7 Har. & J. 160; *Averill v. Guthrie*, 8 Dana, 82.

## CHAPTER XXXII.

### NOTICE AS AFFECTING PRIORITY.

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#### *I. Notice as affecting Priority under the Registry Acts.*

1499. The doctrine of notice as affecting priority is generally adopted both in England<sup>1</sup> and in this country. Subsequent purchasers who have notice of a prior unrecorded deed or mortgage are affected by their knowledge of it in the same way that the prior record of the instrument would affect them.<sup>2</sup> Judg-

<sup>1</sup> Under the local registry acts in England, it has always been conceded that notice of a prior deed would supersede the effect of a prior registry. In the leading case which arose with reference to the registry act for Middlesex, Lord Hardwicke said: "Where a person had no notice of a prior conveyance, there the registering his subsequent conveyance shall prevail against the prior; but if he had notice of a prior conveyance, then that was not a secret conveyance by which he could be prejudiced." *Le Neve v. Le Neve*, 1 Ambler, 436; *White & Tudor's Lead. Cas.* vol. 2, p. 109, 4th Am. ed. And see *Neal v. Kerrs*, 4 Ga. 161; *Forbes v. Deniston*, 4 Bro. P. C. 189; *Blades v. Blades*, 1 Eq. Cas. Abr. 358, pl. 12; *Cheval v. Nichols*, 1 Stra. 664; *Hine v. Dodd*, 2 Atk. 275; *Tunstall v. Trappes*, 3 Sim. 286, 301.

The registry acts of England are as follows: West Riding of Yorkshire, 5 Anne, c. 18; East Riding of Yorkshire and

Kingston-on-Hull, 6 Anne, c. 35; Middlesex, 7 Anne, c. 20; and North Riding of Yorkshire, 8 Geo. II. c. 6. Under the Irish Registry Act, 6 Anne, c. 2, which is materially different from the English, the record gives absolute priority, and the doctrine of notice is not admitted. *Bushell v. Bushell*, 1 Sch. & Lef. 90, 98.

The policy of the doctrine of notice, as laid down by Lord Hardwicke and repeatedly affirmed in England, has been the subject of some criticism; and regret has been expressed that the doctrine has so far superseded the terms of the registry acts. *Davis v. Strathmore*, 16 Ves. 419. See, also, *Ford v. White*, 16 Beav. 120; *Wyatt v. Barwell*, 19 Ves. 435, 438; *Roland v. Hart*, L. R. 6 Ch. App. 678. And see numerous cases cited.

<sup>2</sup> **Colorado:** *Hutchinson v. Hutchinson*, 16 Colo. 349, 26 Pac. Rep. 814. **Florida:** *Thompson v. Maxwell*, 16 Fla. 773. **Michigan:** *Cook v. French*, 96 Mich. 525, 56 N. W. Rep. 101. **New Jersey:** *Conover*

ment creditors having such notice stand in a like position.<sup>1</sup> The doctrine is the same under statutes which declare without qualification that an unacknowledged or unrecorded deed shall be void as against purchasers, or as against all persons who are not parties to the conveyance.<sup>2</sup> The record is constructive notice only; but it is notice to all the world that comes after. Any other notice must in the nature of things be limited in the extent of it, but, so far as it goes, its effect is equitably not any less, certainly, than that of the record. Having notice of a deed or mortgage defectively recorded, or not recorded at all, a subsequent purchaser cannot claim priority for his own deed.<sup>3</sup> As between him and the prior grantee or mortgagee, it is the same as if the prior deed or mortgage had been duly recorded.<sup>4</sup> Therefore priority among mortgagees and grantees depends not only upon the date of their deeds and the date of their record, but also upon the knowledge they have of the true state of the facts as to the title, and of the rights and equities of those who have not fixed their priority by duly recording their deeds.<sup>5</sup>

Notice of an invalid deed does not affect a purchaser,<sup>6</sup> though he may be affected by notice of a valid deed derived from an invalid record of it. Thus, under the statutes of New York, a deed in fee of a freehold estate not duly acknowledged or attested

*v. Van Mater*, 18 N. J. Eq. 481; *Hendrickson v. Woolley*, 39 N. J. Eq. 307. **Iowa**: *Bell v. Thomas*, 2 Iowa, 384; *Peters v. Ham*, 62 Iowa, 656, 18 N. W. Rep. 296. **Missouri**: *Keith & P. Coal Co. v. Bingham*, 97 Mo. 196, 10 S. W. Rep. 32. **New York**: *Butler v. Viele*, 44 Barb. 166; *Fort v. Burch*, 5 Den. 187; *Jackson v. Van Valkenburgh*, 8 Cow. 260; *Dingley v. Bon*, 130 N. Y. 607, 29 N. E. Rep. 1023. **Vermont**: *Morrill v. Morrill*, 53 Vt. 74, 38 Am. Rep. 659. **Tennessee**: *Kirkpatrick v. Ward*, 5 Lea, 434. **Wisconsin**: *Rowell v. Williams*, 54 Wis. 636, 12 N. W. Rep. 86; *Mueller v. Brigham*, 53 Wis. 173, 10 N. W. Rep. 366. **Kansas**: *Short v. Fogle*, 42 Kans. 349, 22 Pac. Rep. 323.

<sup>1</sup> *Wallis v. Rhea*, 10 Ala. 451, 12 Ala. 646; *Jordan v. Mead*, 12 Ala. 247; *Manaudas v. Mann*, 25 Oreg. 597, 37 Pac. Rep. 55.

<sup>2</sup> *Westerly Sav. Bank v. Stillman Manuf. Co.* 16 R. I. 497, 17 Atl. Rep. 918; *Bullock v. Whipp*, 15 R. I. 195, 2 Atl. Rep. 309.

<sup>3</sup> *Johnston v. Canby*, 29 Md. 211; *Coe v. Winters*, 15 Iowa, 481; *Forepaugh v. Appold*, 17 B. Mon. 625; *Johnson v. Badger M. & M. Co.* 13 Nev. 351.

<sup>4</sup> *Hill v. McNichol*, 76 Me. 314; *Copeland v. Copeland*, 28 Me. 525; *Smallwood v. Lewin*, 15 N. J. Eq. 60; *Ohio Life Ins. & Trust Co. v. Ross*, 2 Md. Ch. Dec. 25; *Smith v. Nettles*, 13 La. Ann. 241; *Pike v. Armstead*, 1 Dev. Eq. 110; *Solms v. McCulloch*, 5 Pa. St. 473; *Jackson v. Van Valkenburgh*, 8 Cow. 260.

<sup>5</sup> *La Farge Fire Ins. Co. v. Bell*, 22 Barb. 54; *Vredenburg v. Burnet*, 31 N. J. Eq. 229; *Sheffey v. Bank*, 33 Fed. Rep. 315.

<sup>6</sup> *Van Cloostere v. Logan*, 149 Ill. 588, 36 N. E. Rep. 94.

does not take effect as against a subsequent purchaser; and consequently a purchaser with notice of a prior deed which is void under this statute may treat such prior deed as void.<sup>1</sup> But a purchaser may have actual notice of a valid deed from a record of it which does not operate as constructive notice by reason of its not having been executed according to the statute.<sup>2</sup> "It has been generally held by the American courts, though with some exceptions, that, notwithstanding the registry acts, one who has notice of such facts in reference to an unrecorded conveyance as devolves on him, as an honest man, the duty of making further inquiry, is to be held as having such knowledge as such inquiry honestly made would have disclosed. In those States in which this rule does not apply, it will be found that the state registry acts require actual knowledge of the unrecorded conveyance. One who sees upon the record and reads an instrument improperly recorded, because not acknowledged or proved as required by law, cannot claim to be a *bona fide* purchaser of the property therein described. He knows that what he sees is the copy of an instrument purporting to have been made by the grantor to the grantee. Good faith requires that he shall prosecute further inquiry, and, if he negligently or wilfully neglects to do so, he is to be held to have known all the facts to which that inquiry would have led."<sup>3</sup>

1500. There is a presumption that the first recorded deed or mortgage has priority; and the burden of proving that the grantee or mortgagee in such deed or mortgage had knowledge of the existence of a conveyance of prior execution rests upon the party who makes this claim.<sup>4</sup>

The notice, however, may lose its effect through the agreement of the grantee of the unrecorded conveyance. Thus where a mortgagee agreed to keep his mortgage off the record in order to enable the mortgagor to borrow money on the property by giving a first mortgage, and such agreement was made known to the mortgagee taking the mortgage second in date, at or before its

<sup>1</sup> Chamberlain v. Spargur, 86 N. Y. 603; Nellis v. Munson, 108 N. Y. 453, 15 N. E. Rep. 739; Erwin v. Shuey, 8 Ohio St. 509.

<sup>2</sup> Musgrove v. Bonser, 5 Oreg. 313, 20 Am. Rep. 737; Hastings v. Cutler, 24 N. H. 481.

<sup>3</sup> Woods v. Garnett (Miss.), 16 So. Rep. 390, per Cooper, C. J.

<sup>4</sup> Hendrickson v. Woolley, 39 N. J. Eq. 307; Sheffey v. Bank, 33 Fed. Rep. 315.

execution, and his mortgage was first recorded, such notice will not give the unrecorded mortgage priority.<sup>1</sup>

Undoubtedly it was the purpose of the laws providing for the registry of conveyances of land to enable every one by this means to determine fully the title to the land, without depending upon the possession of the title deeds, or upon inquiry or notice outside of the registry. The symmetry of the registry system has been disturbed and broken in upon by judicial construction, in order to prevent a fraudulent use of the statute, which it is to be presumed the statute did not intend. To allow one who has actual or implied notice of a prior unrecorded deed of the same property, or such notice of equitable rights of other persons in the property, to obtain priority by recording his own deed, would be to enable him to take advantage of the registry laws to obtain an unfair or fraudulent advantage by means of them. Exceptions to the literal application of the law have therefore been engrafted upon it to meet the equitable consequences of such notice.<sup>2</sup>

**1501. Exceptions as regards mortgages in Arkansas, Louisiana, North Carolina, and Ohio.** — As already noticed, it has been questioned whether the courts ought ever to have suffered the question of actual notice to be agitated against one whose conveyance is duly registered.<sup>3</sup> The basis of the doctrine of notice is, that it is unconscientious and fraudulent to permit a junior purchaser to defeat a prior conveyance or incumbrance of which he has knowledge.<sup>4</sup> But it has been doubted whether this doctrine does not give occasion to more fraud than it prevents, and whether vigilance in recording a mortgage should not be rewarded as much as vigilance in obtaining it.<sup>5</sup> Accordingly, as regards mortgages, the statutes of a few States make the recording of them essential to their validity as against third persons. Thus in Arkansas it is provided that a mortgage shall be a lien from the time the same is filed in the recording office, and not before; and

<sup>1</sup> *Hendrickson v. Woolley*, 39 N. J. Eq. 307.

<sup>2</sup> See *Hart v. Farmers' & Mechanics' Bank*, 33 Vt. 252, per Chief Justice Redfield.

<sup>3</sup> Per Sir Wm. Grant, in *Wyatt v. Barwell*, 19 Ves. 435, 439; *Benham v. Keane*, 1 Johns. & H. 685; *Ford v. White*, 16 Beav. 120; per Colcock, J., in *Price v.*

*White*, Bailey Eq. 240; *Canal & Dock Co. v. Russell*, 68 Ill. 426; *Donahue v. Mills*, 41 Ark. 421; *Allen v. Cadwell*, 55 Mich. 8, 20 N. W. Rep. 692; *Moore v. Thomas*, 1 Oreg. 201.

<sup>4</sup> *Harrington v. Allen*, 48 Miss. 492.

<sup>5</sup> Per Hitchcock, J., in *Mayham v. Coombs*, 14 Ohio, 428.

actual notice does not avail to give it validity as against third persons.<sup>1</sup>

In Louisiana the doctrine of notice as supplying the place of registration is wholly rejected. By statute all sales, contracts, and judgments affecting immovable property not duly recorded are declared utterly null and void, except between the parties thereto.<sup>2</sup>

Under the registration law in North Carolina, prior to the act of 1885,<sup>3</sup> it was held that no notice, however full and formal, would supply the place of registration of a deed of trust or mortgage; the statute declaring that they shall not be valid at law to pass any property as against creditors or purchasers for a valuable consideration but from their registration.<sup>4</sup> But if a deed or mortgage stated that the land conveyed had previously been conveyed in trust to secure the payment of a certain debt, although such first mortgage was not recorded till after the second mortgage was recorded, and therefore was inoperative as to the second mortgage, yet the holder of the first mortgage was entitled to satisfaction out of the land in preference to the holder of the second mortgage; for the latter mortgage was regarded as creating a trust for the payment of the prior mortgage in preference to the second mortgage.<sup>5</sup> A mortgage for purchase-money was not entitled to priority over a second mortgage which was first filed, though the second mortgagee had notice of it.<sup>6</sup>

Under the recording acts of Ohio, the doctrine of notice has no place, inasmuch as all mortgages take effect from the time they

<sup>1</sup> Dig. of Stats. § 4742; *Jacoway v. Gault*, 20 Ark. 190, 73 Am. Dec. 494; *Fry v. Martin*, 33 Ark. 203; *Dodd v. Parker*, 40 Ark. 536.

<sup>2</sup> Rev. Civ. Code, §§ 2264, 2266; *Rocheau v. Delacroix*, 26 La. Ann. 584; *Harang v. Plattsmier*, 21 La. Ann. 426.

<sup>3</sup> Act of 1885, ch. 147, p. 233, provides that after December 1, 1885, where a party purchases land with the knowledge that another has purchased the same land, and has a deed therefor dated prior to December 1, 1885, which has not been registered, the second purchaser shall acquire no title as against the prior unregistered deed. *Cowen v. Withrow*, 114 N. C. 558, 21 S. E. Rep. 676.

<sup>4</sup> Code 1883, § 1254; *Robinson v. Wil-*

*loughby*, 70 N. C. 358; *Blevins v. Barker*, 75 N. C. 436, 438; *Miller v. Miller*, Phil. Eq. 85; *Womble v. Battle*, 3 Ired. Eq. 182; *Fleming v. Burgin*, 2 Ired. Eq. 584; *Leggett v. Bullock*, Busb. L. 283; *King v. Portis*, 77 N. C. 25; *Deal v. Palmer*, 72 N. C. 582; *Todd v. Outlaw*, 79 N. C. 235; *Hinton v. Leigh*, 102 N. C. 28, 8 S. E. Rep. 890; *Traders' Nat. Bank v. Manuf. Co.* 96 N. C. 298, 3 S. E. Rep. 363; *Traders' Nat. Bank v. Manuf. Co.* 100 N. C. 345, 5 S. E. Rep. 81; *Quinnerly v. Quinnerly*, 114 N. C. 145, 19 S. E. Rep. 99.

<sup>5</sup> *Hinton v. Leigh*, 102 N. C. 28, 8 S. E. Rep. 890.

<sup>6</sup> *Quinnerly v. Quinnerly*, 114 N. C. 145, 19 S. E. Rep. 99.

are delivered to the recorder.<sup>1</sup> A judgment recovered after the date of the mortgage, and before it is recorded, takes precedence of it.<sup>2</sup> The admission of evidence of actual notice of a prior unrecorded deed, as affecting a mortgagee's right of priority, is attended with all the danger and uncertainty incident to parol evidence, when used for the purpose of affecting written instruments and disturbing titles, and for this reason the policy has been adopted in this State of allowing the whole question of priority to be settled by the simple fact of prior registry. This furnishes a clear and certain standard of decision incapable of variation, and thus avoids a very fruitful source of litigation.<sup>3</sup>

**1502.** The recording acts charge subsequent purchasers with constructive notice of all instruments of record in the apparent chain of title, and not with notice of all instruments of record by whomsoever made relating to the land in question. When a purchaser searches the records till he finds the deed by which his grantor acquired his title, he is not bound to look for deeds of an antecedent grantor recorded after the deed to his grantor. The record of a deed is constructive notice only to subsequent purchasers under the same grantor.<sup>4</sup>

**1503.** When, therefore, a deed is made to one who fails to record it until after his grantor has made a deed of the same land to another, who has notice of the first deed, a purchaser from the second grantee whose deed is first recorded, in case such purchaser has no actual knowledge of the first deed, is not

<sup>1</sup> R. S. 1890, § 4133; *Holliday v. Franklin Bank*, 16 Ohio, 533; *Stansell v. Roberts*, 13 Ohio, 148, 42 Am. Dec. 193; *Mayham v. Coombs*, 14 Ohio, 428; *Bloom v. Noggle*, 4 Ohio St. 45; *Bercaw v. Cockerill*, 20 Ohio St. 163, and cases there cited; *Building Asso. v. Clark*, 43 Ohio St. 427, 2 N. E. Rep. 846; *Erwin v. Shuey*, 8 Ohio St. 509. And see *Astor v. Wells*, 4 Wheat. 466.

<sup>2</sup> *Mayham v. Coombs*, 14 Ohio, 428; *Holliday v. Franklin Bank*, 16 Ohio, 533.

<sup>3</sup> Per Ranney, J., in *Bloom v. Noggle*, 4 Ohio St. 45; *Building Asso. v. Clark*, 43 Ohio St. 427, 2 N. E. Rep. 846; *Kemper v. Campbell*, 44 Ohio St. 210, 6 N. E. Rep. 566.

<sup>4</sup> *Dexter v. Harris*, 2 Mason, 531. **Massachusetts:** *Morse v. Curtis*, 140 Mass.

112, 54 Am. Rep. 456; *Connetcticut v. Bradish*, 14 Mass. 296. **Maine:** *Trull v. Bigelow*, 16 Mass. 405, 8 Am. Dec. 144; *Hill v. McNichol*, 76 Me. 314. **Missouri:** *Ford v. Unity Church Soc.* 120 Mo. 498, 25 S. W. Rep. 394; *Odle v. Odle*, 73 Mo. 289; *Crockett v. Maguire*, 10 Mo. 34; *Dodd v. Williams*, 3 Mo. App. 278. **Pennsylvania:** *Calder v. Chapman*, 52 Pa. St. 359, 91 Am. Dec. 163. **Vermont:** *Day v. Clark*, 25 Vt. 397. The second grantee is preferred in Vermont, not because the purchaser is himself a purchaser without notice, but because the purchaser did not know that his grantor was not a *bona fide* purchaser. **Illinois:** *Carbine v. Pringle*, 90 Ill. 302; *Irish v. Sharp*, 89 Ill. 261; *Manly v. Pettee*, 38 Ill. 128. **Indiana:** *Corbin v. Sullivan*, 47 Ind. 356. §§ 1482, 1488.



affected with constructive notice of the prior deed in consequence of the recording of that deed before he received his own deed; for he is not bound to search the records for deeds of the antecedent grantor recorded after the deed to his own grantor. Thus the owner of land mortgaged it to A, and then mortgaged it to B, who had notice of the earlier mortgage, and who recorded his mortgage before the mortgage to A was recorded. After both mortgages were recorded, B assigned his mortgage to C, who had no actual notice of the mortgage to A. The Supreme Court of Massachusetts held that C had the better title to the land.<sup>1</sup> The court say: "There are indexes of grantors and grantees, so that, in searching a title, the examiner is obliged to run down the list of grantors, or run backward through the list of grantees. If he can start with an owner who is known to have a good title, he is obliged to run through the index of grantors until he finds a conveyance by the owner of the land in question. After such conveyance, the former owner becomes a stranger to the title, and the examiner must follow down the name of the new owner to see if he has conveyed the land, and so on. It would be a hardship to require an examiner to follow in the indexes of grantors the names of every person who at any time, through perhaps a long chain of title, was the owner of the land. We do not think this is the practical construction which lawyers and conveyancers have given to our registry laws. The inconveniences of such a construction would be much greater than would be the inconvenience of requiring a person, who has neglected to record his prior deed for a time, to record it and to bring a bill in equity to set aside the subsequent deed, if it was taken in fraud of his rights. The better rule, and the one the least likely to create confusion of titles, seems to us to be that if a purchaser, upon examining the registry, find a conveyance from the owner of the land to his grantor, which gives him a perfect record title completed by what the law, at the time it is recorded, regards as equivalent to a livery of seisin, he is entitled to rely upon such record title, and is not obliged to search the records afterwards

<sup>1</sup> *Morse v. Curtis*, 140 Mass. 112, 114, 54 Am. Rep. 456, following and affirming *Connecticut v. Bradish*, 14 Mass. 296; *Trull v. Bigelow*, 16 Mass. 406, 8 Am. Dec. 144. In *Flynt v. Arnold*, 2 Met.

619, Chief Justice Shaw criticises the early decisions in Massachusetts just cited, but, the decision of the court being upon another ground, his expressions on this point are only dicta.

in order to see if there has been any prior unrecorded deed of the original owner."

1504. The rule that a purchaser in good faith is not affected with notice of a prior deed from an antecedent grantor, recorded subsequently to the deed to his grantor, though prior to his own purchase deed, has the support of the better authorities.<sup>1</sup> "If this were not so," said Jackson, J., in an early case,<sup>2</sup> "our laws, which require the registering of deeds, would be useless if not worse; because a purchaser, after the most thorough examination in the registry of deeds, and finding a succession of conveyances, all in legal form and in perfect order, might still be evicted upon proof of a secret trust, or a fraud, on the part of some former owner."

There are, however, quite a number of decisions to the contrary.<sup>3</sup>

<sup>1</sup> See, in addition to the cases already cited, Rawle on Covenants, § 259, and Judge Hare in a note to *Duchess of Kingston's Case*, 2 Smith Lead. Cas. (8th ed.) 734. And this is said to be the more reasonable rule by the annotators of the *Leading Cases in Equity*. *Le Neve v. Le Neve*, 2 White & T. Lead. Cas. Eq. 180.

<sup>2</sup> *Connecticut v. Bradish*, 14 Mass. 296, 301. The principle of this case was affirmed in *Trull v. Bigelow*, 16 Mass. 406, 8 Am. Dec. 144, where Parker, C. J., said: "This principle is just; for the honest assignee finds a good subsisting title on record in his grantor, pays him the value of the land, and is wholly ignorant of any circumstances which contradict the apparent fairness of the title. In such case the negligence of the first purchaser is the cause of the difficulty; and although he shall not suffer, when his negligence is fraudulently taken advantage of by a subsequent purchaser, yet when a third party claims the land, deriving his title from him who in the public registry appears to be the lawful owner, negligence ought to turn the scale against the party who was guilty of it." Followed also in *Glidden v. Hunt*, 24 Pick. 221.

<sup>3</sup> *New York*: *Van Rensselaer v. Clark*, 17 Wend. 25, 31 Am. Dec. 280; *Schutt v. Large*, 6 Barb. 373; *Ring v. Steele*, 3

*Keyes*, 450; *Jackson v. Post*, 15 Wend. 588; *Fort v. Burch*, 5 Den. 187; *Westbrook v. Gleason*, 79 N. Y. 23; *Clark v. Mackin*, 30 Hun, 411. *Iowa*: *English v. Waples*, 13 Iowa, 57. *Michigan*: *Van Aken v. Gleason*, 34 Mich. 477. *Wisconsin*: *Fallass v. Pierce*, 30 Wis. 443; *Erwin v. Lewis*, 32 Wis. 276, overruling *Ely v. Wilcox*, 20 Wis. 523, 91 Am. Dec. 436. *California*: *Mahoney v. Middleton*, 41 Cal. 41. *Mississippi*: *Woods v. Garnett* (Miss.), 16 So. Rep. 390, 392. *Cooper, C. J.*, said: "We think the Massachusetts decisions are erroneous, because they hold that one not bound by the registry law is protected by it. . . . It is no answer to say that it is inconvenient to the purchaser to examine a long and voluminous record made after the record of the title of his grantor. To this the sufficient reply is that, but for the registry acts, he would not have even the protection which such records afford, but would deal at his peril with his grantor, and secure only such title as he might assert."

In *Van Rensselaer v. Clark*, 17 Wend. 25, 31 Am. Dec. 280, Derick Schuyler owned the premises in question on the 25th of August, 1794. He that day conveyed them to James Van Rensselaer, but the deed was not recorded till January 2, 1804. July 2, 1799, Derick Schuyler con-

1505. According to the authorities last cited, the right of the first purchaser or mortgagee to preserve his title by recording his deed continues after any number of subsequent conveyances in the chain of title derived from the second grantee from the original grantor, although the deeds in this chain of title have all been duly recorded, provided that such subsequent purchasers, one and all, have bought either with knowledge of the prior unrecorded deed, or without paying valuable consideration. So long as this state of things continues, the prior title will hold, and may be perfected by record. But so soon as any one in the chain of title under the second conveyance purchases in good faith for a valuable consideration, and places his deed on record, the title under the first unrecorded deed is gone forever,<sup>1</sup> unless it be

veyed the same premises to Philip Schuyler, who had notice of the unrecorded deed to James Van Rensselaer. The deed to Philip Schuyler was recorded October 25, 1802. On the 2d of April, 1805, Philip Schuyler conveyed to Clark, who in 1806 conveyed to Emott, who in 1833 conveyed to Miller. The court held that Philip Schuyler was a *bona fide* purchaser; that, the deed to Van Rensselaer being recorded before the deed from Philip Schuyler to Clark, the latter took the land chargeable with notice of the deed to Van Rensselaer; that although neither Clark, Emott, or Miller had actual notice or knew of the deed from Derick Schuyler to Van Rensselaer, and although upon the examination of the records they found a regular recorded title in their respective grantors, yet the records informed them that Derick Schuyler had conveyed the premises to Van Rensselaer previously to the conveyance to Philip Schuyler. It was argued that Clark bought of Philip Schuyler on the faith of finding that his deed was first recorded, and that he should not be held to look further and run the hazard of actual notice to Philip Schuyler. But it was held otherwise by the court, which decided that, to entitle a purchaser to protection under the recording acts, he must not have notice which is inconsistent with good faith.

The following case is still later: On

the 10th day of April, 1871, A, the owner of certain lands, mortgaged them for \$3,000 to B, who, on the 25th of July, 1871, delivered the same to C, and on the 28th of October, 1871, executed to him a formal assignment, which, with the mortgage, was recorded January 2, 1872. On September 13, 1871, A conveyed the premises to D, who had actual knowledge of the mortgage to B, and of the consideration he had paid for it. This deed was recorded October 5, 1871. On the 16th of January, 1873, D executed a mortgage upon the premises to E for \$2,000, who assigned it to F, who had no notice of the first mortgage, except such constructive notice as was given by the record. It was held that when C put the first mortgage on record, January 2, 1872, it was a complete and perfect title, and that the lien acquired by F under the second mortgage was subsequent to it. *Goelet v. McManus*, 1 Hun, 306.

<sup>1</sup> This point is illustrated in the case of *Fallass v. Pierce*, 30 Wis. 443, which was several times argued before the court, and was finally decided in a well-considered opinion by Chief Justice Dixon. Using the same illustration before given, he says: "If, for example, in the case supposed, C took his deed with knowledge of the prior conveyance to B, and had then conveyed to D, who had like knowledge, and D should convey to E, and so on, convey-

conveyed to a former owner who was charged with notice of the prior equity.

This class of cases very frequently presents questions of the greatest difficulty; and the language of Lord Chancellor Northington is generally applicable to any one of them: "This is one of those cases which are always very honorably labored by the counsel at the bar, and determined with great anxiety by the court, as some of the parties must be shipwrecked in the event."<sup>1</sup>

1506. As a general rule a purchaser is not bound to search the records for incumbrances as against a title that does not appear of record.<sup>2</sup> Generally, therefore, the record of any mortgage prior to the conveyance by which the mortgagor took his title is no notice of the incumbrance to a subsequent purchaser.<sup>3</sup> The recording of an agreement, by one who has no title to certain land, to sell the land in case he should acquire it, is not construc-

ances should be executed to the end of the alphabet, each subsequent grantee having knowledge of B's prior right, and all of their conveyances being recorded, yet then, if B should record his deed before the last grantee with knowledge, and Z should make conveyance, the purchaser from Z would be bound to take notice of B's rights, and of the relations existing between him and all the subsequent purchasers from C to Z inclusive. And in the same case, if Z should sell to a purchaser in good faith for value from him, yet if B should get his conveyance recorded *before* that of such purchaser, his title would be preferred because of such first record. And it is manifest that the same result would follow if in the case supposed none of the subsequent grantees, from C to Z inclusive, paid any valuable consideration for the land; or if, in the case of each successive grantee, his title was defective and invalid as against B, either by reason of his knowledge of B's title, or because he was a mere volunteer, paying no consideration whatever for the conveyance." The case of *Ely v. Wilcox*, 20 Wis. 523, 91 Am. Dec. 436, is overruled. *Fallass v. Pierce*, 30 Wis. 443, is followed in *Girardin v. Lampe*, 58 Wis.

267, 16 N. W. Rep. 614; *Erwin v. Lewis*, 32 Wis. 276.

See *White & Tudor's Lead. Cas. in Eq.* 4th Am. ed. vol. 2, pt. 1, p. 212, for a dissent to this line of decisions, because they make it requisite to search for conveyances from two persons during the same period.

In *Day v. Clark*, 25 Vt. 397, 402, the rule is laid down that the record of the prior deed after the second is notice to a purchaser from the vendee in the second that there is such a prior deed; but the record of it is no notice that the vendee in the second deed, at the time he secured it, had notice of the first deed, and without such notice the title of the purchaser from the vendee in the second but first recorded deed would not be affected by the fraud or knowledge of his vendor.

<sup>1</sup> See *Stanhope v. Verney*, 2 Eden, 81.

<sup>2</sup> *Cook v. Travis*, 20 N. Y. 400, 402; *Lozey v. Simpson*, 11 N. J. Eq. 246; *Clark v. Mackin*, 30 Hun, 411; *Stockwell v. State*, 101 Ind. 1.

<sup>3</sup> *Calder v. Chapman*, 52 Pa. St. 359, 91 Am. Dec. 163; *Wing v. McDowell*, Walk. (Mich.) 175; *Farmers' Loan & Trust Co. v. Maltby*, 8 Paige, 361; *Montgomery v. Keppel*, 75 Cal. 128, 19 Pac. Rep. 178; *Bingham v. Kirkland*, 34 N. J. Eq. 229; *Tarbell v. West*, 86 N. Y. 280.

tive notice to a purchaser or mortgagee who becomes such after the promisor has acquired the title.<sup>1</sup> The whole object of the registry acts is to protect subsequent purchasers and incumbrancers against previous conveyances which are not recorded, and to deprive the holder of previous unregistered conveyances of his right of priority which he would have at the common law. The title upon record is the purchaser's protection. The registry of a deed is notice only to those who claim through or under the grantor by whom the deed was executed.<sup>2</sup> When one link in the chain of title is wanting, there is no clue to guide the purchaser in his search to the next succeeding link by which the claim is continued. When the purchaser has traced the title down to an individual, out of whom the record does not carry it, the registry acts make that title the purchaser's protection.<sup>3</sup>

1507. Yet the circumstances may be such that a purchaser will be bound to search the records for incumbrances as against a title which does not appear of record; as, for instance, when he has actual notice, prior to the date of the conveyance to himself, of an equitable interest of another in the land by reason of his possession of it under a parol contract of purchase. One holding an executory contract of purchase, or one in possession of land under a contract of sale, though the contract be by parol, has a mortgageable interest, and a mortgage of it may be legally and properly recorded, so as to take precedence of a subsequent conveyance of the property, if the subsequent purchaser had actual notice of the existence of the mortgageable estate in the mortgagor prior to his receiving his own deed.<sup>4</sup>

<sup>1</sup> *Oliphant v. Burns* (N. Y.), 40 N. E. Rep. 980.

<sup>2</sup> *Veazie v. Parker*, 23 Me. 170; *Roberts v. Bourne*, 23 Me. 165, 39 Am. Dec. 614; *Pierce v. Taylor*, 23 Me. 246; *Frank v. Heidenheimer*, 84 Tex. 642, 19 S. W. Rep. 855; *Jenkins v. Adams*, 71 Tex. 1, 4, 8 S. W. Rep. 603.

<sup>3</sup> Per Chancellor Williamson in *Losey v. Simpson*, 11 N. J. Eq. 246; *Roll v. Rea*, 50 N. J. L. 264, 12 Atl. Rep. 905; *Maddox v. Arp*, 114 N. C. 585, 19 S. E. Rep. 665; *Emeric v. Alvarado*, 90 Cal. 444, 27 Pac. Rep. 356; *Bates v. Norcross*, 14 Pick. 224; *Watson v. Chalk*, 11 Tex. 89, 93; *Thompson v. Westbrook*, 56 Tex. 265; *Lumpkin*

*v. Adams*, 74 Tex. 96, 102, 11 S. W. Rep. 1070; *Holmes v. Buckner*, 67 Tex. 107, 113, 2 S. W. Rep. 452; *Peterson v. McCauley* (Tex. Civ. App.), 25 S. W. Rep. 826; *Cunningham v. Thornton*, 28 Ill. App. 58; *Carbine v. Pringle*, 90 Ill. 302; *Rodgers v. Kavanaugh*, 24 Ill. 583; *Irish v. Sharp*, 89 Ill. 261; *Dexter v. Harris*, 2 Mason, 531; *Manly v. Pettee*, 38 Ill. 128; *Wait v. Smith*, 92 Ill. 385; *Works v. State*, 120 Ind. 119, 22 N. E. Rep. 127. And see *Cook v. Travis*, 20 N. Y. 400; *Parkist v. Alexander*, 1 Johns. Ch. 394, 398.

<sup>4</sup> *Crane v. Turner*, 7 Hun, 357, affirmed 67 N. Y. 437. But see § 1503.

A recital in a deed that the grantee had been in possession of the granted farm since a given date, several months prior to the deed, under a contract for the purchase of it, is actual notice to one claiming under the title of such deed that the grantee had been in possession before he received a deed of the land; and the law charges him with notice that such grantee had, during such possession, a mortgageable interest in the land; and he is bound to search the records for incumbrances against the title from the time the grantee entered into possession under the contract, and he is bound by a mortgage made by such grantee while in possession under the contract of sale and before receiving a deed.<sup>1</sup>

**1508. Notice of a secret trust.** — It is frequently the case that an estate which appears by the record to be absolutely the property of the grantee is in fact held by him in trust for another person. In such case, any one who deals with him in respect to this estate, with knowledge of the trust, takes it subject to the trust, and will be required to perform it and discharge the lien.<sup>2</sup> If the conveyance, though absolute in form, be in fact a mortgage, a purchaser with knowledge of this fact takes the estate subject to the mortgage and the mortgagor's right of redemption. "Though a purchaser may buy in an incumbrance, or lay hold on any plank to protect himself, yet he shall not protect himself by the taking a conveyance from a trustee after he had notice of the trust, for, by taking a conveyance with notice of the trust,

<sup>1</sup> *Crane v. Turner*, 7 Hun, 357. Mr. Justice Follett, by way of illustration, said: "If, January first, a grantee receives a deed and enters into possession, but neglects to record the deed, or it is destroyed, and subsequently he receives a new deed bearing a later date, and reciting that it is confirmatory of a deed dated January first, under which he has been in possession since that date, and which deed has been lost, it would not be held that a search back to the date of the confirmatory deed was due diligence in a person who had actual notice of the recital, even though accompanied by inquiry of the grantee; and if he should take a mortgage and record it, it would not have precedence over a duly recorded mortgage given between the dates of the first and second deeds."

<sup>2</sup> *Ferrars v. Cherry*, 2 Vern. 384; *Cory v. Eyre*, 1 De G., J. & S. 149; *Wormley v. Wormley*, 8 Wheat. 421; *Caldwell v. Carrington*, 9 Pet. 86; *Boone v. Chiles*, 10 Pet. 177; *Oliver v. Piatt*, 3 How. 333; *Wright v. Dame*, 22 Pick. 55; *Harwood v. Pearson*, 122 Mass. 425; *Smith v. Bowen*, 35 N. Y. 83; *Sadler's App.* 87 Pa. St. 154; *Lyons v. Bodenhamer*, 7 Kans. 455; *Murray v. Ballou*, 1 Johns. Ch. 566; *James v. Cowing*, 17 Hun, 256; *Dillaye v. Commercial Bank*, 51 N. Y. 345; *West v. Fitz*, 109 Ill. 425; *Sergeant v. Ingersoll*, 7 Pa. St. 340; *Jones v. Shaddock*, 41 Ala. 262; *Smith v. Walser*, 49 Mo. 250; *Learned v. Tritch*, 6 Colo. 432; *Dixon v. Caldwell*, 15 Ohio St. 412, 86 Am. Dec. 487; *Jackson v. Blackwood*, 4 McAr. 188; *Wethered v. Roon*, 17 Tex. 143.

he himself becomes the trustee, and must not, to get a plank to save himself, be guilty of a breach of trust.”<sup>1</sup>

One who acquires the legal title to land with notice of an equitable mortgage in another will be decreed to hold the legal title for the benefit of the equitable mortgagee.<sup>2</sup>

## II. *Actual Notice.*

1509. There are three kinds of notice, — actual, implied, and constructive. As the doctrine of notice as affecting the priority of incumbrances arises from the equitable view that it is fraud in one, who has notice of an adverse claim in another, to attempt to acquire a title to the prejudice of the interest of which he has been made aware, it is obvious that the actual culpability involved by the notice must depend altogether upon the kind and degree of notice received. Yet the legal consequences are the same, whatever the kind and degree of the notice may be, provided the notice is imputed at all. Notice, however, is not necessarily or commonly knowledge, though in legal effect it may be equivalent to knowledge.

1510. Actual notice literally means direct personal knowledge.<sup>3</sup> Yet the term is often used in a broader sense as including notice implied from indirect or circumstantial evidence.<sup>4</sup> Whether it exists in any particular case, and whether it is sufficient to charge the party whom it is sought to affect by it, is a question of fact to be considered and determined upon the evidence in each particular case. It is deemed effectual and sufficient when the

<sup>1</sup> *Saunders v. Dehew*, 2 Vern. 271.

<sup>2</sup> *Gale v. Morris*, 29 N. J. Eq. 222; *Lounsbury v. Norton*, 59 Conn. 170, 22 Atl. Rep. 153.

<sup>3</sup> *Story's Eq. Jur.* § 399; *Lamb v. Pierce*, 113 Mass. 72; *Crassen v. Swove-land*, 22 Ind. 427; *Rogers v. Jones*, 8 N. H. 264; *Williamson v. Brown*, 15 N. Y. 354; *Baltimore v. Williams*, 6 Md. 235.

The statutes of *Massachusetts*, P. S. ch. 120, § 4, provide that no unrecorded deed shall be valid save as against the grantors and persons having “actual notice thereof.” By actual notice is not meant necessarily that a person must actually have seen or been told of the deed by the grantor, but it means any intelligible information

of it, either verbal or in writing, coming from a source which a party ought to give heed to. *Curtis v. Mundy*, 3 Met. 405; *George v. Kent*, 7 Allen, 16. This provision was first adopted in the Rev. Stat. of 1836, before which time implied or constructive notice was held to be sufficient, but now has no effect. *Parker v. Osgood*, 3 Allen, 487. And see *Lawrence v. Stratton*, 6 Cush. 163, 166; *Pomroy v. Stevens*, 11 Met. 244; *Dooley v. Wolcott*, 4 Allen, 406; *Sibley v. Leffingwell*, 8 Allen, 584. So in *Maine*, R. S. 1883, ch. 73, § 8; and *Missouri*, R. S. 1889, § 2420.

<sup>4</sup> *Knapp v. Bailey*, 79 Me. 195, 9 Atl. Rep. 122.

evidence shows that the matters relating to the prior claim or interest of another, constituting notice of it, are brought distinctly to the knowledge and attention of the person it is sought to affect.<sup>1</sup>

1511. Whether "actual notice" means actual knowledge or includes constructive knowledge, in statutes requiring actual notice to affect a purchaser, is a question upon which the decisions are not in harmony. In Massachusetts it is held that, although a purchaser has knowledge that the lands had been sold and purchased by another person, yet if no deed had been recorded, and the purchaser had no knowledge that a deed had been made, he is not chargeable with actual notice.<sup>2</sup> Therefore proof of open and notorious occupation and improvement, or of other facts which would reasonably put a purchaser upon inquiry, is not sufficient;<sup>3</sup> but one claiming under an unrecorded deed must prove that the subsequent purchaser had actual knowledge of some claim or right of the person holding possession, or actual knowledge or notice of the unrecorded deed. It is competent, however, to present to the jury evidence of implied or constructive notice to the purchaser of an unrecorded deed in connection with direct evidence that he had actual notice of such deed.<sup>4</sup> Moreover, actual knowledge of an unrecorded deed does not mean that the purchaser shall have positive and certain knowledge of its existence, or such knowledge as he would acquire by seeing the deed, or being told of it by the grantor. It is such knowledge as men usually act upon in their ordinary affairs.<sup>5</sup> This construction of the requirement of *actual notice* to affect a subsequent purchaser gives full effect to the words, and is in accordance with the definition of them given by the best writers. This construction, moreover, gives full effect to the registry laws, and enables purchasers to rely upon them fully and implicitly without searching the outside world to ascertain the true state of the title. It simply requires of all persons who

<sup>1</sup> Robinson's Law of Priority, p. 27; Michigan Mut. L. Ins. Co. v. Conant, 40 Mich. 530; Vest v. Michie, 31 Gratt. 149; Jackson, L. & S. R. Co. v. Davison, 65 Mich. 437, 37 N. W. Rep. 537.

<sup>2</sup> Lamb v. Pierce, 113 Mass. 72.

<sup>3</sup> White v. Foster, 102 Mass. 375; Sibley v. Leffingwell, 8 Allen, 584; Parker v. Osgood, 3 Allen, 487; Mara v. Pierce, 9 Gray, 306; Pomroy v. Stevens, 11 Met.

244. Also in Indiana: Crassen v. Swove-land, 22 Ind. 427, 434.

<sup>4</sup> Sibley v. Leffingwell, 8 Allen, 584.

<sup>5</sup> In Curtis v. Mundy, 3 Met. 405, Putnam, J., said: "We think the notice should be so express and satisfactory to the party as that it would be a fraud in him subsequently to purchase, attach, or levy upon the land, to the prejudice of the first grantee."



hold or claim any interest in real estate, that they shall use due care and diligence in placing their rights beyond all danger by obtaining and putting upon record proper deeds.

It is true, however, that in most other States in which there are statutes requiring "actual notice" or "knowledge" to affect a purchaser, a less strict interpretation of the word is adopted, and actual notice does not imply actual knowledge. While actual notice of an unrecorded deed is distinguished from mere notice such as would be imputed from actual, open, and visible occupation, whether known to the purchaser or not, yet the words are held to include constructive knowledge imputed from actual, open, and visible occupation, where such occupation is in fact known to the purchaser,<sup>1</sup> or from other facts which constructively charge him with notice. Notice is regarded as actual when the purchaser either knows of the existence of the adverse claim of title, or is conscious of having the means of such knowledge.<sup>2</sup>

In other States, under statutes that speak of "notice" instead of "actual notice," for stronger reasons, actual knowledge or actual notice is not meant, but such notice only as might be charged upon a purchaser if he had used the means of knowledge he actually possessed.<sup>3</sup>

<sup>1</sup> *Vattier v. Hinde*, 7 Pet. 252. **Iowa**: *Allen v. McCalla*, 25 Iowa, 464, 96 Am. Dec. 56; *Wilson v. Miller*, 16 Iowa, 111. **Kansas**: *Greer v. Higgins*, 20 Kans. 420; *Johnson v. Clark*, 18 Kans. 157. **Maine**: *Knapp v. Bailey*, 79 Me. 195; *Webster v. Maddox*, 6 Me. 256; *Porter v. Sevey*, 43 Me. 519. **Maryland**: *Ringgold v. Bryan*, 3 Md. Ch. 488; *Price v. McDonald*, 1 Md. 403, 54 Am. Dec. 657. **Missouri**: *Vaughn v. Tracy*, 22 Mo. 415, 25 Mo. 318, 67 Am. Dec. 471; *Speck v. Rigg*, 40 Mo. 405; *Maupin v. Emmons*, 47 Mo. 304; *State Bank v. Frame*, 112 Mo. 502, 20 S. W. Rep. 620. **Ohio**: *Kelley v. Stanbery*, 13 Ohio, 408; *McKinzie v. Per*, 15 Ohio St. 162. **Oregon**: *Musgrove v. Bonser*, 5 Oreg. 313, 20 Am. Rep. 737; *Bohlman v. Coffin*, 4 Oreg. 313; *Manaudas v. Mann*, 14 Oreg. 450, 13 Pac. Rep. 449. **Wisconsin**: *Brinkman v. Jones*, 44 Wis. 498, 521. The court say: "We recognize the obligation to give some

effect to the term 'actual notice,' as distinguished from mere 'notice,' and must, therefore, hold that no constructive knowledge shall be imputed to the purchaser as a ground of notice. For example, this court has held that actual, open, and visible occupation, whether known to the purchaser or not, shall be deemed sufficient notice to the purchaser of the rights and equities of such occupant. This rule could not be applied to a case like the one at bar, unless such actual occupation was known to the purchaser." See, also, *Cunningham v. Brown*, 44 Wis. 72.

<sup>2</sup> *Speck v. Rigg*, 40 Mo. 405; *Connecticut Mut. L. Ins. Co. v. Smith*, 117 Mo. 261, 22 S. W. Rep. 623; *Mason v. Black*, 87 Mo. 330; *Rhodes v. Outcalt*, 48 Mo. 367; *Taaffe v. Kelley*, 110 Mo. 127, 19 S. W. Rep. 539; *Michigan Mut. L. Ins. Co. v. Conant*, 40 Mich. 530.

<sup>3</sup> *Traylor v. Townsend*, 61 Tex. 144.

1512. Notice implied by circumstances has been called actual notice in the second degree.<sup>1</sup> Most of the courts have construed the statutes requiring actual notice or knowledge so as to include this species of actual notice as well as notice by direct evidence. Actual notice under this broader use of the term includes all instances of actual notice established by circumstantial evidence. "If a party has knowledge of such facts as would lead a fair and prudent man, using ordinary caution, to make further inquiries, and he avoids the inquiry, he is chargeable with notice of the facts which by ordinary diligence he would have ascertained. He has no right to shut his eyes against the light before him. He does a wrong not to heed the 'signs and signals' seen by him. It may be well concluded that he is avoiding notice of that which he in reality believes or knows. Actual notice of facts which, to the mind of a prudent man, indicate notice, is proof of notice."<sup>2</sup> In the words of Mr. Justice Strong, "means of knowledge, with the duty of using them, are in equity equivalent to knowledge itself."<sup>3</sup>

A subsequent purchaser having "actual notice that the property in question is incumbered or affected, is charged constructively with notice of all the facts and instruments to the knowledge of which he would have been led by an inquiry into the incumbrance or other circumstance affecting the property of which he had notice."<sup>4</sup>

1513. The degrees and kinds of actual notice are of course without number, ranging from a formal written statement of the lien, giving all its detail, to a mere verbal declaration of the fact of its existence; it may be one given expressly as a notice, or it may have come in an accidental way. But neither the manner of the notice nor the purpose of it is material.<sup>5</sup> The degree of the notice, however, is material. "Flying reports are many times fables and not truth."<sup>6</sup> A mere rumor or suspicion that some

<sup>1</sup> Knapp v. Bailey, 79 Me. 195, 204; Speck v. Riffin, 40 Mo. 405; Maupin v. Emmons, 47 Mo. 304; Wilson v. Miller, 16 Iowa, 111.

<sup>2</sup> Knapp v. Bailey, 79 Me. 195, 204, 1 Am. St. Rep. 295, per Peters, C. J., denying the views expressed in Spofford v. Weston, 29 Me. 140.

<sup>3</sup> Cordova v. Hood, 17 Wall. 1.

<sup>4</sup> Fidelity Ins., T. & S. D. Co. v. Shenandoah Val. R. Co. 32 W. Va. 244, 259, 9 S. E. Rep. 180.

<sup>5</sup> Smith v. Smith, 2 Compt. & M. 231; North British Ins. Co. v. Hallett, 7 Jur. N. S. 1263; Wailes v. Cooper, 24 Miss. 208, 228.

<sup>6</sup> Wildgoose v. Wayland, Gouldsb. 147, pl. 67, per Lord Keeper Egerton. And

other person claims an interest in the property will not affect a person with notice of such interest.<sup>1</sup> Formerly the rule was, that such notice, to be binding, must proceed from some person interested in the property.<sup>2</sup> Of course, formal and technical notice can be given only by the person directly interested; but a stranger can give information which will affect a purchaser by putting him upon inquiry as to the fact. Information from a person directly interested in the property is entitled to more weight than the statements of a stranger are entitled to; but it may be stated as a general proposition that, if the information be derived from any other source entitled to credit, and it be definite, it will be equally binding as if it came from the party himself.<sup>3</sup> Thus, if one about to purchase land is informed by the recorder that the vendor had already given a deed of the same property to another person who had deposited his deed for record, but had withdrawn

see *Butler v. Stevens*, 26 Me. 484; *Doyle v. Teas*, 5 Ill. 202; *Wilson v. McCullough*, 23 Pa. St. 440; *Buttrick v. Holden*, 13 Met. 355.

<sup>1</sup> *Jolland v. Stainbridge*, 3 Ves. Jr. 478; *Satterfield v. Malone*, 35 Fed. Rep. 445; *Parkhurst v. Hosford*, 21 Fed. Rep. 827; *Hardy v. Harbin*, 1 Sawyer, 194; *Flagg v. Mann*, 2 Sumn. 486. **Alabama**: *Lambert v. Newman*, 56 Ala. 623. **Delaware**: *Hall v. Livingston*, 3 Del. Ch. 348. **Georgia**: *Ratteree v. Conley*, 74 Ga. 153. **Illinois**: *Chicago v. Witt*, 75 Ill. 211; *Pittman v. Sofley*, 64 Ill. 155; *Otis v. Spencer*, 102 Ill. 622, 40 Am. Rep. 617. **Iowa**: *Wilson v. Miller*, 16 Iowa, 111; *Weare v. Williams*, 85 Iowa, 253, 52 N. W. Rep. 328. **Maine**: *Butler v. Stevens*, 26 Me. 484. **Massachusetts**: *Buttrick v. Holden*, 13 Met. 355. **Michigan**: *Shepard v. Shepard*, 36 Mich. 173. **Mississippi**: *Wailles v. Cooper*, 24 Miss. 208; *Loughridge v. Bowland*, 52 Miss. 546; *Buck v. Paine*, 50 Miss. 648. **New Jersey**: *Condit v. Wilson*, 36 N. J. Eq. 370; *Green v. Morgan* (N. J.), 21 Atl. Rep. 857. **New York**: *Jackson v. Van Valkenburgh*, 8 Cow. 260. **Ohio**: *Woodworth v. Paige*, 5 Ohio St. 70; *Jaeger v. Hardy*, 48 Ohio St. 335, 27 N. E. Rep. 863, per *Williams*, C. J. **Pennsylvania**: *Maul v. Rider*, 59 Pa. St. 167; *Bugbee's App.* 110

Pa. St. 331; *Kerns v. Swope*, 2 Watts, 75; *Churcher v. Guernsey*, 39 Pa. St. 84, 86; *Hottenstein v. Lerch*, 104 Pa. St. 454, 460; *Jaques v. Weeks*, 7 Watts, 261, 267; *Wilson v. McCullough*, 23 Pa. St. 440, 62 Am. Dec. 347. **Texas**: *Hawley v. Bullock*, 29 Tex. 216, 222; *Martel v. Somers*, 26 Tex. 551; *Wethered v. Boon*, 17 Tex. 143. **Virginia**: *French v. Loyal Co.* 5 Leigh, 627. **Wisconsin**: *Parker v. Kane*, 4 Wis. 1, 65 Am. Dec. 283; *Lamont v. Stimson*, 5 Wis. 443.

<sup>2</sup> *Natal Land Co. v. Good*, 2 L. R. P. C. 121; *Barnhart v. Greenshields*, 9 Moore P. C. 18, 36; *Rogers v. Hoskins*, 14 Ga. 166; *Lamont v. Stimson*, 5 Wis. 443; *Vanduyne v. Vreeland*, 12 N. J. Eq. 142, 155; *Peebles v. Reading*, 8 S. & R. 484, 496; *Ripple v. Ripple*, 1 Rawle, 386.

<sup>3</sup> *Mulliken v. Graham*, 72 Pa. St. 484, 490; *Butcher v. Yocum*, 61 Pa. St. 168, 100 Am. Rep. 625; *Philips v. Bank*, 18 Pa. St. 394; *Curtis v. Mundy*, 3 Met. 405, 407; *Lawton v. Gordon*, 37 Cal. 202; *Martel v. Somers*, 26 Tex. 551; *Bartlett v. Glascock*, 4 Mo. 62; *Tucker v. Constable*, 16 Oreg. 407, 19 Pac. Rep. 13; *Jackson v. Van Valkenburgh*, 8 Cow. 260; *Jaeger v. Hardy*, 48 Ohio St. 335, 27 N. E. Rep. 863.

it before it was recorded, this information, being from a trustworthy source, and being definite as regards the existence of the prior deed, and affording the means of pursuing the inquiry, operates as notice to the purchaser of such prior unrecorded deed.<sup>1</sup>

1514. What is sufficient to put a purchaser upon inquiry, and affect him with the facts which the inquiry might lead to, it is difficult to state in the form of a rule universally applicable. In each case it must be determined whether the facts and circumstances disclosed are such as to charge the conscience of the purchaser with the duty of following up the inquiry.<sup>2</sup> In general, a notice of a claim, right, or interest affecting a title is sufficient if it is such a notice as a man of ordinary intelligence would act upon if it affected his ordinary business affairs.<sup>3</sup> A very brief and general statement by an adverse claimant is sufficient to charge a purchaser with the duty of further investigation.<sup>4</sup> Notice may be inferred from slight circumstances when it is shown that the purchaser and the vendor, who has made a prior conveyance or incumbrance of the same property, are intimately associated in business, or intimately related by blood or connected by marriage.<sup>5</sup>

But in general it may be said that a mere want of caution does

<sup>1</sup> *Lawton v. Gordon*, 37 Cal. 202.

<sup>2</sup> *Baker v. Bliss*, 39 N. Y. 70; *Williamson v. Brown*, 15 N. Y. 354; *Fassett v. Smith*, 23 N. Y. 252; *Chicago v. Witt*, 75 Ill. 211; *Passumpsic Sav. Bank v. First Nat. Bank*, 53 Vt. 82; *Deason v. Taylor*, 53 Miss. 697; *Wilson v. Hunter*, 30 Ind. 466; *Harrison v. Boring*, 44 Tex. 255.

<sup>3</sup> *Booth v. Barnum*, 9 Conn. 286, 23 Am. Dec. 339; *Bradlee v. Whitney*, 108 Pa. St. 362; *Barnes v. M'Clinton*, 3 Pa. 67; *Musgrove v. Bonser*, 5 Oreg. 313, 20 Am. Rep. 737; *Bohlman v. Coffin*, 4 Oreg. 313; *Willcox v. Hill*, 11 Mich. 256; *Ringgold v. Waggoner*, 14 Ark. 69; *Harrison v. Boring*, 44 Tex. 255; *Helms v. Chadbourne*, 45 Wis. 60; *State Bank v. Frame*, 112 Mo. 502, 20 S. W. Rep. 620; *Meier v. Blume*, 80 Mo. 179, 183; *Drey v. Doyle*, 99 Mo. 459, 467, 12 S. W. Rep. 287. In *Curtis v. Mundy*, 3 Met. 405, Putnam, J., said: "Information of the

giving of a deed brought home to a party with as much authority as the fact of the marriage or death of a friend in the newspaper would be, as we think, actual notice within the statute. And if such actual notice or information should prove to be true, the party receiving it would be affected by it as much as if he had seen the transaction, and so had actual knowledge of the fact; as if, for example, after he had witnessed the conveyance he had gone with great haste and put an attachment upon the estate before the grantee, with ordinary diligence, had time to put his deed upon record. The statute, which is declaratory of the principles of the common law, considers such conduct to be fraudulent, and will protect the party, who was thus intended to be deprived of his estate, as completely as if his deed had been recorded before the attachment."

<sup>4</sup> *Russell v. Petree*, 10 B. Mon. 184.

<sup>5</sup> *Trefts v. King*, 18 Pa. St. 157.

not charge a purchaser with notice.<sup>1</sup> It is not enough that he might entertain a mere suspicion of an unknown equity or interest. It is not enough that an over-prudent and cautious man, if his attention had been called to the suspicious circumstance, would have been likely to seek an explanation of it. There must be some clear neglect to inquire, after having some notice of some definite equity or interest in another.

1515. A purchaser knowing of the existence of a debt for unpaid purchase-money is not chargeable with notice of an unrecorded mortgage securing such purchase-money.<sup>2</sup> But a purchaser with such knowledge is put upon inquiry as to the existence of a vendor's lien, and is chargeable with notice of it, if it exists, in a State where such a lien is recognized.<sup>3</sup> A purchaser of land with notice that his vendor holds under a bond for title, and that one of the purchase-notes mentioned in the bond is not paid, is not a *bona fide* purchaser for value as against the assignee of such note by assignment previously made.<sup>4</sup>

The mere fact that one who was a witness to an unrecorded mortgage afterwards became the purchaser of the land from the mortgagor is not sufficient to affect him with notice of the mortgage.<sup>5</sup>

If an assignee of a mortgage has notice that it was made to his assignor without consideration for the purpose of raising money by its sale, he is put upon inquiry whether any liens intervened between its date and his purchase of it; and the fact that the mortgagor offers it for sale is a circumstance to put the purchaser upon inquiry.<sup>6</sup>

<sup>1</sup> Ware v. Egmont, 4 De G., M. & G. 460; Briggs v. Rice, 130 Mass. 50; Buttrick v. Holden, 13 Met. 355; Woodworth v. Paige, 5 Ohio St. 70; Willis v. Vallette, 4 Met. (Ky.) 186; Cavin v. Middleton, 63 Iowa, 618, 19 N. W. Rep. 805; Parker v. Conner, 93 N. Y. 118, 124, 45 Am. Rep. 178. Some of these cases probably go too far in stating that the purchaser's negligence must go to the extent of being gross or culpable in order to affect him with notice.

<sup>2</sup> Bell v. Tyson, 74 Ala. 353; Pollak v. Davidson, 87 Ala. 551, 6 So. Rep. 312.

<sup>3</sup> Overall v. Taylor, 99 Ala. 12, 11 So. Rep. 738; Thompson v. Sheppard, 85

Ala. 611, 5 So. Rep. 334; Woodall v. Kelly, 85 Ala. 368, 5 So. Rep. 164; Rosette v. Wynn, 73 Ala. 146; Lomax v. Le Grand, 60 Ala. 537; Koch v. Roth, 150 Ill. 212, 37 N. E. Rep. 317; Graham v. West (Tex. Civ. App.), 26 S. W. Rep. 920; Ruff v. Lind, 75 Tex. 700, 13 S. W. Rep. 68.

<sup>4</sup> Lytle v. Turner, 12 Lea, 641; Payne v. Abercrombie, 10 Heisk. 161; Dishmore v. Jones, 1 Coldw. 554.

<sup>5</sup> Vest v. Michie, 31 Gratt. 149, 31 Am. Rep. 722; Goodwin v. Dean, 50 Conn. 517.

<sup>6</sup> Mullison's Est. 68 Pa. St. 212.

1516. A purchaser may be charged with notice by the fact that he is paying a very inadequate price for the property.<sup>1</sup> He may also be charged with notice from any suspicious circumstances affecting the transaction.<sup>2</sup> Thus, where a debtor, under circumstances showing great embarrassment, and otherwise suspicious, gave to a creditor an assignment of a mortgage covering the amount of the debt, it was held that there was enough in the circumstances of the transaction to put the creditor upon inquiry as to a prior assignment by the same debtor to another person, and he was therefore charged with notice thereof.<sup>3</sup>

1517. Notice, to supply the place of registry, must be sufficient to make inquiry upon; it must be more than what is barely sufficient to put the party upon inquiry.<sup>4</sup> In some cases it is even said that, to break in upon the registry acts, the notice must be such as will, with the attending circumstances, affect the party with fraud.<sup>5</sup>

The notice must be clear and undoubted;<sup>6</sup> and when that is the case it is regarded as *per se* evidence of fraud for one to attempt to defeat a prior incumbrance by setting up a subsequent deed.<sup>7</sup>

It is sufficient if it comes within the rule, *Id certum est quod certum reddi potest*. In general it may be said that the facts disclosed amount to notice when they are such as render it incum-

<sup>1</sup> Durant v. Crowell, 97 N. C. 367; Hoppin v. Doty, 25 Wis. 573; Runkle v. Gaylord, 1 Nev. 123; Hume v. Franzen, 73 Iowa, 25; Lounsbury v. Norton, 59 Conn. 170, 22 Atl. Rep. 153, per Andrews, C. J.

<sup>2</sup> Eck v. Hatcher, 58 Mo. 235; Tillinghast v. Champlin, 4 R. I. 173, 67 Am. Dec. 510.

<sup>3</sup> Hoyt v. Hoyt, 8 Bosw. 511.

<sup>4</sup> Dey v. Dunham, 2 Johns. Ch. 182; Jackson v. Van Valkenburgh, 8 Cow. 260; Williamson v. Brown, 15 N. Y. 354; Reed v. Gannon, 50 N. Y. 345; Webster v. Van Steenberg, 46 Barb. 211; Tompkins v. Henderson, 83 Ala. 391, 3 So. Rep. 774.

<sup>5</sup> Jones v. Smith, 1 Hare, 43; Vest v. Michie, 31 Gratt. 149, 31 Am. Rep. 722; Goodwin v. Dean, 50 Conn. 517; Hall v. Livingston, 3 Del. Ch. 348; Woodworth

v. Paige, 5 Ohio St. 70; Pittman v. Sofley, 64 Ill. 155; Mundy v. Vawter, 3 Gratt. 518; Dey v. Dunham, 2 Johns. Ch. 182; Holmes v. Stout, 10 N. J. Eq. 419; Anthony v. Wheeler, 130 Ill. 128, 22 N. E. Rep. 494, 17 Am. St. Rep. 281.

<sup>6</sup> Hine v. Dodd, 2 Atk. 275; West v. Reid, 2 Hare, 249; Riley v. Hoyt, 29 Hun, 114; Condit v. Wilson, 36 N. J. Eq. 370; Smith v. Yule, 31 Cal. 180, 89 Am. Dec. 167; Wilson v. McCullough, 23 Pa. St. 440, 62 Am. Dec. 347; Rogers v. Wiley, 14 Ill. 65, 56 Am. Dec. 491.

<sup>7</sup> Dunham v. Dey, 15 Johns. 554, 8 Am. Dec. 282; Loughridge v. Bowland, 52 Miss. 546; Acer v. Westcott, 46 N. Y. 384, 7 Am. Rep. 255; Cambridge Valley Bank v. Delano, 48 N. Y. 326; Morris v. White, 36 N. J. Eq. 324; Pittman v. Sofley, 64 Ill. 155.

bent on the purchaser or mortgagee to inquire, and at the same time enable him to prosecute the inquiry successfully.<sup>1</sup> If in such case he wilfully closes his eyes and remains ignorant of facts he would ascertain by a reasonable inquiry, he is affected with notice of them just as much as he would be had he made the inquiry.<sup>2</sup> Thus, if a purchaser has notice of an easement upon the land he

<sup>1</sup> **Alabama**: *Webb v. Robbins*, 77 Ala. 176; *Tompkins v. Henderson*, 83 Ala. 391, 3 So. Rep. 774. **California**: *Thompson v. Pioche*, 44 Cal. 508; *Galland v. Jackman*, 26 Cal. 79, 85 Am. Dec. 172. **Connecticut**: *Booth v. Barnum*, 9 Conn. 286, 23 Am. Dec. 339; *Boswell v. Goodwin*, 31 Conn. 74, 81 Am. Dec. 169. **Georgia**: *Hunt v. Dunn*, 74 Ga. 120. **Illinois**: *Chicago v. Witt*, 75 Ill. 211; *Heaton v. Prather*, 84 Ill. 330; *Hankinson v. Barbour*, 29 Ill. 80; *Rupert v. Mark*, 15 Ill. 540; *Stokes v. Riley*, 121 Ill. 166, 11 N. E. Rep. 877; *Hunter v. Stoneburner*, 92 Ill. 75; *Morrison v. Kelly*, 22 Ill. 610, 74 Am. Dec. 169; *Doyle v. Teas*, 5 Ill. 202, 250; *Chicago v. Witt*, 75 Ill. 211; *Grundies v. Reid*, 107 Ill. 304; *Rock Island & P. Ry. Co. v. Dimick*, 144 Ill. 628, 32 N. E. Rep. 291, 19 L. R. A. 105. **Indiana**: *Indiana B. & W. Ry. Co. v. McBroom*, 114 Ind. 198, 15 N. E. Rep. 831; *Wilson v. Hunter*, 30 Ind. 466; *Singer v. Scheible*, 109 Ind. 575, 10 N. E. Rep. 616; *Smith v. Schweigerer*, 129 Ind. 363, 28 N. W. Rep. 696. **Iowa**: *Leas v. Garverich*, 77 Iowa, 275, 42 N. W. Rep. 194; *Wilson v. Miller*, 16 Iowa, 111. **Maine**: *Spofford v. Weston*, 29 Me. 140; *Hull v. Noble*, 40 Me. 459. **Maryland**: *Stockett v. Taylor*, 3 Md. Ch. 537. **Michigan**: *Converse v. Blumrach*, 14 Mich. 109, 90 Am. Dec. 230; *Michigan Mut. L. Ins. Co. v. Conant*, 40 Mich. 530; *Allen v. Cadwell*, 55 Mich. 8, 20 N. W. Rep. 692. **Mississippi**: *Loughridge v. Bowland*, 52 Miss. 546; *Buck v. Paine*, 50 Miss. 648; *McLeod v. First Nat. Bank*, 42 Miss. 99; *Plant v. Shryock*, 62 Miss. 821. **Missouri**: *Meier v. Blume*, 80 Mo. 179; *Bartlett v. Glascock*, 4 Mo. 62; *Maupin v. Emmons*, 47 Mo. 304. **Nebraska**: *Eiseman v. Gallagher*, 24 Neb. 79. **New Hampshire**: *Nute*

*v. Nute*, 41 N. H. 60; *Rogers v. Jones*, 8 N. H. 264; *Janvrin v. Janvrin*, 60 N. H. 169. **New Jersey**: *Hoy v. Bramhall*, 19 N. J. Eq. 563, 97 Am. Dec. 687. **New York**: *Baker v. Bliss*, 39 N. Y. 70; *Williamson v. Brown*, 15 N. Y. 354; *Acer v. Westcott*, 46 N. Y. 384, 7 Am. Rep. 355; *Cambridge Bank v. Delano*, 48 N. Y. 326; *Ellis v. Horrman*, 90 N. Y. 466. **North Carolina**: *Blackwood v. Jones*, 4 Jones Eq. 54. **Oregon**: *Carter v. Portland*, 4 Oreg. 339. **Pennsylvania**: *Maul v. Rider*, 59 Pa. St. 167, 171; *Wilson v. McCullough*, 23 Pa. St. 440, 62 Am. Dec. 347; *Bradlee v. Whitney*, 108 Pa. St. 362; *Mulliken v. Graham*, 72 Pa. St. 484. **Tennessee**: *Paine v. Abercrombie*, 10 Heisk. 161. **Texas**: *Powell v. Haley*, 28 Tex. 52; *Traylor v. Townsend*, 61 Tex. 144. **Vermont**: *Stevens v. Goodenough*, 26 Vt. 676; *Blaisdell v. Stevens*, 16 Vt. 179. **Virginia**: *Long v. Weller*, 29 Gratt. 347; *Wood v. Krebbs*, 30 Gratt. 708; *Effinger v. Hall*, 81 Va. 94; *Robinson v. Crenshaw*, 84 Va. 348. **West Virginia**: *Cain v. Cox*, 23 W. Va. 594; *Crumlish v. Railroad Co.* 32 W. Va. 244. **Wisconsin**: *Helms v. Chadbourne*, 45 Wis. 60; *Parker v. Kane*, 4 Wis. 1, 65 Am. Dec. 283.

<sup>2</sup> *Bunting v. Ricks*, 2 Dev. & Bat. Eq. 130; *White & Tudor's Lead. Cas.* 4th Am. ed. vol. 2, pt. 1, pp. 152-155; *Blaisdell v. Stevens*, 16 Vt. 179, 186; *Williamson v. Brown*, 15 N. Y. 354; *Burnham v. Brennan*, 10 J. & S. 49; *Baker v. Bliss*, 39 N. Y. 70; *Brinkman v. Jones*, 44 Wis. 498; *Allen v. McCalla*, 25 Iowa, 464, 96 Am. Dec. 56; *Musgrove v. Bonser*, 5 Oreg. 313, 20 Am. Rep. 737; *Hankinson v. Barber*, 29 Ill. 80; *Montgomery v. Koppel*, 75 Cal. 128, 19 Pac. Rep. 178; *Bonner v. Stephens*, 60 Tex. 616; *Kyle v. Ward*, 81 Ala. 120, 1 So. Rep. 468.

is buying, he is chargeable with notice of its nature and extent, which he might have ascertained by due inquiry from the persons entitled to the benefit of the easement.<sup>1</sup>

1518. One who purchases land across which there is a well-defined roadbed for a railroad is put upon inquiry as to the rights acquired by a railroad company which had commenced the construction of its road through the land ;<sup>2</sup> and if by inquiry the purchaser would have learned that the strip of land covered by the grade had been conveyed to the railroad company by an unrecorded deed, he is chargeable with notice of such deed.<sup>3</sup> In such case the grade of the railroad is an unmistakable monument which notifies the whole world that a railroad company had entered upon the land and built its roadbed thereon ; and the legal presumption arises that it had done so under some claim of right.

1519. Notice of an intention on the part of the owner of property to execute a lien upon it does not prevent the person having such notice from taking a valid incumbrance upon it. But where a prior mortgage, which was intended to be a conveyance in fee, was by mistake, as executed, only a conveyance for life, and a second mortgagee had such actual notice of it as induced him to believe that the mortgage was in fee, it was, as against him, held to be a mortgage in fee.<sup>4</sup>

Moreover, notice of an intention to execute a deed is not notice of the contents of the deed as executed.<sup>5</sup> A creditor may by his vigilance secure his demand, if possible, by taking a mortgage from his debtor, just as he might by an attachment, although he knew that another creditor intended to make an attachment in the one case, or to take a mortgage in the other, and had taken steps for effecting this.<sup>6</sup>

1520. As a general rule a purchaser is not put upon inquiry by notice of a deed not in the line of title under which he claims.<sup>7</sup> He is not put upon inquiry by notice of a deed which

<sup>1</sup> Webb v. Robbins, 77 Ala. 176.

<sup>5</sup> Ponder v. Scott, 44 Ala. 241.

<sup>2</sup> Indiana: Indiana B. & W. Ry. Co. v. McBroom, 114 Ind. 198, 15 N. E. Rep. 831 ; Jeffersonville, &c. R. Co. v. Oyler, 60 Ind. 383 ; Paul v. Connersville, &c. R. Co. 51 Ind. 527.

<sup>6</sup> Warden v. Adams, 15 Mass. 233 ; Cushing v. Hurd, 4 Pick. 252, 16 Am. Dec. 335.

<sup>3</sup> Chicago & E. I. R. Co. v. Wright, 153 Ill. 307, 38 N. E. Rep. 1062.

<sup>7</sup> Satterfield v. Malone, 35 Fed. Rep. 445 ; Woods v. Farmere, 7 Watts, 382 ; Hetherington v. Clark, 30 Pa. St. 393 ; Ely v. Wilcox, 20 Wis. 523 ; St. John v. Conger, 40 Ill. 535 ; Carbine v. Pringle, 90 Ill. 302 ; Grundics v. Reid, 107 Ill. 304 ;

<sup>4</sup> Gale v. Morris, 30 N. J. Eq. 285, 7 Reporter, 436.



does not necessarily affect the property in question, especially if he is at the same time told that in fact it does not affect it, but relates to other property.<sup>1</sup> But if the notice be of an instrument that actually does affect the land, though there may be some doubt on the information obtained whether the land is included or not, the purchaser will be charged with full notice of the instrument if he fails to make suitable inquiry.<sup>2</sup>

But the purchaser may have notice of facts which will put him upon inquiry and charge him with notice of deeds not in the chain of his title.<sup>3</sup> If a purchaser buys either the legal estate or an equitable interest in land, having knowledge of an outstanding equitable interest, he is chargeable with notice of any record of a conveyance or incumbrance of that interest. Knowledge of an equitable interest carries with it notice of the condition of such interest as it appears upon the public records.<sup>4</sup>

1521. The inquiry should be prosecuted by recourse to reliable and disinterested sources of information. It is not safe or sufficient to rely upon the statements of the vendor, or of one who has a motive for misleading the inquirer.<sup>5</sup> If the claimant of an adverse interest be questioned by a purchaser regarding such interest, and he refuses to answer or is unable to do so, he should not be allowed to allege that the purchaser was put upon inquiry and is chargeable with notice.<sup>6</sup> The purchaser in such case can hardly be charged with bad faith in not prosecuting the inquiry, and not obtaining information which was peculiarly within the knowledge of such adverse claimant. On the contrary, the adverse claimant might under some circumstances be chargeable with bad faith in attempting to mislead the purchaser.<sup>7</sup>

*Chicago & E. I. R. Co. v. Wright*, 153 Ill. 307, 38 N. E. Rep. 1062.

<sup>1</sup> *Jones v. Smith*, 1 Phillips, 244, 1 Hare, 43.

<sup>2</sup> *Price v. McDonald*, 1 Md. 403, 419, 54 Am. Dec. 657; *Hudson v. Warner*, 2 H. & G. 415.

<sup>3</sup> *Chicago & E. I. R. Co. v. Wright*, 153 Ill. 307, 38 N. E. Rep. 1062.

<sup>4</sup> *Jones v. Lapham*, 15 Kans. 540.

<sup>5</sup> *Blatchley v. Osborn*, 33 Conn. 226; *Price v. McDonald*, 1 Md. 403, 54 Am. Dec. 657; *Russell v. Petree*, 10 B. Mon. 184; *Littleton v. Giddings*, 47 Tex. 109; *Singer v. Jacobs*, 11 Fed. Rep. 559; Over-

*all v. Taylor*, 99 Ala. 12, 11 So. Rep. 738; *Simpson v. Hinson*, 88 Ala. 527, 7 So. Rep. 264; *Manasses v. Dent*, 89 Ala. 565, 8 So. Rep. 108; *Weil v. McWhorter*, 94 Ala. 540, 10 So. Rep. 131.

<sup>6</sup> *McGehee v. Gindrat*, 20 Ala. 95.

<sup>7</sup> *Broome v. Beers*, 6 Conn. 198; *Carr v. Wallace*, 7 Watts, 394; *Epley v. With-erow*, 7 Watts, 163; *Lesley v. Johnson*, 41 Barb. 359; *Brinckerhoff v. Lansing*, 4 Johns. Ch. 65, 8 Am. Dec. 538; *Fay v. Valentine*, 12 Pick. 40, 22 Am. Dec. 397; *Platt v. Squire*, 12 Met. 494; *Miller v. Bingham*, 29 Vt. 82; *Stafford v. Ballou*, 17 Vt. 329.

By merely examining the records, a purchaser put upon inquiry as to a prior unrecorded deed does not discharge his duty in following up the inquiry, for the records can give him no information respecting an unrecorded deed.<sup>1</sup>

One who purchases with notice that his vendor has agreed to sell to another takes subject to such agreement,<sup>2</sup> though he has no actual notice that the agreement is in writing.<sup>3</sup> He has notice enough to put him upon inquiry, and it is his own fault if he fails to inform himself as to the validity and legal force of the agreement.

Notice to a purchaser of a contract by his grantor to pay for water furnished to the land for a certain period, the contract constituting a lien upon the land, is sufficient to put the purchaser upon inquiry, though he does not know the terms of the contract, and his failure to make the inquiry does not relieve him of the obligation upon the land.<sup>4</sup>

**1522.** If a purchaser put upon inquiry fails to prosecute it with due diligence, he is conclusively presumed to have notice of the facts that a due inquiry would have disclosed.<sup>5</sup> When it is

<sup>1</sup> *Blatchley v. Osborn*, 33 Conn. 226; *Munroe v. Eastman*, 31 Mich. 283; *Shotwell v. Harrison*, 30 Mich. 179; *Reck v. Clapp*, 98 Pa. St. 581.

<sup>2</sup> *Veith v. McMurtry*, 26 Neb. 341, 42 N. W. Rep. 6.

<sup>3</sup> *Conihhan v. Thompson*, 111 Mass. 270.

<sup>4</sup> *Fresno Canal, &c. Co. v. Rowell*, 80 Cal. 114, 22 Pac. Rep. 53.

<sup>5</sup> *Whitbread v. Jordan*, 1 Young & Coll. Ex. 303; *Hanbury v. Litchfield*, 2 Myl. & K. 629; *Kennedy v. Green*, 3 Myl. & K. 699; *Maxfield v. Burton*, 17 L. R. Eq. 15; *Hoxie v. Carr*, 1 Sumn. 173. **Alabama**: *Foster v. Stallworth*, 62 Ala. 547; *Taylor v. Agricultural & M. Asso.* 68 Ala. 229. **Arkansas**: *Gaines v. Saunders*, 50 Ark. 322, 7 S. W. Rep. 301. **California**: *Montgomery v. Keppel*, 75 Cal. 128, 19 Pac. Rep. 178; *Bryan v. Torrey*, 84 Cal. 126, 24 Pac. Rep. 319, 21 Pac. Rep. 725. **Colorado**: *Filmore v. Reithman*, 6 Colo. 120. **Georgia**: *Hunt v. Dunn*, 74 Ga. 120. **Illinois**: *Doyle v. Teas*, 5 Ill. 202; *Hankinson v. Barbour*,

29 Ill. 80; *Mason v. Mullahy*, 145 Ill. 383, 387, 34 N. E. Rep. 36; *Citizens' Nat. Bank v. Dayton*, 116 Ill. 257; *Bent v. Coleman*, 89 Ill. 364; *Chicago, R. I. & P. R. Co. v. Kennedy*, 70 Ill. 350; *Stokes v. Riley*, 121 Ill. 166, 11 N. E. Rep. 877. **Iowa**: *Wilson v. Miller*, 16 Iowa, 111; *Weare v. Williams*, 85 Iowa, 253, 52 N. W. Rep. 328; *English v. Waples*, 13 Iowa, 57; *Allen v. McCalla*, 25 Iowa, 464, 96 Am. Dec. 56; *Zuver v. Lyons*, 40 Iowa, 510; *Jones v. Bamford*, 21 Iowa, 217. **Kentucky**: *Russell v. Petree*, 10 B. Mon. 184. **Maryland**: *Mayor v. Williams*, 6 Md. 235; *Price v. McDonald*, 1 Md. 403, 54 Am. Dec. 657. **Michigan**: *Schweiss v. Woodruff*, 73 Mich. 473, 41 N. W. Rep. 511; *Converse v. Blumrich*, 14 Mich. 109, 90 Am. Dec. 230; *Oliver v. Sanborn*, 60 Mich. 346, 27 N. W. Rep. 527. **Mississippi**: *Loughridge v. Bowland*, 52 Miss. 546; *Buck v. Paine*, 50 Miss. 648; *McLeod v. First Nat. Bank*, 42 Miss. 99. **Nebraska**: *Eiseman v. Gallagher*, 24 Neb. 79, 37 N. W. Rep. 941. **New Hampshire**: *Nute v. Nute*, 41 N. H.

shown that a purchaser had knowledge of facts sufficient to put him on inquiry as to the existence of some right or title in conflict with the title or interest he is about to purchase, he is presumed to have made the inquiry, and ascertained the extent of such prior right, or to have been guilty of a degree of negligence equally fatal to his claim to be considered a *bona fide* purchaser.<sup>1</sup> He is chargeable with notice of all facts that he might have learned by the exercise of reasonable diligence, prosecuting the inquiry in the right direction.<sup>2</sup> Having notice of the existence of an unrecorded deed, he has notice of all its contents.<sup>3</sup> Having knowledge that his grantor's title is disputed, though no suit has been commenced to test the title, he is put upon inquiry as to the true condition of the title. A purchaser is put upon inquiry if he has knowledge that the records relative to the land he is buying show alterations, changes, and erasures.<sup>4</sup>

A description of land which is ambiguous or inconsistent may be sufficient to put the purchaser upon inquiry as to the land intended to be conveyed.<sup>5</sup> The purchaser is certainly chargeable with notice if he knows that the description is erroneous, and from his knowledge of the property is able to interpret the deed as it was intended to be made.<sup>6</sup> But knowledge by a purchaser of the boundaries of the land he is buying is not notice to him of the acreage or superficial area of such land, so as to preclude his recovering for a fraudulent misrepresentation of quantity.<sup>7</sup>

60; *Warren v. Swett*, 31 N. H. 332. **New York**: *Cambridge Valley Bank v. Delano*, 48 N. Y. 326; *Howard Ins. Co. v. Halsey*, 4 Sandf. 566, 8 N. Y. 271, 59 Am. Dec. 478; *Parker v. Conner*, 93 N. Y. 118, 124, 45 Am. Rep. 178. **Pennsylvania**: *Maul v. Rider*, 59 Pa. St. 167; *Jaques v. Weeks*, 7 Watts, 261. **South Carolina**: *Maybin v. Kirby*, 4 Rich. Eq. 105. **South Dakota**: *Betts v. Letcher*, 1 S. D. 182, 46 N. W. Rep. 193. **Texas**: *Traylor v. Townsend*, 61 Tex. 144; *Bacon v. O'Connor*, 25 Tex. 213. **Vermont**: *Blaisdell v. Stevens*, 16 Vt. 179. **Virginia**: *Effinger v. Hall*, 81 Va. 94. **Wisconsin**: *Pringle v. Dunn*, 37 Wis. 449, 19 Am. Rep. 772; *Helms v. Chadbourne*, 45 Wis. 60; *Brinkman v. Jones*, 44 Wis. 498.

<sup>1</sup> *Williamson v. Brown*, 15 N. Y. 354, per *Selden, J.*; *Maul v. Rider*, 59 Pa. St.

167; *Chicago & E. I. R. Co. v. Wright*, 153 Ill. 307, 38 N. E. Rep. 1062; *Chicago v. Hill*, 75 Ill. 211; *Morrison v. Kelly*, 22 Ill. 610; *Grundies v. Reid*, 107 Ill. 304.

<sup>2</sup> *Passumpsic Sav. Bank v. First Nat. Bank*, 53 Vt. 82; *Seymour v. Darrow*, 31 Vt. 122, 131.

<sup>3</sup> *Jones v. Williams*, 24 Beav. 47; *George v. Kent*, 7 Allen, 16; *Martin v. Cauble*, 72 Ind. 67; *Willink v. Morris Canal & B. Co.* 4 N. J. Eq. 377; *Hill v. Murray*, 56 Vt. 177; *Paxson v. Brown*, 61 Fed. Rep. 874.

<sup>4</sup> *Hedrick v. Atchison, & c. Ry. Co.* 120 Mo. 516, 25 S. W. Rep. 759.

<sup>5</sup> *Carter v. Hawkins*, 62 Tex. 393.

<sup>6</sup> *Carter v. Hawkins*, 62 Tex. 393.

<sup>7</sup> *Estes v. Odom*, 91 Ga. 600, 18 S. E. Rep. 355.

**1523.** A purchaser put upon inquiry may rebut the presumption of notice by showing that he made due investigation without discovering the prior right or title he was bound to investigate.<sup>1</sup> The question whether he has made due inquiry is one of fact, to be investigated by the jury; and consequently the results of the inquiry, including the statements made in reply to the inquiry, may be given in evidence, though such evidence is not competent upon the question of the evidence of the prior right or title in regard to which the inquiry was made.<sup>2</sup>

**1524.** The burden of proof is upon the person who claims priority, and charges another with notice, to make out affirmatively that the other has such notice.<sup>3</sup> But in case fraud has been proved, the party claiming through the fraudulent transaction has the burden of proving his own good faith and want of notice.<sup>4</sup> Even where no fraud is shown, it is held in some cases that the burden of proof is upon the party claiming under the second deed that he is a purchaser in good faith and for a valuable consideration without notice.<sup>5</sup> A recital in the purchaser's deed that he had paid the purchase-money is not sufficient evidence to establish that fact so as to constitute him an innocent purchaser for value.<sup>6</sup>

<sup>1</sup> *Rogers v. Jones*, 8 N. H. 264; *Gregory v. Savage*, 32 Conn. 250; *Williamson v. Brown*, 15 N. Y. 354; *Acer v. Westcott*, 46 N. Y. 384, 7 Am. Rep. 355; *Parker v. Conner*, 93 N. Y. 118, 124, 45 Am. Rep. 178; *Barnard v. Campau*, 29 Mich. 162, 165; *Schweiss v. Woodruff*, 73 Mich. 473, 41 N. W. Rep. 511; *Wilson v. Williams*, 25 Tex. 54; *Bell v. Davis*, 75 Ind. 314; *Thompson v. Pioche*, 44 Cal. 508; *McGehee v. Gindrat*, 20 Ala. 95.

<sup>2</sup> *Nute v. Nute*, 41 N. H. 60; *Parker v. Conner*, 93 N. Y. 118, 124, 45 Am. Rep. 178; *Schutt v. Large*, 6 Barb. 373; *Chiles v. Conley*, 2 Dana, 21; *Rogers v. Wiley*, 14 Ill. 65, 56 Am. Dec. 491; *M'Mechan v. Griffing*, 3 Pick. 149, 15 Am. Dec. 198. That the question of due diligence is one of law, see *Pollak v. Davidson*, 87 Ala. 551, 6 So. Rep. 312; *Morris v. Daniels*, 35 Ohio St. 406.

<sup>3</sup> *Ryder v. Rush*, 102 Ill. 338; *Brown v. Welch*, 18 Ill. 343, 68 Am. Dec. 549; *Rogers v. Wiley*, 14 Ill. 65, 56 Am. Dec.

491; *Anthony v. Wheeler*, 130 Ill. 128, 22 N. E. Rep. 494, 17 Am. St. Rep. 281; *Fort v. Burch*, 6 Barb. 60, 78; *Center v. Planters' & Merchants' Bank*, 22 Ala. 743; *Lambert v. Newman*, 56 Ala. 623; *Bartlett v. Varner*, 56 Ala. 580; *Pollak v. Davidson*, 87 Ala. 551, 6 So. Rep. 312; *Steiner v. Clisby*, 95 Ala. 91, 10 So. Rep. 240; *McCormick v. Leonard*, 38 Iowa, 272; *Miles v. Blanton*, 3 Dana, 525; *Van Wagenen v. Hopper*, 8 N. J. Eq. 684, 707; *Marshall v. Dunham*, 66 Me. 539; *Butler v. Stevens*, 26 Me. 484; *Vest v. Michie*, 31 Gratt. 149, 31 Am. Rep. 722; *Fomby v. Colquitt*, 56 Ark. 537, 20 S. W. Rep. 413.

<sup>4</sup> *Davis v. Nolan*, 49 Iowa, 683; *Letson v. Reed*, 45 Mich. 27, 7 N. W. Rep. 231; *Berry v. Whitney*, 40 Mich. 65.

<sup>5</sup> *Sillyman v. King*, 36 Iowa, 207; *Cutler v. James*, 64 Wis. 173, 54 Am. Rep. 603.

<sup>6</sup> *Bremer v. Case*, 60 Tex. 151; *Watkins v. Edwards*, 23 Tex. 443; *Mason v. Mullahy*, 145 Ill. 383, 34 N. E. Rep. 36.

1525. One claiming to be an innocent purchaser, without notice of a prior unrecorded deed, has the burden of proving the facts that make him such a purchaser.<sup>1</sup> "To entitle a subsequent vendee to have a prior unregistered conveyance postponed to his subsequent conveyance, it must appear, first, that he was a purchaser *bona fide*; second, that he purchased without notice, actual or constructive, of the title of the prior vendee. It must appear that the payment of the purchase-money was *bona fide* and truly made." But to this rule there is an exception, as well established as the rule itself. "Where the subsequent purchaser gets the legal title, and another party, holding an equitable title, seeks to oust him, the burden of proof rests on the holder of such equity to show that the subsequent purchaser had notice, actual or constructive, of his equitable title, or such facts as would put a prudent man on inquiry."<sup>2</sup>

Where two mortgages were made by the same mortgagor, and the mortgage of earlier date was not recorded till after the others, it was held that it was essential for the holder of the earlier mortgage, if he would postpone the other mortgage to his own, to prove by a preponderance of evidence that the holder of the later mortgage had actual notice of the existence of the prior mortgage when he received his.<sup>3</sup>

1526. The burden of proof as to notice depends somewhat upon the pleadings. One pleading that he is a *bona fide* purchaser for value must, in the first place, make satisfactory proof of his purchase and payment for the land; but, when these facts have been proved, the *onus* is shifted to the person asserting the equity or incumbrance to prove notice thereof to the purchaser,—that is, either actual notice or knowledge of facts calculated to put him on inquiry, and which, if followed up, would have led to discovery of the equity or incumbrance.<sup>4</sup>

<sup>1</sup> Watkins v. Edwards, 23 Tex. 443; Morton v. Lowell, 56 Tex. 643; Thompson v. Westbrook, 56 Tex. 265; Harrison v. Boring, 44 Tex. 255; King v. Haley, 75 Tex. 163, 12 S. W. Rep. 1112; Spicer v. Waters, 65 Barb. 227; Buchanan v. Wise, 28 Neb. 312, 44 N. W. Rep. 458; Wood v. Rayburn, 18 Oreg. 3, 22 Pac. Rep. 521.

<sup>2</sup> Peterson v. McCauley (Tex. Civ. App.), 25 S. W. Rep. 826, per Lightfoot,

C. J., citing Hill v. Moore, 62 Tex. 610; Patty v. Middleton, 82 Tex. 586, 17 S. W. Rep. 909.

<sup>3</sup> Marshall v. Dunham, 66 Me. 539.

<sup>4</sup> Hodges v. Winston, 94 Ala. 576, 10 So. Rep. 535; Barton v. Barton, 75 Ala. 400; Taylor v. Agricultural & M. Asso. 68 Ala. 229; Craft v. Russell, 67 Ala. 9; Brown v. Elmendorf (Tex. Civ. App.), 25 S. W. Rep. 145; Johnson v. Newman, 43 Tex. 628, 642; Lewis v. Cole, 60 Tex.

1527. Notice has effect if received at any time before the trade is completed by the payment of the consideration. A subsequent purchaser is bound by notice of a prior unrecorded conveyance, or of any other right or title to the property, although not received till after he has agreed upon the terms of the trade, if it be received before he has actually paid the consideration, or in any way put himself to disadvantage by a partial completion of the transaction.<sup>1</sup> If a mortgagee has notice of a prior unrecorded mortgage before paying over the money secured by his mortgage, he takes subject to the unrecorded mortgage, though his own mortgage has already been recorded.<sup>2</sup> But after the transaction is completed by the payment of the consideration, notice of a prior mortgage is without effect.<sup>3</sup>

341; *Biggerstaff v. Murphy*, 3 Tex. Civ. App. 363, 22 S. W. Rep. 768.

<sup>1</sup> *Beckett v. Cordley*, 1 Bro. C. C. 353; *Wormley v. Wormley*, 8 Wheat. 421; *Wood v. Mann*, 1 Sumn. 506; *Flagg v. Mann*, 2 Sumn. 486; *Hoxie v. Carr*, 1 Sumn. 173. **Alabama**: *Wells v. Morrow*, 38 Ala. 125. **Arkansas**: *Duncan v. Johnson*, 13 Ark. 190. **Illinois**: *Baldwin v. Sager*, 70 Ill. 503; *Keys v. Test*, 33 Ill. 316; *Schultze v. Houfes*, 96 Ill. 335; *Moshier v. Knox College*, 32 Ill. 155; *Brown v. Welch*, 18 Ill. 343, 68 Am. Dec. 549. **Indiana**: *Wilson v. Hunter*, 30 Ind. 466; *Rhodes v. Green*, 36 Ind. 7, 10; *Lewis v. Phillips*, 17 Ind. 108, 79 Am. Dec. 457; *Anderson v. Hubble*, 93 Ind. 570, 47 Am. Rep. 394. **Iowa**: *English v. Waples*, 13 Iowa, 57; *Kitteridge v. Chapman*, 36 Iowa, 348. **Kentucky**: *Blight v. Banks*, 6 T. B. Mon. 192, 17 Am. Dec. 136. **Michigan**: *Palmer v. Williams*, 24 Mich. 328; *Blanchard v. Tyler*, 12 Mich. 329, 86 Am. Dec. 57; *Warner v. Whittaker*, 6 Mich. 133, 72 Am. Dec. 65; *Dixon v. Hill*, 5 Mich. 404. **Minnesota**: *Minor v. Willoughby*, 3 Minn. 239. **Mississippi**: *Kilcrease v. Lam*, 36 Miss. 569. **Missouri**: *Bishop v. Schneider*, 46 Mo. 472, 2 Am. Rep. 533; *Aubuchon v. Bender*, 44 Mo. 560; *Paul v. Fulton*, 25 Mo. 156. **Nebraska**: *Veith v. McMurtry*, 26 Neb. 341, 42 N. W. Rep. 6. **New Hampshire**: *Patten v. Moore*, 32 N. H. 382. **New Jersey**: *Haughwort v.*

*Murphy*, 21 N. J. Eq. 118; *Dean v. Anderson*, 34 N. J. Eq. 496; *Losey v. Simpson*, 11 N. J. Eq. 246. **New York**: *Penfield v. Dunbar*, 64 Barb. 239; *Farmers' Loan Co. v. Maltby*, 8 Paige, 361; *Murray v. Ballou*, 1 Johns. Ch. 566; *Heatley v. Finster*, 2 Johns. Ch. 158; *Jewett v. Palmer*, 7 Johns. Ch. 65, 11 Am. Dec. 401; *Weaver v. Barden*, 49 N. Y. 286. **North Carolina**: *Southerland v. Fremont*, 107 N. C. 565, 12 S. E. Rep. 237; *Arrington v. Arrington*, 114 N. C. 151, 166, 19 S. E. Rep. 351. **Ohio**: *Morris v. Daniels*, 35 Ohio St. 406. **Oregon**: *Musgrove v. Bonser*, 5 Oreg. 313, 20 Am. Rep. 737; *Wood v. Rayburn*, 18 Oreg. 3, 22 Pac. Rep. 521. **Pennsylvania**: *Henry v. Raiman*, 25 Pa. St. 354, 64 Am. Dec. 703; *Hoffman v. Strohecker*, 7 Watts, 86, 32 Am. Dec. 740. **South Carolina**: *Bush v. Bush*, 3 Strobb. Eq. 131, 51 Am. Dec. 675. **Tennessee**: *Otis v. Payne*, 86 Tenn. 663, 8 S. W. Rep. 848. **Texas**: *Bonner v. Stephens*, 60 Tex. 616; *Fraim v. Frederick*, 32 Tex. 294. **Wisconsin**: *Everts v. Agnes*, 4 Wis. 343, 65 Am. Dec. 314.

<sup>2</sup> *Schultze v. Houfes*, 96 Ill. 335; *Otis v. Payne*, 86 Tenn. 663, 88 S. W. Rep. 848.

<sup>3</sup> *Constant v. University*, 133 N. Y. 640, 31 N. E. Rep. 26; *Syer v. Bundy*, 9 La. Ann. 540; *Jamison v. Gjemenson*, 10 Wis. 411; *Lynch v. Hancock*, 14 S. C. 66; *Redden v. Miller*, 95 Ill. 336.

In case the payment of the consideration and the acceptance of a deed by the purchaser occur at different times, a denial of notice, in order to support a claim to protection as a *bona fide* purchaser, must relate both to the time when the deed is delivered and to that when the consideration was paid. But, where it appears upon the face of the answer that the purchase for a certain price and the delivery of the deed were at the same time and as parts of one transaction, the denial of notice until the defendant had made the purchase is equivalent to a denial of notice at the delivery of the deed.<sup>1</sup>

**1528.** A purchaser who has paid a part of the purchase-money before receiving notice of prior equities or rights is protected to the extent of such payment, but no further.<sup>2</sup> He is entitled to invoke the aid of the equitable principle, that he who asks equity must do equity, and therefore the adverse claimant should reimburse the amount actually paid by the purchaser before receiving notice of the claim.<sup>3</sup> But he is not protected in any payment made by him after receiving notice of any prior right or equity in another.<sup>4</sup> A payment by giving a mortgage for a part of the purchase-money, after the purchaser had received notice of a prior unrecorded conveyance, does not protect the purchaser, and any payment made by him upon such mortgage is made in his own wrong.<sup>5</sup>

Even if the purchaser has given a mortgage, receiving a bond or a note not negotiable, before receiving notice of a prior unrecorded deed, but receives such notice afterwards, before making

<sup>1</sup> McDonald v. Belding, 145 U. S. 492, 12 Sup. Ct. Rep. 892, per Harlan, J., limiting Byers v. Fowler, 12 Ark. 218, 286, 54 Am. Dec. 271; and Miller v. Fraley, 21 Ark. 22.

<sup>2</sup> Redden v. Miller, 95 Ill. 336; Baldwin v. Sager, 70 Ill. 503; Moshier v. Knox College, 32 Ill. 155; Lewis v. Phillips, 17 Ind. 108, 79 Am. Dec. 457; Kitteridge v. Chapman, 36 Iowa, 348; Stalker v. McDonald, 6 Hill, 93, 40 Am. Dec. 389; Tufts v. Tufts, 18 Wend. 621; Dixon v. Hill, 5 Mich. 404; Thomas v. Stone, Walk. Ch. 117; Fessler's App. 75 Pa. St. 483, 502; Juvenal v. Jackson, 14 Pa. St. 519; Losey v. Simpson, 11 N. J. Eq. 246; Haughwout v. Murphy, 22 N. J. Eq. 531;

Florence S. M. Co. v. Zeigler, 58 Ala. 221, 225; Marchbanks v. Banks, 44 Ark. 48; Hardin v. Harrington, 11 Bush, 367; Arrington v. Arrington, 114 N. C. 151, 166, 19 S. E. Rep. 351.

<sup>3</sup> Youst v. Martin, 3 S. & R. 423; Belias v. M'Carty, 10 Watts, 13; Kitteridge v. Chapman, 36 Iowa, 348.

<sup>4</sup> Warner v. Whittaker, 6 Mich. 133, 72 Am. Dec. 65; Wells v. Morrow, 38 Ala. 125.

<sup>5</sup> Losey v. Simpson, 11 N. J. Eq. 246; Quirk v. Thomas, 6 Mich. 76; Marchbanks v. Banks, 44 Ark. 48; Jewett v. Palmer, 7 Johns. Ch. 65, 11 Am. Dec. 401.

payment of the note and mortgage, he is not entitled to claim the protection of a *bona fide* purchaser, and a subsequent payment of the note is in his own wrong.<sup>1</sup> This is upon the ground that it is in the power of the purchaser to resist the payment of his mortgage, in whosoever hands it may be. But if the purchaser has given a negotiable note secured by mortgage for a part of the purchase-money, the assignee of such mortgage takes it free from all prior equities, and it is not in the power of the mortgagor to resist the payment; and therefore the giving of such a mortgage for a part of the purchase-money is a payment which protects the purchaser against any equities of which he had no notice before the giving of the mortgage, though he may have received notice while the mortgage is still outstanding.<sup>2</sup>

1529. A purchaser with notice may acquire a good title from one who was a purchaser for value without notice. The rule that a purchaser of property, with notice of some prior adverse claim to or interest in such property, takes subject to such interest, is subject to the limitation that, if a person with such notice acquires a legal title to the property from one who is without such notice, he is entitled to the same protection as his vendor, as otherwise it would very much clog the sale of estates.<sup>3</sup>

<sup>1</sup> *Blanchard v. Tyler*, 12 Mich. 339, 86 Am. Dec. 57; *Lewis v. Phillips*, 17 Ind. 108, 79 Am. Dec. 457; *Rhodes v. Green*, 36 Ind. 7, 10; *Haughwout v. Murphy*, 21 N. J. Eq. 118; *Green v. Green*, 41 Kans. 472, 21 Pac. Rep. 586.

<sup>2</sup> *Hall v. Hall*, 38 Ala. 131; *Digby v. Jones*, 67 Mo. 104.

<sup>3</sup> *Lowther v. Carlton*, 2 Atk. 242; *Brandlyn v. Ord*, 1 Atk. 571; *Harrison v. Forth*, Prec. Ch. 51; *Sweet v. Southcote*, 2 Bro. Ch. 66; *Bassett v. Norsworthy*, 2 White & T. Lead. Cas. Eq. 31; *Piatt v. Vattier*, 1 McLean, 146; *Bean v. Smith*, 2 Mason, 252; *Wood v. Mann*, 1 Sumn. 506; *Boone v. Chiles*, 10 Pet. 177, 209. **Alabama**: *Bartlett v. Varner*, 56 Ala. 580; *Cahalan v. Monroe*, 56 Ala. 303; *Whitfield v. Riddle*, 78 Ala. 99. **Arkansas**: *Fargason v. Edrington*, 49 Ark. 207, 4 S. W. Rep. 763. **California**: *Abadie v. Lobero*, 36 Cal. 390. **Connecticut**: *Blatchley v. Osborn*, 33 Conn. 226. **Florida**: *Doyle v. Wade*, 23 Fla. 90, 1 So. Rep.

516; *Eldridge v. Post*, 20 Fla. 579. **Georgia**: *Lee v. Cato*, 27 Ga. 637, 73 Am. Dec. 746; *Colquitt v. Thomas*, 8 Ga. 258. **Illinois**: *Shinn v. Shinn*, 15 Bradw. 141; *St. Joseph Manuf. Co. v. Daggett*, 84 Ill. 556. **Indiana**: *Trentman v. Eldridge*, 98 Ind. 525; *Sharpe v. Davis*, 76 Ind. 17; *Evans v. Nealis*, 69 Ind. 148; *McShirley v. Birt*, 44 Ind. 382. **Iowa**: *East v. Pugh*, 71 Iowa, 162. **Maine**: *Pierce v. Faunce*, 47 Me. 507; *Brackett v. Ridlon*, 54 Me. 426; *Hill v. McNichol*, 76 Me. 314. **Massachusetts**: *Dana v. Newhall*, 13 Mass. 498; *Trull v. Bigelow*, 16 Mass. 406, 8 Am. Dec. 144; *Boynton v. Rees*, 8 Pick. 329, 19 Am. Dec. 326; *Glidden v. Hunt*, 24 Pick. 221. **Michigan**: *Shotwell v. Harrison*, 22 Mich. 410. **Mississippi**: *Lusk v. McNamer*, 24 Miss. 58. **Missouri**: *Funkhouser v. Lay*, 78 Mo. 458. **New Hampshire**: *Bell v. Twilight*, 18 N. H. 159, 45 Am. Dec. 367. **New Jersey**: *Roll v. Rea*, 50 N. J. L. 264, 12 Atl. Rep. 905; *Holmes v. Stout*, 10 N. J. Eq. 419; *Hen-*



A purchaser without notice would otherwise be deprived of the full measure of protection to which he is entitled, that is, a free right of disposal, — the right to sell and transfer a perfect title to any purchaser.

Therefore, if a person takes a mortgage or other conveyance with notice of a prior incumbrance, but takes it from one who purchased for value without such notice, and therefore acquired a title good against such incumbrance, such subsequent purchaser with notice may shelter himself under the protection which the law affords his grantor; he takes the latter's rights.<sup>1</sup> The grantor must, however, have been a purchaser for value, and not merely a volunteer who took a title subject to equities, as in such case the purchaser from him would take subject to the same equities.<sup>2</sup> When the party without notice is only a nominal party, such as a trustee, and the real party in interest has notice, neither can be considered a purchaser without notice.<sup>3</sup> One who takes a mortgage, with notice of a prior unrecorded mortgage, is not the less a purchaser with notice, and subject to such mortgage, because he is at the same time informed that the debt secured by such mortgage is usurious.<sup>4</sup>

A judgment creditor who has notice of an unrecorded mortgage holds his lien subject to the mortgage.<sup>5</sup>

*ninger v. Heald*, 51 N. J. Eq. 74, 29 Atl. Rep. 190. **New York**: *Cook v. Travis*, 22 Barb. 338, 20 N. Y. 400; *Varick v. Briggs*, 6 Paige, 323; *Webster v. Van Steenberg*, 46 Barb. 211; *Demarest v. Wynkoop*, 3 Johns. Ch. 129, 147, 8 Am. Dec. 467; *Bumpus v. Platner*, 1 Johns. Ch. 213; *Lacustrine Fer. Co. v. Lake Guano & F. Co.* 82 N. Y. 476; *Wood v. Chapin*, 13 N. Y. 509, 67 Am. Dec. 62. **Nevada**: *Allison v. Hagan*, 12 Nev. 38. **North Carolina**: *Taylor v. Kelly*, 3 Jones Eq. 240; *Arrington v. Arrington*, 114 N. C. 151, 166, 19 S. E. Rep. 351; *Wallace v. Cohen*, 111 N. C. 103, 15 S. E. Rep. 892; *Klinger v. Lemler*, 135 Ind. 77, 34 N. E. Rep. 698; *Arnold v. Smith*, 80 Ind. 417; *Brown v. Cody*, 115 Ind. 484, 18 N. E. Rep. 9. **Ohio**: *Card v. Patterson*, 5 Ohio St. 319. **Pennsylvania**: *Ashton's App.* 73 Pa. St. 153; *Church v. Ruland*, 64 Pa. St. 432; *Bracken v. Miller*, 4 W. & S. 102; *Hood v. Fahnestock*, 8 Watts, 489, 34 Am. Dec. 489. **Texas**:

*Gulf, &c. Ry. Co. v. Gill* (Tex. Civ. App.), 23 S. W. Rep. 142; *Peterson v. McCauley* (Tex. Civ. App.), 25 S. W. Rep. 826; *Grace v. Wade*, 45 Tex. 522; *Lewis v. Johnson*, 68 Tex. 448, 450, 4 S. W. Rep. 644; *Holmes v. Buckner*, 67 Tex. 107, 2 S. W. Rep. 452. **Vermont**: *Barber v. Richardson*, 57 Vt. 408; *Day v. Clark*, 25 Vt. 397. **Virginia**: *Rorer Iron Co. v. Trout*, 83 Va. 397, 2 S. E. Rep. 713. **Wisconsin**: *Pringle v. Dunn*, 37 Wis. 449, 467, 19 Am. Rep. 772.

<sup>1</sup> *Harrington v. Allen*, 48 Miss. 492; *Chance v. McWhorter*, 26 Ga. 315.

<sup>2</sup> *Johns v. Sewell*, 33 Ind. 1.

<sup>3</sup> *Runkle v. Gaylord*, 1 Nev. 123; *Murphy v. Nathans*, 46 Pa. St. 508. See, also, *Chance v. McWhorter*, 26 Ga. 315.

<sup>4</sup> *Beverly v. Brooke*, 2 Leigh, 425.

<sup>5</sup> *Williams v. Tatnall*, 29 Ill. 553; *Thomas v. Vanliu*, 28 Cal. 616. But see *Smith v. Jordan*, 25 Ga. 687; *Condit v. Wilson*, 36 N. J. Eq. 370.

It is no defence to one who takes a deed of land, with actual knowledge on his part of a previous mortgage upon it, that the parties to the mortgage agreed that it should not be recorded, and the mortgagee received a written guaranty "to hold him harmless from any loss by reason of not recording the deeds."<sup>1</sup>

1530. But the title of a purchaser without notice cannot be transferred free from equities back to a prior grantor who was charged with notice at the time he acquired his former title, for a purchaser cannot be allowed to clear off the existing equities, of which he had notice, by transferring the title to an innocent purchaser, and then repurchasing the property. The existing equities of which he had knowledge revive and attach to the property to the same extent that they formerly attached to it in his hands.<sup>2</sup> Thus, a second mortgage, which in the hands of the mortgagee is subject to a prior subsisting mortgage by reason of his notice thereof, it not being a lien of record, becomes, in the hands of an assignee for value and without notice, free of such prior equitable lien. But the priority of the second mortgage is lost if it be again assigned to the former owner, who had notice of the prior equity of the first mortgage; and it is also lost, and the equity of the first mortgage reattaches, in case there is a foreclosure sale under the second mortgage, and the second mortgagee, who had notice of the prior equity of the first mortgage, becomes the purchaser at such foreclosure sale.<sup>3</sup>

1531. A person without notice may in good faith acquire a legal title from one who has notice of a prior equitable right.<sup>4</sup>

<sup>1</sup> Lord v. Doyle, 1 Cliff. 453.

<sup>2</sup> Trentman v. Eldridge, 98 Ind. 525; Bumpus v. Platner, 1 Johns. Ch. 213; Clark v. McNeal, 114 N. Y. 287, 21 N. E. Rep. 405; Schutt v. Large, 6 Barb. 373; Church v. Church, 25 Pa. St. 278; Church v. Ruland, 64 Pa. St. 432; Allison v. Hagan, 12 Nev. 38; Ely v. Wilcox, 26 Wis. 91; Troy City Bank v. Wilcox, 24 Wis. 671; Mitchell v. Aten, 37 Kans. 33, 14 Pac. Rep. 497; Henninger v. Heald, 51 N. J. Eq. 74, 29 Atl. Rep. 190; Huling v. Abbott, 86 Cal. 423, 25 Pac. Rep. 4; Talbert v. Singleton, 42 Cal. 390.

<sup>3</sup> Clark v. McNeal, 114 N. Y. 287, 21 N. E. Rep. 405.

<sup>4</sup> Mertins v. Jolliffe, Amb. 311, 313;

Attorney-General v. Wilkins, 17 Beav. 285, 293; Harrison v. Forth, Prec. Ch. 51; M'Queen v. Farquhar, 11 Ves. 467, 478; Bean v. Smith, 2 Mason, 252. **Alabama**: Mallory v. Stodder, 6 Ala. 801. **Georgia**: Lee v. Cato, 27 Ga. 637, 73 Am. Dec. 746. **Illinois**: Paris v. Lewis, 85 Ill. 597. **Kentucky**: Hardin v. Harrington, 11 Bush, 367; Willis v. Vallette, 4 Met. 186. **Maine**: Knox v. Silloway, 10 Me. 201; Hill v. McNichol, 76 Me. 314. **Massachusetts**: Glidden v. Hunt, 24 Pick. 221; Connecticut v. Bradish, 14 Mass. 296; **Somes v. Brewer**, 2 Pick. 184, 13 Am. Dec. 406. **Mississippi**: Price v. Martin, 46 Miss. 489. **New Hampshire**: Bell v. Twilght, 18 N. H. 159, 45 Am. Dec. 367; Hoit v. Russell,

The last purchaser's "own *bona fides* is a good defence, and the *mala fides* of his vendor ought not to invalidate it." Therefore, although one who has notice of a prior unrecorded mortgage cannot himself purchase the land, or take a mortgage upon it, without its being subject to such unrecorded mortgage, yet if he sells the land or the mortgage to a purchaser in good faith, before the record of the prior mortgage, the purchaser from him will acquire a title superior to the unrecorded mortgage; but should such purchaser omit to record his deed or assignment until the mortgage is recorded, he would stand in no better position than his assignor.<sup>1</sup>

In like manner an attaching creditor without notice of an unrecorded deed will hold the estate, although the debtor had notice of it.<sup>2</sup>

### III. *Implied Notice.*

1532. Implied notice arises out of the legal relation of a person who has no notice with another who has notice. Implied notice is a branch of actual notice, and is imputed to a person when he is conscious of having the means of knowledge which he does not use, or he has such relations with another that the knowledge of the latter, though not communicated, is imputed to him. Thus notice to the principal is implied from notice to his agent. When an agent acquires a knowledge of any matters or instruments affecting the title of any lands, about the purchase or mortgage of which he is employed, and this knowledge is such that it is his duty to communicate it to his principal, the law imputes this knowledge to the principal; or, in other words, notice to the principal of such matters or instruments is implied.<sup>3</sup>

56 N. H. 559. **New Jersey**: Smith v. Vreeland, 16 N. J. Eq. 198; Danbury v. Robinson, 14 N. J. Eq. 213, 82 Am. Dec. 244. **New York**: Varick v. Briggs, 6 Paige, 323; Demarest v. Wynkoop, 3 Johns. Ch. 129, 8 Am. Dec. 467; Jackson v. Van Valkenburgh, 8 Cow. 260; Slatery v. Schwannecke, 118 N. Y. 543, 23 N. E. Rep. 922; Wood v. Chapin, 13 N. Y. 509, 67 Am. Dec. 62; Decker v. Boice, 83 N. Y. 215. **South Carolina**: Jones v. Hudson, 23 S. C. 494. **Texas**: Sydnor v. Roberts, 13 Tex. 598; Moore v.

Curry, 36 Tex. 668. **Washington**: Sayward v. Thompson, 11 Wash. 706, 40 Pac. Rep. 379. **Wisconsin**: Pringle v. Dunn, 37 Wis. 449, 19 Am. Rep. 772.

<sup>1</sup> § 475; Fort v. Burch, 5 Denio, 187; Jackson v. Van Valkenburgh, 8 Cow. 260; Stroud v. Lockart, 4 Dall. 153; Harrington v. Allen, 48 Miss. 492; Westbrook v. Gleason, 79 N. Y. 23, reversing 14 Hun, 245; Doherty v. Stimmel, 40 Ohio St. 294.

<sup>2</sup> Coffin v. Ray, 1 Met. 212.

<sup>3</sup> Fuller v. Benet, 2 Hare, 394; Smith

Such notice is sometimes called constructive, but it is really implied from the identity of principal and agent, and not imputed by virtue of a construction placed upon their conduct or relation. The line of demarkation between the different kinds of notice is not always observed, but this is a matter of very little practical importance, because the effect of notice, whether it be called actual, implied, or constructive, is the same.

Notice to an agent, to bind the principal, must be brought home to the agent while engaged in the business and negotiation of the principal, and when it would be a breach of trust in the former not to communicate the knowledge to the latter.<sup>1</sup> The knowledge of the agent can be charged to the principal only when clear proof is made that the knowledge was present in the agent's mind at the time of the transaction which is the subject of consideration by the court.<sup>2</sup> The agency must also be estab-

*v. Ayer*, 101 U. S. 320; *May v. Le Claire*, 11 Wall. 217. **California**: *Donald v. Beals*, 57 Cal. 399. **Connecticut**: *Clark v. Fuller*, 39 Conn. 238; *First Nat. Bank v. New Milford*, 36 Conn. 93. **Iowa**: *Walker v. Schreiber*, 47 Iowa, 529; *Smith v. Dunton*, 42 Iowa, 48; *Yerger v. Barz*, 56 Iowa, 77, 8 N. W. Rep. 769. **Kentucky**: *Willis v. Vallette*, 4 Met. 186. **Mississippi**: *Allen v. Poole*, 54 Miss. 323. **Missouri**: *Meier v. Blume*, 80 Mo. 179; *Hickman v. Green*, 123 Mo. 165, 27 S. W. Rep. 440; *Merchants' Nat. Bank v. Lovett*, 114 Mo. 519. **Nebraska**: *Cogswell v. Griffith*, 23 Neb. 334, 36 N. W. Rep. 538. **New Hampshire**: *Hovey v. Blanchard*, 13 N. H. 145. **New Jersey**: *Stanley v. Chamberlin*, 39 N. J. L. 565; *Losey v. Simpson*, 11 N. J. Eq. 246. **New York**: *Jackson v. Van Valkenburgh*, 8 Cow. 260; *Williamson v. Brown*, 15 N. Y. 354, 359; *Bank v. Davis*, 2 Hill, 451; *Josephthal v. Heyman*, 2 Abb. N. C. 22; *Josephthal v. Steffen*, 8 N. Y. Weekly Dig. 61; *Slattery v. Schwannecke*, 118 N. Y. 543, 23 N. E. Rep. 922. **North Carolina**: *Cowan v. Withrow*, 111 N. C. 306, 16 S. E. Rep. 397. **Pennsylvania**: *Bigley v. Jones*, 114 Pa. St. 510, 7 Atl. Rep. 54; *Farrington v. Woodward*, 82 Pa. St. 259. **Tennessee**: *Myers v. Ross*, 3 Head,

59; *Tagg v. Tenn. Nat. Bank*, 9 Heisk. 479.

<sup>1</sup> *Satterfield v. Malone*, 35 Fed. Rep. 445; *Rogers v. Palmer*, 102 U. S. 263. **Alabama**: *Pepper v. George*, 51 Ala. 190. **California**: *May v. Borel*, 12 Cal. 91. **Connecticut**: *Clark v. Fuller*, 39 Conn. 238. **Georgia**: *Fry v. Shehee*, 55 Ga. 208. **Illinois**: *Whitney v. Burr*, 115 Ill. 289, 3 N. E. Rep. 434. **Iowa**: *Smith v. Dunton*, 42 Iowa, 48. **Kentucky**: *Willis v. Vallette*, 4 Met. 186. **New Hampshire**: *Tucker v. Tilton*, 55 N. H. 223. **New York**: *Weisser v. Denison*, 10 N. Y. 68, 61 Am. Dec. 731; *Hodgkins v. Montgomery Co. Ins. Co.* 34 Barb. 213; *New York Cent. Ins. Co. v. Nat. Protection Ins. Co.* 20 Barb. 468; *Haywood v. Shaw*, 16 How. Pr. 119. **Oregon**: *Wood v. Rayburn*, 18 Ore. 3, 22 Pac. Rep. 521, 527. **Pennsylvania**: *Barbour v. Wiehle*, 116 Pa. St. 308, 9 Atl. Rep. 520; *Houseman v. Girard Loan Asso.* 81 Pa. St. 256; *Hood v. Fahnestock*, 8 Watts, 489, 34 Am. Dec. 489. **Virginia**: *Morrison v. Bausemer*, 32 Gratt. 225. **Washington**: *Pacific Manuf. Co. v. Brown*, 8 Wash. 347, 36 Pac. Rep. 273. **Wisconsin**: *Pringle v. Dunn*, 37 Wis. 449, 19 Am. Rep. 772.

<sup>2</sup> *Constant v. University*, 111 N. Y. 604, 19 N. E. Rep. 631, 133 N. Y. 640,

lished.<sup>1</sup> The knowledge or notice of facts acquired by an attorney, while engaged in the business of his client, is knowledge or notice of them by the client himself.<sup>2</sup> Notice to one interested in the purchase of land, though his name does not appear in the conveyance, this being made to another, is notice to the latter.<sup>3</sup> Notice to a trustee is generally notice to the *cestui que trust*.<sup>4</sup>

The fact that the attorney for a mortgagee in a foreclosure suit was the attorney for a claimant in a suit to foreclose a mechanic's lien does not charge the lien claimant with notice of the pendency of the suit to foreclose the mortgage. The ground of the decision was that the attorney's knowledge was not obtained in the course of his employment for the party sought to be charged with notice.<sup>5</sup>

Where a solicitor induced a client to take a mortgage upon the lands of a third person, situate in the county of Middlesex, in England, and soon afterwards induced a second client to advance money on a mortgage of the same lands, without informing him of the existence of the first mortgage, and the second mortgage was registered before the first mortgage was registered, it was held that the holder of the second mortgage must be taken to have had, through the solicitor, notice of the first mortgage, and could not by the prior registration obtain priority.<sup>6</sup> Lord Chancellor Hatherley said: "It has been held over and over again that notice to a solicitor of a transaction, and about a matter as to which it is part of his duty to inform himself, is actual notice to the client. Mankind would not be safe if it were held that, under such circumstances, a man has not notice of that which his agent has actual notice of. The purchaser of an estate has, in ordinary cases, no personal knowledge of the title, but employs

31 N. E. Rep. 26; *Slattery v. Schwan-neck*, 118 N. Y. 543, 23 N. E. Rep. 922.

<sup>1</sup> *Caughman v. Smith*, 28 S. C. 605, 5 S. E. Rep. 362.

<sup>2</sup> *Maxfield v. Burton*, 17 L. R. Eq. 15; *Smith v. Ayer*, 101 U. S. 320; *May v. Le Claire*, 11 Wall. 217. *Iowa*: *Sowler v. Day*, 58 Iowa, 252, 12 N. W. Rep. 297; *Shoemaker v. Smith*, 80 Iowa, 655, 45 N. W. Rep. 744; *Jones v. Bamford*, 21 Iowa, 217. *Maine*: *Bunker v. Gordon*, 81 Me. 66, 16 Atl. Rep. 341. *Mississippi*: *Ed-*

*wards v. Hillier*, 70 Miss. 803, 13 So. Rep. 692. *New York*: *Jackson v. Van Valkenburgh*, 8 Cow. 260; *Josephthal v. Heyman*, 2 Abb. N. C. 22, 4 Cent. L. J. 368.

<sup>3</sup> *Littleton v. Giddings*, 47 Tex. 109; *Stanley v. Green*, 12 Cal. 148; *Wise v. Tripp*, 13 Me. 9.

<sup>4</sup> *Pope v. Pope*, 40 Miss. 516.

<sup>5</sup> *Pacific Manuf. Co. v. Brown*, 8 Wash. 347, 36 Pac. Rep. 273. See § 1534.

<sup>6</sup> *Rolland v. Hart*, L. R. 6 Ch. App. 678.

a solicitor, and can never be allowed to say that he knew nothing of some prior incumbrance because he was not told of it by his solicitor."

1533. "It is a moot question upon what principle this doctrine rests," says Vice-Chancellor Kindersley.<sup>1</sup> "It has been held by some that it rests on this: that the probability is so strong that the solicitor would tell his client what he knows himself, that it amounts to an irresistible presumption that he did tell him; and so you must presume actual notice on the part of the client. I confess my own impression is, that the principle on which the doctrine rests is this: that my solicitor is *alter ego*, — he is myself; I stand in precisely the same position as he does in the transaction, and therefore his knowledge is my knowledge; and it would be a monstrous injustice that I should have the advantage of what he knows without the disadvantage. But whatever be the principle upon which the doctrine rests, the doctrine itself is unquestionable."

"In such a case," said Lord Chancellor Brougham,<sup>2</sup> "it would be most iniquitous and most dangerous, and give shelter and encouragement to all kinds of fraud, were the law not to consider the knowledge of one as common to both, whether it be so in fact or not."

1534. Whether the notice must be in the same transaction, or in some transaction in which the principal is concerned, is a question upon which the authorities are not agreed. Lord Hardwicke established the distinction that notice to the agent binds the principal only when it is given to or acquired by him in the transaction in which the principal employs him.<sup>3</sup> The rea-

<sup>1</sup> Boursot v. Savage, L. R. 2 Eq. 134, 142.

<sup>2</sup> Kennedy v. Green, 3 Myl. & K. 699, 719. And see Bradley v. Riches, L. R. 9 Ch. D. 189.

<sup>3</sup> Warrick v. Warrick, 3 Atk. 291, 294, per Lord Hardwicke; Fitzgerald v. Faucconberge, Fitzgib. 207; 2 White & Tudor's Lead. Cas. in Eq. 4th Am. ed. pt. 1, pp. 170, 173; Rolland v. Hart, L. R. 6 Ch. App. 678; Blumenthal v. Brainerd, 38 Vt. 402, 91 Am. Dec. 350; Houseman v. Girard Mut. B. & L. Asso. 81 Pa. St. 256; Roach v. Karr, 18 Kans. 529, 26 Am. Rep. 788; McCormick v. Wheeler, 36 Ill. 114;

Fuller v. Benett, 2 Hare, 394, 404; Jones v. Bamford, 21 Iowa, 217; Fulton Bank v. New York & S. Canal Co. 4 Paige, 127; Howard Ins. Co. v. Halsey, 8 N. Y. 271, 59 Am. Dec. 478; Weisser v. Denison, 10 N. Y. 68, 61 Am. Dec. 731; New York Central Ins. Co. v. National Ins. Co. 20 Barb. 468; Barnes v. McClinton, 3 Pa. 67, 23 Am. Dec. 62; Bracken v. Miller, 4 W. & S. 102; Hood v. Fahnestock, 8 Watts, 489, 34 Am. Dec. 489; Willis v. Vallette, 4 Met. (Ky.) 186; Rand v. Davis (Tex. Civ. App.), 27 S. W. Rep. 939; Kauffman v. Robey, 62 Tex. 308, 310, 311, 48 Am. Rep. 264; Smith v. Sublett, 28

son for this limitation, made by Lord Hardwicke in the leading case on this subject, has been stated to be, that an agent cannot stand in the place of the principal until the relation is constituted; and that, as to all the information which he has previously acquired, the principal is a mere stranger.<sup>1</sup> Another explanation commonly made of the rule is, that the agent may have forgotten the former transaction.<sup>2</sup> Under this latter view of the doctrine, the criticism of Lord Eldon<sup>3</sup> might well be regarded as shaking it; but it is suggested in later cases that it was not the purpose of his dictum to question the general doctrine itself. At any rate this has been insisted upon ever since his time, and may be regarded as settled.<sup>4</sup>

While Lord Hardwicke's limitation of the rule was followed in many cases in England, and quite generally in this country, his doctrine has been overruled in England,<sup>5</sup> and has been abandoned in many recent decisions in this country. Lord Eldon's suggestion that the principal would be bound if the agent acquired the information so recently as to make it impossible that he could have forgotten it, is really an abandonment of the rule.<sup>6</sup> But the broad doctrine that the principal is affected by the agent's knowledge of any prior lien, trust, or fraud affecting the property,

Tex. 163; *Harrington v. McFarland*, 1 Tex. Civ. App. 289, 21 S. W. Rep. 116; *Irvine v. Grady*, 85 Tex. 120, 19 S. W. Rep. 1028; *Mechem*, Ag. §§ 720, 726.

"It was said in substance by Lord Hardwicke, in *Warrick v. Warrick*, 3 Atk. 291, 294, that notice to the agent or counsel, who was employed in the business by another person, or in another business and at another time, is no notice to his client who employs him afterwards. It would be very mischievous if it was so; for the man of most practice and greatest eminence would then be the most dangerous to employ."

<sup>1</sup> *Mountford v. Scott*, 3 Madd. 34, 40. And see *Fuller v. Benett*, 2 Hare, 394, per Sir J. Wigram; *Morrison v. Bausemer*, 32 Gratt. 225. See, however, *Sowler v. Day*, 58 Iowa, 252, 12 N. W. Rep. 297.

<sup>2</sup> *Slattery v. Schwannecke*, 118 N. Y. 543, 23 N. E. Rep. 922; *Constant v. University*, 111 N. Y. 604, 19 N. E. Rep.

631, again in court, 133 N. Y. 640, 31 N. E. Rep. 26, reversing 17 N. Y. Supp. 363.

\* When the case of *Mountford v. Scott* was on appeal before Lord Eldon, L. C. (*Turn. & R.* 274), he remarked that "it might fall to be considered whether one transaction might not follow so close upon the other as to render it impossible to give a man credit for having forgotten it. I should be unwilling to go so far as to say that, if an attorney has notice of a transaction in the morning, he shall be held in a court of equity to have forgotten it in the evening." And see *Hargreaves v. Rothwell*, 1 Keen, 154; *Brotherton v. Hatt*, 2 Vern. 574; *Constant v. Am. Bap. Soc.* 21 J. & S. 170.

<sup>4</sup> *Fuller v. Benett*, 2 Hare, 394.

<sup>5</sup> *Dresser v. Norwood*, 17 Com. B. N. S. 466.

<sup>6</sup> *Distilled Spirits*, 11 Wall. 356, 367, per Bradley, J.

no matter when acquired, has quite strong support at the present day.<sup>1</sup>

When the agent or attorney is employed by a person in several mortgage transactions, and he acts for the mortgagees also in all of them, although the transactions are distinct, the later mortgagees are said to be affected with notice of the earlier mortgages, on the ground that the transactions follow each other so closely that they amount to a continuous dealing with the same title.<sup>2</sup> This exception would remain good only when the mortgagor is the same in all the transactions, and the same attorney is employed in all.

Notice of a prior unrecorded mortgage is not imputed to a mortgagee for the reason that his agent or attorney in the transaction knew of such a mortgage, but believed it had been satisfied. Thus the mere fact that the agent making the loan was also the agent of the prior mortgagee in taking his mortgage eleven months before is not notice to the subsequent mortgagee, unless he not only knew of the prior mortgage, but also believed it an existing lien; and where it appears that he was the agent of the prior mortgagee to invest, hold, and reinvest money, and that, though he knew that the prior mortgage was still in existence, he considered that money paid to him by the subsequent mortgagee was in his hands as trustee for the prior mortgagee for reinvestment, and that he held it as a payment of the prior mortgage, though such mortgage was not formally satisfied, notice of the prior mortgage cannot be imputed to the subsequent mortgagee.<sup>3</sup>

1535. The distinction is made that a solicitor or attorney at law, employed as a professional adviser, is not an agent within the rule that knowledge on the part of the agent affects the principal. Of course if an attorney at law is employed to negotiate the sale of property or to invest money in mortgages, in such employment he acts as an attorney in fact, and not merely in his professional character. If an attorney, however, is merely consulted as to the title of land his client is purchasing, and he

<sup>1</sup> *Distilled Spirits*, 11 Wall. 356; *Arrington v. Arrington*, 114 N. C. 151, 172, 19 S. E. Rep. 351; *Hart v. Farmers' & Mechanics' Bank*, 33 Vt. 252.

<sup>2</sup> *Brotherton v. Hatt*, 2 Vern. 574; *Hargreaves v. Rothwell*, 1 Keen, 154; *Win-*

*ter v. Anson*, 1 Sim. & St. 434, 3 Russ. 488, 493. And see *Distilled Spirits*, 11 Wall. 356.

<sup>3</sup> *Constant v. University*, 133 N. Y. 640, 31 N. E. Rep. 26, reversing 17 N. Y. Supp. 363.



is not employed to negotiate the purchase, and he conducts the examination in the usual way of examining the records and ascertaining whether there is a clear record title, and he does not disclose information outside of the record which he has obtained in some other transaction, his client is not bound by such undisclosed knowledge of his professional adviser. The failure of the legal adviser to disclose the information he has acquired in such other transaction may have been dictated by professional obligation to another for whom he was acting at the time; but, whatever the reason may have been for not disclosing the information, his client is not affected with notice of it.<sup>1</sup> “The general rule that a principal is bound by the knowledge of his agent is based on the principle of law that it is the agent’s duty to communicate to his principal the knowledge which he has respecting the subject-matter of negotiation, and the presumption that he will perform that duty. When it is not the agent’s duty to communicate such knowledge, when it would be unlawful for him to do so, — as, for example, when it has been acquired confidentially as attorney for a former client in a prior transaction, — the reason of the rule ceases, and in such a case an agent would not be expected to do that which would involve the betrayal of professional confidence, and his principal ought not to be bound by his agent’s secret and confidential information. This often happened in the case of large estates in England, where men of great professional eminence were frequently consulted. They thus became possessed, in a confidential manner, of secret trusts or other defects of title, which they could not honorably, if they could legally, communicate to subsequent clients.”<sup>2</sup>

**1536.** The notice must be of some matter material to the transaction; of something which it is the duty of the agent to make known to the principal.<sup>3</sup> If the agent acts merely in a ministerial capacity, — as, for instance, in obtaining the execution

<sup>1</sup> Pomeroy’s Eq. Jur. § 668. Mr. Pomeroy says: “Whenever a solicitor or attorney at law is brought within the operation of the rule, he must be employed in some other capacity than as a mere professional and legal adviser. He must be employed to represent his client in a transaction whereby the principal is to acquire some rights, or is to be subjected to some

liabilities.” *Arrington v. Arrington*, 114 N. C. 151, 172, 19 S. E. Rep. 351, is the most important case on this point, in which the learned Chief Justice reviews the authorities.

<sup>2</sup> *Distilled Spirits*, 11 Wall. 356, 367, per Bradley, J.

<sup>3</sup> *Wyllie v. Pollen*, 32 L. J. N. S. Ch. 782.

of a deed, — the principal is not affected with the agent's knowledge.<sup>1</sup> In like manner, a mortgagor to whom a mortgage is intrusted for record is not such an agent of the mortgagee that notice to him of an incumbrance, or his knowledge of it, is constructive notice to the mortgagee.<sup>2</sup> As pointed out by Lord Westbury,<sup>3</sup> a solicitor whose notice affects his client must be a solicitor "for the confidential purpose of advising;" otherwise there is no duty on his part to communicate the knowledge to the client, and the doctrine of implied notice has no application.

Notice to the agent, to bind the principal, must be within the scope of the agent's employment.<sup>4</sup> Thus, where one is employed as agent simply to effect an exchange of land on specified terms, the agency is special, and, it not being within the scope of the agent's employment to examine and pass on the title of the land to be taken in exchange, notice to him of an unrecorded deed of the land would not be notice to the principal, especially where the agent was also the agent of the other party in the exchange, and as such obtained the information, and in addition had an interest in concealing the fact, his commissions depending on a consummation of the exchange.<sup>5</sup>

Notice of the existence of an unrecorded mortgage upon the property to an officer employed to make an attachment is notice to the plaintiff, and is equivalent to a record in protecting it against the attachment.<sup>6</sup> But such knowledge on the part of an attorney who makes the writ, but has no agency in procuring the attachment, has been held not to affect the plaintiff.<sup>7</sup>

1537. When the same agent or attorney is employed by both parties in the same transaction, his knowledge is then the knowledge of both the vendor and vendee, of both the mortgagor and mortgagee.<sup>8</sup> In such case, moreover, the rule that the agent's

<sup>1</sup> *Wyllie v. Pollen*, 32 L. J. N. S. Ch. 782.

<sup>2</sup> *Anketel v. Converse*, 17 Ohio St. 11, 91 Am. Dec. 115; *Hoppock v. Johnson*, 14 Wis. 303.

<sup>3</sup> In *Wyllie v. Pollen*, 32 L. J. N. S. Ch. 782.

<sup>4</sup> *Hickman v. Green*, 123 Mo. 165, 27 S. W. Rep. 440; *Mechanics' Bank v. Schaumburg*, 38 Mo. 228; *Hayward v.*

*Nat. Insurance Co.* 52 Mo. 181, 14 Am. Rep. 400.

<sup>5</sup> *Hickman v. Green*, 123 Mo. 165, 27 S. W. Rep. 440, the justices dissenting.

<sup>6</sup> *Tucker v. Tilton*, 55 N. H. 223.

<sup>7</sup> *Tucker v. Tilton*, 55 N. H. 223.

<sup>8</sup> *Sheldon v. Cox*, Amb. 624; *Losey v. Simpson*, 11 N. J. Eq. 246. See *Astor v. Wells*, 4 Wheat. 466; *Constant v. Am. Bap. Soc.* 21 J. & S. 170.

notice must be in the same transaction is less strictly adhered to.<sup>1</sup> Thus, where a person made two successive mortgages of the same property, and then gave a further charge to the first mortgagee, and the same solicitor was employed in all three transactions, it was held that the first mortgagee had implied notice of the second mortgagee's incumbrance, and that the latter was entitled to priority over the further charge to the first mortgagee.<sup>2</sup>

**1538.** When the attorney himself is the mortgagor, the rule, that the knowledge of the attorney is the knowledge of the client, does not apply; it does not follow in such case that the mortgagee has constructive notice of facts connected with the title which are known to the mortgagor.<sup>3</sup> Therefore, where one was attorney for two persons, and executed to one of them a mortgage, which was not recorded, and afterwards executed another mortgage of the same premises to the other, and this mortgage was recorded, it was held that the priority of the latter mortgage was not affected by the attorney's knowledge of the mortgage first executed.<sup>4</sup> Whenever the agent is "the contriver, the actor, and the gainer of the transaction," the reason for charging the principal with notice of the facts no longer exists.<sup>5</sup>

**1539.** In like manner, when the agent is guilty of any fraud, for the carrying out of which it is necessary that he should conceal it from his principal, notice of it cannot be imputed to the latter.<sup>6</sup> "It must be made out that distinct fraud was intended in the very transaction, so as to make it necessary for the solicitor to conceal the facts from his client, in order to defraud him."<sup>7</sup>

<sup>1</sup> *Fuller v. Benett*, 2 Hare, 394, 403; *Brotherton v. Hatt*, 2 Vern. 574.

<sup>2</sup> *Hargreaves v. Rothwell*, 1 Keen, 154. See *Jamison v. Gjemenson*, 10 Wis. 411.

<sup>3</sup> *Hewitt v. Loosemore*, 9 Hare, 449; *Espin v. Pemberton*, 3 De G. & J. 547; *Hope F. Ins. Co. v. Cambrelling*, 1 Hun, 493. But *Sheldon v. Cox*, Amb. 624, is regarded as an authority to the contrary, followed in *Majoribanks v. Hovenden*, 6 Ir. Eq. 238; *Rorke v. Lloyd*, 13 Ir. Ch. 273; *Tucker v. Henzill*, 4 Ir. Ch. 513.

<sup>4</sup> *Hope F. Ins. Co. v. Cambrelling*, 1 Hun, 493. And see *Rolland v. Hart*, L. R. 6 Ch. App. 678, 683, per Lord Hatherley; *Kennedy v. Green*, 3 Myl. & K. 699; *McCormick v. Wheeler*, 36 Ill. 114, 85

Am. Dec. 388; *Winchester v. Balto. & S. R. Co.* 4 Md. 231.

<sup>5</sup> *Kennedy v. Green*, 3 Myl. & K. 699.

<sup>6</sup> *Kennedy v. Green*, 3 Myl. & K. 699, 15 Ch. D. 639; *In re European Bank*, L. R. 5 Ch. App. 358; *Fulton Bank v. N. Y. & Sharon Canal Co.* 4 Paige, 127; *National Life Ins. Co. v. Minch*, 53 N. Y. 144; *Frenkel v. Hudson*, 82 Ala. 158, 2 So. Rep. 758; *Atlantic Nat. Bank v. Harris*, 118 Mass. 147; *Dillaway v. Butler*, 135 Mass. 479; *Allen v. South Boston R. Co.* 150 Mass. 200, 22 N. E. Rep. 917; *Innerarity v. Merchants' Nat. Bank*, 139 Mass. 332, 1 N. E. Rep. 282.

<sup>7</sup> *Rolland v. Hart*, L. R. 6 Ch. App. 678, 682.

The fraud must exist independently of the question whether the act was communicated to the principal or not.<sup>1</sup>

Applying these principles, the High Court of Justice of England in a recent case, where a trustee who was a solicitor used trust funds in purchasing an estate which was conveyed to his brother, and afterwards in raising money on the estate acted as solicitor for the mortgagee, held that the fraud of the solicitor ran through the whole transaction, and prevented the imputation of notice.<sup>2</sup>

In other words, if the act done by the agent is such as cannot be said to be done by him in the character of agent, but is done by him in the character of a party to an independent fraud on his principal, it is not to be imputed to the principal as an act done by his agent.<sup>3</sup> Or, to state the matter somewhat differently, notice is imputed to the principal by reason of the agent's knowledge, unless there are such circumstances in the case, independent of the fact under inquiry, as to raise an inevitable conclusion that the notice had not been communicated.<sup>4</sup>

**1540. Notice is not necessarily implied out of the relationship of husband and wife.** A married woman is not chargeable with knowledge of facts affecting the title to real estate purchased by her, because her husband has knowledge of such facts, in case the purchase is not made through his agency, and he takes no part in the negotiations.<sup>5</sup> But where a husband buys land for his wife, with knowledge of a prior unrecorded deed, the wife is chargeable with such knowledge.<sup>6</sup>

**1541. A purchaser from one of two joint owners is chargeable with notice of the interest of the other, when this interest is shown by the conveyance, to which he must look for his vendor's title.**<sup>7</sup> Thus, if the deed to his grantor shows that the land was bought with partnership funds or for partnership purposes, the purchaser from one of the joint owners is chargeable with

<sup>1</sup> *Atterbury v. Wallis*, 8 De G., M. & G. 454, 466; *Sharpe v. Foy*, L. R. 4 Ch. App. 35; *Hewitt v. Loosemore*, 9 Hare, 449, 455.

<sup>2</sup> *Cave v. Cave*, L. R. 15 Ch. D. 639.

<sup>3</sup> *Cave v. Cave*, L. R. 15 Ch. D. 639, per Fry, J.; *Espin v. Pemberton*, 3 De G. & J. 547.

<sup>4</sup> *Thompson v. Cartwright*, 33 Bear. 178.

<sup>5</sup> *Snyder v. Sponable*, 1 Hill, 567, 7 Hill, 427; *Satterfield v. Malone*, 35 Fed. Rep. 445; *Pringle v. Dunn*, 37 Wis. 449, 19 Am. Rep. 772.

<sup>6</sup> *McMaken v. Niles* (Iowa), 60 N. W. Rep. 199.

<sup>7</sup> *Campell v. Roach*, 45 Ala. 667.

notice of the partnership equities.<sup>1</sup> The purchaser is not chargeable with notice that the land is partnership property merely from knowledge that the owners are partners, and that they use the lands for partnership purposes, in case there is nothing in the purchase deeds of such owners to indicate that it was bought for partnership purposes.<sup>2</sup>

1542. But if a purchaser has knowledge that the land is partnership property, and he attempts to purchase the individual interest of one partner, he buys subject to the equitable rights of the other partners. The purchaser is put upon inquiry by such knowledge as to the equitable rights of the other partners, and takes subject to such rights.<sup>3</sup> The purchaser with such knowledge is also bound by the equities of the partnership creditors. Thus, where one purchased of a surviving partner the undivided half of a parcel of land upon which there was a planing-mill, knowing that the land was purchased and the mill built with partnership funds, and had always been applied to partnership uses, that the firm was largely indebted, if not insolvent, and that none of its debts had been paid by the surviving partner, who conducted the sale secretly, and absconded with the proceeds of the sale immediately upon its completion, the purchaser was held to be affected by his knowledge, and by the circumstances of the transaction, so that he took the title subject to the trust with which it was affected in the hands of his vendor.<sup>4</sup>

1543. Notice, to affect a corporation, must be brought home to the presidents and directors, or to some officer to whom the

<sup>1</sup> *Brewer v. Browne*, 68 Ala. 210.

<sup>2</sup> *Tillinghast v. Champlin*, 4 R. I. 173, 67 Am. Dec. 510; *Kepler v. Erie Dime Sav. & L. Co.* 101 Pa. St. 602; *Lefevre's App.* 69 Pa. St. 122, 8 Am. Rep. 229; *Reynolds v. Ruckman*, 35 Mich. 80, 81. *Coolley, C. J.*, said: "Real estate held by partners may or may not be partnership property, but usually it is not so unless partnership assets have been used to purchase it, or unless it was put in originally as a part of the joint estate. But generally the fact that two or more persons make use of property, in which their interests are apparently several for partnership purposes, is very far from indicating an understanding that it is partnership estate,

much less any such conclusive understanding that others would be bound to take notice." See, however, *Bergeron v. Richardott*, 55 Wis. 129, 12 N. W. Rep. 384.

<sup>3</sup> *Hoxie v. Carr*, 1 Sumn. 173; *Dyer v. Clark*, 5 Met. 562, 580; *Tillinghast v. Champlin*, 4 R. I. 173, 67 Am. Dec. 510; *Sigourney v. Munn*, 7 Conn. 324.

<sup>4</sup> *Tillinghast v. Champlin*, 4 R. I. 173, 67 Am. Dec. 510. The circumstance that a mortgage was executed to three persons does not create a mutual agency, so that notice to one will affect the others. *Snyder v. Sponable*, 1 Hill, 567; *Steiner v. Clisby*, 95 Ala. 91, 10 So. Rep. 240.

matter to which the notice relates has been specially given in charge.<sup>1</sup> Thus, to affect a bank, which is about to take a mortgage, with notice of a prior unrecorded deed, it is not sufficient to show that the cashier had such notice.<sup>2</sup> Even a notice to an individual director, who has no duty to perform in relation to such notice or the matter to which the notice relates, cannot be considered notice to the corporation.<sup>3</sup> Notice to an agent of a corporation has the same effect as notice to an agent of an individual. The agent is not affected by notice except while he is acting in the matter to which the notice relates. Notice to an individual director is not notice to the corporation, unless the director at the time is officially engaged in the business of the corporation.<sup>4</sup> Notice to a director, while he is acting solely for himself and not for the corporation, is not notice to the corporation, and cannot affect its rights.<sup>5</sup> When, however, the director has official duties to perform in respect to the matter, and the faithful performance of these duties renders it incumbent upon him to communicate the information to the other officers of the corporation, then the corporation stands affected with the director's knowledge in the same manner as if he had acquired it while in the discharge of his official duties.<sup>6</sup> A corporation taking a mortgage of land is not chargeable with constructive notice of a prior conveyance of it by the mortgagor, because the latter was, at the date of the deed and of the mortgage, a director of the company, for in such a transaction the mortgagor deals with the company as a third party on his own behalf, acting for himself with and against the company, and not for it.<sup>7</sup> A corporation is

<sup>1</sup> *Simmons Creek Coal Co. v. Doran*, 142 U. S. 417, 12 Sup. Ct. Rep. 239.

<sup>2</sup> *Wilson v. McCullough*, 23 Pa. St. 440, 62 Am. Rep. 347.

<sup>3</sup> *Fulton Bank v. N. Y. & Sharon Canal Co.* 4 Paige, 127, 136.

<sup>4</sup> *Bank v. Davis*, 2 Hill, 451.

<sup>5</sup> *Barnes v. Trenton Gas Light Co.* 27 N. J. Eq. 33; *Winchester v. Baltimore & S. R. R. Co.* 4 Md. 231; *La Farge F. Ins. Co. v. Bell*, 22 Barb. 54.

<sup>6</sup> *Fulton Bank v. N. Y. & Sharon Canal Co.* 4 Paige, 127.

<sup>7</sup> *La Farge F. Ins. Co. v. Bell*, 22 Barb. 54, 62. "If his position as a director," says Mr. Justice Emott, "could make him

the agent, or rather identify him entirely with the plaintiffs in such sort as to charge them with constructive notice of all the facts with which he was personally acquainted as to the title to lands in which they had any interest, in any case, it could not be so when he did not become concerned as their especial agent, or transact business in their behalf. Most clearly it cannot be the case where the facts concerned his private affairs, and the transaction was one in which he was dealing with the company as a third party on his own behalf, and acting for himself with and against them."

not affected by notice to a stockholder. To render the knowledge of individual corporations the knowledge of the corporation, it must be the knowledge of all of them,<sup>1</sup> unless communicated to the board of directors.<sup>2</sup>

#### IV. *Constructive Notice.*

1544. In general. — Constructive notice is that which is imputed to a person upon strictly legal inference of matters which he necessarily ought to know, or which, by the exercise of ordinary diligence, he might know. It excludes actual notice. It cannot be controverted.<sup>3</sup> The most familiar instance of constructive notice is that which under the registry laws is afforded by the record of a deed. Every subsequent inquirer is bound to know the existence and contents of such deed, and it is not admissible for him to show that his attorney examined the records and failed to find the deed of record.<sup>4</sup> But there are various other kinds of constructive notice, and a purchaser or mortgagee is as much bound by the knowledge thus imputed to him, of

<sup>1</sup> *Mercantile Nat. Bank v. Parsons*, 54 Minn. 56, 55 N. W. Rep. 825, 40 Am. St. Rep. 299.

<sup>2</sup> *Wilson v. McCullough*, 23 Pa. St. 440, 62 Am. Dec. 347.

<sup>3</sup> *Plumb v. Fluitt*, 2 Anst. 432, 438, per Eyre, C. B., who says that constructive notice is in its nature no more than evidence of notice the presumption of which is so violent that the court will not allow even of its being controverted. *Kennedy v. Green*, 3 Myl. & K. 699, 719; *Hewitt v. Loosemore*, 9 Hare, 449; *Espin v. Pemberton*, 3 De G. & J. 547; *Hiern v. Mill*, 13 Ves. 121; *Townsend v. Little*, 109 U. S. 504; *Griffith v. Griffith*, Hoff. 153; *Weidler v. Farmers' Bank*, 11 S. & R. 134; *Knapp v. Bailey*, 79 Me. 195, 9 Atl. Rep. 122; *Rogers v. Jones*, 8 N. H. 264. See article on Constructive Notice, by William L. Scott, 17 Am. Law Rev. 849.

Vice-Chancellor Wigram, in *Jones v. Smith*, 1 Hare, 43, laid it down that cases in which constructive notice had been established resolved themselves into two classes: first, those in which the party charged had actual notice that the prop-

erty in dispute was in some way affected, and the court has thereupon bound him with constructive notice of facts to a knowledge of which he would have been led by an inquiry into the matters affecting the property, of which he had actual notice; and, secondly, those where the court has been satisfied that the party charged had designedly abstained from inquiry for the purpose of avoiding notice. If there is not actual notice that the property is in some way affected, so that the case does not fall within the first class, and no fraudulent turning away from a knowledge of facts which the *res gestæ* would suggest to a prudent mind, or gross and culpable negligence, so as to bring it within the second, then the doctrine of constructive notice would not apply. *Simmons Creek Coal Co. v. Doran*, 142 U. S. 417, 12 Sup. Ct. Rep. 239, per Fuller, C. J.

As to the term *ordinary diligence*, see *Passumpsic Sav. Bank v. First N. Bank*, 53 Vt. 82, 90.

<sup>4</sup> *Edwards v. Barwise*, 69 Tex. 84, 6 S. W. Rep. 677.

matters and instruments affecting the title to property, as he would be if he were informed of them by a deed properly recorded. Whether the person charged with such notice actually had knowledge of the facts affecting the property in question, or might have learned them by inquiry, or whether he studiously abstained from inquiry for the very purpose of avoiding notice, he is alike presumed to have had notice.<sup>1</sup>

1545. Constructive notice is imputed either upon the ground of fraud or of negligence. It does not exist without one or the other. "If, in short, there is not actual notice that the property is in some way affected," says Vice-Chancellor Wigram,<sup>2</sup> "and no fraudulent turning away from a knowledge of facts which the *res gestæ* would suggest to a prudent mind; if mere want of caution, as distinguished from fraudulent and wilful blindness, is all that can be imputed to a purchaser, — there the doctrine of constructive notice will not apply; there the purchaser will in equity be considered, as in fact he is, a *bona fide* purchaser without notice." In another case Vice-Chancellor Turner said:<sup>3</sup> "When this court is called upon to postpone a legal mortgage, its powers are invoked to take away a legal right, and I see no ground which can justify it in doing so, except fraud, or gross and wilful negligence, which in the eye of this court amounts to fraud."

1546. Notice of the existence of an adverse right, title, or lien, without the particulars of it, is sufficient. One who has knowledge of a prior unrecorded mortgage upon some portion of the premises of which he is about to purchase a part is bound by such knowledge to ascertain the extent of that mortgage, and whether it covers the portion of the property he is about to acquire an interest in, and he will be postponed to such prior mortgage, even if this proves to be an incumbrance upon the whole property.<sup>4</sup> Having notice of its existence, he is chargeable with con-

<sup>1</sup> Whitbread v. Jordan, 1 Y. & C. Exch. 303, 328; Jones v. Smith, 1 Hare, 43, 55; Bisco v. Banbury, 1 Ch. Ca. 287, 291; Ware v. Egmont, 4 De G., M. & G. 460, 473. And see cases collected in 2 White & Tudor's Lead. Cas. 4th Am. ed. p. 121; Jackson v. Blackwood, 1 McAr. & Mack. 188.

<sup>2</sup> Jones v. Smith, 1 Hare, 43, affirmed on appeal, 1 Ph. 244.

<sup>3</sup> Hewitt v. Loosemore, 9 Hare, 449, 458.

<sup>4</sup> 2 White & Tudor's Lead. Cas. in Eq. 4th Am. ed. pt. 1, 190; Jones v. Williams, 24 Beav. 47; Hall v. Smith, 14 Ves. 426; Willink v. Morris C. & B. Co. 4 N. J. Eq. 377; Guion v. Knapp, 6 Paige, 35, 27 Am. Dec. 741.



structive notice of all its contents.<sup>1</sup> One having notice of the existence of a mortgage can only acquire an interest subordinate to it, though the mortgage fails to recite the amount of the note which it was given to secure,<sup>2</sup> or it recites that it was given to secure "any indebtedness" of the mortgagor to the mortgagee, and these words referred only to a future indebtedness.<sup>3</sup>

One having notice that an estate is incumbered is not justified in assuming that the incumbrance is one already known to him; he is bound to inquire into the nature and extent of the charge referred to.<sup>4</sup> A notice of a lease is notice of all the covenants and provisions contained in it.<sup>5</sup>

**1547. Notice from recitals.** — When a person claims under a deed which by its recitals leads him to other facts affecting the title to the property, he is presumed to know such facts; for it would be gross negligence in him not to make inquiry as to the facts he is thus put in the way of ascertaining.<sup>6</sup> A recital or

<sup>1</sup> *George v. Kent*, 7 Allen, 16; *Pike v. Goodnow*, 12 Allen, 472, 474; *Barr v. Kinard*, 3 Strobb. 73; *Webb v. Robbins*, 77 Ala. 176; *Martin v. Cauble*, 72 Ind. 67; *Ijames v. Gaither*, 93 N. C. 358, 362; *Gulf, &c. Ry. Co. v. Gill*, 5 Tex. Civ. App. 496, 23 S. W. Rep. 142.

<sup>2</sup> *Wilson v. Vaughan*, 61 Miss. 472.

<sup>3</sup> *Simons v. First Nat. Bank*, 93 N. Y. 269. See, however, § 344; *Morris v. Murray*, 82 Ky. 36.

<sup>4</sup> *Jones v. Williams*, 24 Beav. 47.

<sup>5</sup> *Taylor v. Stibbert*, 2 Ves. Jun. 437.

<sup>6</sup> *Bacon v. Bacon*, Tothill, 231; *Moore v. Bennett*, 2 Ch. Ca. 246; *Pilcher v. Rawlins*, L. R. 11 Eq. 53; *Rafferty v. Mal-lory*, 3 Biss. 362; *Reeves v. Vinacke*, 1 McCrary, 213; *Cordova v. Hood*, 17 Wall. 1; *Lipse v. Spear*, 4 Hughes, 535. **Alabama**: *Corbitt v. Clenny*, 52 Ala. 480; *Burch v. Carter*, 44 Ala. 115. **California**: *Hassey v. Wilke*, 55 Cal. 525. **Connecticut**: *Hamilton v. Nutt*, 34 Conn. 501; *Sigourney v. Munn*, 7 Conn. 324. **District of Columbia**: *Shoemaker v. Chappell*, 4 Mack. 413. **Georgia**: *Rosser v. Cheney*, 61 Ga. 468. **Illinois**: *Ætna Life Ins. Co. v. Ford*, 89 Ill. 252, 11 Chic. L. N. 47; *United States Mortgage Co. v. Gross*, 93 Ill. 483; *Dean v. Long*, 122 Ill. 447, 14

N. E. Rep. 34; *Foster v. Strong*, 5 Bradw. 223; *Chicago, R. I. & P. R. Co. v. Kennedy*, 70 Ill. 350; *Morris v. Hogle*, 37 Ill. 150, 87 Am. Dec. 243. **Indiana**: *Smith v. Lowry*, 113 Ind. 37, 15 N. E. Rep. 17; *Wiseman v. Hutchinson*, 20 Ind. 40; *Cincinnati, Ind. &c. Ry. Co. v. Smith*, 127 Ind. 461, 26 N. E. Rep. 1009. **Iowa**: *Clark v. Holland*, 72 Iowa, 34, 33 N. W. Rep. 350, 2 Am. St. Rep. 230; *Ætna Life Ins. Co. v. Bishop*, 69 Iowa, 645, 29 N. W. Rep. 761. **Kentucky**: *Anderson v. Layton*, 3 Bush, 87; *Bakewell v. Ogden*, 2 Bush, 265; *Mueller v. Engelin*, 12 Bush, 441. **Maine**: *Pike v. Collins*, 33 Me. 38. **Maryland**: *Bryan v. Harvey*, 18 Md. 113. **Massachusetts**: *Sargent v. Hubbard*, 102 Mass. 380; *George v. Kent*, 7 Allen, 16. **Michigan**: *Wait v. Baldwin*, 60 Mich. 622, 27 N. W. Rep. 697; *Baker v. Mather*, 25 Mich. 51. **Minnesota**: *Ross v. Worthington*, 11 Minn. 438, 88 Am. Dec. 95. **Mississippi**: *Deason v. Taylor*, 53 Miss. 697; *Wailes v. Cooper*, 24 Miss. 208. **Missouri**: *Mason v. Black*, 87 Mo. 329; *Bronson v. Wanzer*, 86 Mo. 408; *Central Trust Co. v. Wabash, St. L. & P. Ry. Co.* 29 Fed. Rep. 546; *Poage v. Wabash, &c. Ry. Co.* 24 Mo. App. 199. **New Hampshire**: *Buchanan v. Balkum*, 60

description in a deed, to have this effect, must be in the course of the title under which the purchaser claims.<sup>1</sup> Recitals in collateral and immaterial deeds incidentally referred to, not as relating in any way to the title of the property, or to the consideration paid for it, do not affect the purchaser.<sup>2</sup> A recital must be sufficiently clear to put the purchaser upon inquiry, and to lead him to the requisite information.<sup>3</sup> If the recital does not explain

N. H. 406; *Brown v. Eastman*, 16 N. H. 588. **New Jersey**: *Jennings v. Dixey*, 36 N. J. Eq. 490; *Sea Grove Build. Asso. v. Parsons*, 17 Atl. Rep. 834. **New York**: *Acer v. Westcott*, 46 N. Y. 384, 7 Am. Rep. 355; *Cambridge Valley Bank v. Delano*, 48 N. Y. 326; *Howard Ins. Co. v. Halsey*, 8 N. Y. 271, 59 Am. Dec. 478; *Dunham v. Dey*, 15 Johns. 554, 8 Am. Dec. 282; *Gibbert v. Peteler*, 38 Barb. 488; *Dingley v. Bon*, 130 N. Y. 607, 29 N. E. Rep. 1023, 1024, affirming 8 N. Y. Supp. 935. **Ohio**: *Bonner v. Ware*, 10 Ohio, 465; *Reeder v. Bar*, 4 Ohio, 446, 22 Am. Dec. 762. **Pennsylvania**: *Parke v. Neeley*, 90 Pa. St. 52; *Kerr v. Kitchen*, 17 Pa. St. 433; *Knouff v. Thompson*, 16 Pa. St. 357; *Bellas v. Lloyd*, 2 Watts, 401. **Tennessee**: *Payne v. Abercrombie*, 10 Heisk. 161; *McGavock v. Deery*, 1 Coldw. 265; *Land Co. v. Hill*, 87 Tenn. 589, 608. **Texas**: *Renick v. Dawson*, 55 Tex. 102; *Willis v. Gay*, 48 Tex. 463, 26 Am. Rep. 328; *Peters v. Clements*, 46 Tex. 114; *Polk v. Chaison*, 72 Tex. 500; *Franco-Texan Land Co. v. McCormick (Tex.)*, 23 S. W. Rep. 123. **Vermont**: *Willis v. Adams*, 66 Vt. 223, 28 Atl. Rep. 1033. **Virginia**: *Burwell v. Fauber*, 21 Gratt. 446; *Whitlock v. Johnson*, 87 Va. 323, 12 S. E. Rep. 614. **Wisconsin**: *Dailey v. Kastell*, 56 Wis. 444; *Wier v. Simmons*, 55 Wis. 637; *Pringle v. Dunn*, 37 Wis. 449, 19 Am. Rep. 772.

<sup>1</sup> *Boggs v. Varner*, 6 W. & S. 469; *Bellas v. Lloyd*, 2 Watts, 401; *McCrea v. Newman (N. J. Eq.)*, 19 Atl. Rep. 198; *Coleman v. Barklew*, 27 N. J. L. 357; *Burke v. Beveridge*, 15 Minn. 205; *Corbin v. Sullivan*, 47 Ind. 356; *Hazlett v. Sinclair*, 77 Ind. 488, 40 Am. Rep. 254; *Burch v. Carter*, 44 Ala. 115; *Tydings v. Pitcher*, 82 Mo. 379; *Digman v. McCol-*

*lum*, 47 Mo. 372; *Polk v. Cosgrove*, 4 Biss. 437; *Mason v. Black*, 87 Mo. 329; *Knox Co. v. Brown*, 103 Mo. 223, 15 S. W. Rep. 382; *Mueller v. Engeln*, 12 Bush, 441.

<sup>2</sup> *Kansas City Land Co. v. Hill*, 87 Tenn. 589, 11 S. W. Rep. 797; *Durst v. Daugherty*, 81 Tex. 650, 17 S. W. Rep. 388; *Lindauer v. Younglove*, 47 Minn. 62, 49 N. W. Rep. 384.

<sup>3</sup> *Briggs v. Rice*, 130 Mass. 50; *Racouillat v. Rene*, 32 Cal. 450.

In the following case we doubt whether the evidence was sufficiently clear to afford notice. A mortgage of lands was foreclosed, and the lands were sold under a parol agreement between the mortgagor and purchaser at the foreclosure sale that the lands should be reconveyed to the former on payment of the mortgage debt. The mortgagor, who continued in possession, died without having made full payment of the debt, and his widow, who became the administratrix of his estate, completed the payment, and thereupon the lands were conveyed to her in her own right by a quitclaim deed, in which it is stated that the consideration received for them was five dollars. The deed was duly recorded, and the lands, which were worth about six thousand dollars, were afterwards mortgaged by the widow to secure loans to her, amounting to the sum of two thousand two hundred and twenty dollars. It was held that the nature of the conveyance to her, and the recital therein that it was made in consideration of five dollars, were facts sufficient to put a purchaser under the mortgage she executed upon inquiry, which, if prosecuted with ordinary diligence, would have led to actual notice of the trust in which she held the lands; and that one who bought

itself, it must refer to some deed or fact which will explain it, to make it constructive notice.<sup>1</sup> Notice flowing from matters of record can never be more extensive than the facts stated or referred to.<sup>2</sup>

A recital of a mortgage which defectively describes the land in a deed under which a purchaser from the mortgagor claims title charges him with notice of it.<sup>3</sup>

A purchaser by a deed which refers to a recorded mortgage of the same land by his grantor has notice of a statement in such mortgage that the grantor reserved the trees growing on the land, the same having been sold to a third person.<sup>4</sup>

A description of a portion of the land described in a deed as "land, the title to which is in A, given as collateral security to pay certain notes," is sufficient notice to the purchaser of an unrecorded mortgage to A to preserve the priority of the mortgage.<sup>5</sup> But a purchaser from one who has covenanted to pay all legal mortgages and incumbrances of whatever nature and description on the premises is not put upon inquiry as to any incumbrance not of record, when there is a mortgage of record to which the covenant could properly refer. Neither could he be charged with constructive notice of a mortgage improperly recorded, as, for instance, one without seal.<sup>6</sup>

A note secured by a mortgage or deed of trust, and referring to such mortgage or deed by a statement that the note is secured by a mortgage or deed of trust, as the case may be, gives notice of the terms of the mortgage or deed of trust, so far as these terms in any way qualify the terms of the note, and the holder of the note is bound by such provisions of the mortgage;<sup>7</sup> thus,

under such mortgage without inquiry was not, therefore, a *bona fide* purchaser without notice. *Gaines v. Saunders*, 50 Ark. 322.

( Of six hundred dollars                      said )  
( premises are subject to a former )  
It was held that this was notice of a prior mortgage of that amount.

<sup>1</sup> *White v. Carpenter*, 2 Paige, 217; *Cambridge Valley Bank v. Delano*, 48 N. Y. 326; *Bell v. Twilight*, 22 N. H. 500, *Kaine v. Denniston*, 22 Pa. St. 202; *Van Slyck v. Skinner*, 41 Mich. 186; *Morris v. Murray*, 82 Ky. 36; *French v. Loyal Co.* 5 Leigh, 627. In *Sanborn v. Robinson*, 54 N. H. 239, at the close of the description in a mortgage, the following words were inclosed in parentheses : —

<sup>2</sup> *Gale v. Morris*, 29 N. J. Eq. 222; *Briggs v. Rice*, 130 Mass. 50; *Norman v. Towne*, 130 Mass. 52; *Branch v. Griffin*, 99 N. C. 173, 5 S. E. Rep. 393.

<sup>3</sup> *Knox Co. v. Brown*, 103 Mo. 223.

<sup>4</sup> *White v. Foster*, 102 Mass. 375.

<sup>5</sup> *Dunham v. Dey*, 15 Johns. 554, 8 Am. Dec. 282.

<sup>6</sup> *Racouillat v. Rene*, 32 Cal. 450.

<sup>7</sup> *Orrick v. Durham*, 79 Mo. 174.

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he is bound by a provision in the mortgage that the non-payment of interest on the note shall have the effect of making the note due and payable at once.<sup>1</sup>

1548. When a purchaser cannot make out his title except through a deed which leads him to the knowledge of another fact, he will be deemed to have knowledge of that fact.<sup>2</sup>

One taking a conveyance executed by the grantor, not only individually but as attorney in fact for another, is charged with notice of an interest in the principal for whom the grantor acted as attorney.<sup>3</sup>

1549. A purchaser from one whose title-deed describes him as "trustee" has notice of a trust of some kind, and is put upon inquiry as to the existence and nature of the trust, though the word "trustee," without the name of the beneficiary or any declaration of trust, may be insufficient in itself to create a trust.<sup>4</sup>

A purchaser from one whose title-deed recites facts sufficient to show that the land is subject to a trust takes the land charged with the trust; as, where a deed to an attorney recites that the conveyance is in consideration of the assignment to the grantor by the grantee, as agent, of a certain judgment in favor of his clients, a purchaser from such attorney has notice of such trust.<sup>5</sup>

1550. Persons dealing with a trustee must take notice of the scope of his authority; and even a third person taking a title which comes through a trustee, and having notice of facts which should put him upon inquiry whether the trustee was acting within the scope of his authority, is not protected. Thus, where a person who had as trustee taken a mortgage upon land, for the benefit of minor children, afterwards purchased the equity of redemption, and then without consideration discharged the mortgage before any part of it was due, and obtained a loan to himself from a savings bank, it was held that the bank was chargeable with notice of the trust, and was bound to inquire by what authority the trustee discharged the mortgage. "The trust was expressed in the instrument, although not fully set out in

<sup>1</sup> Noell v. Gaines, 68 Mo. 649, 8 Cent. L. J. 353; Clark v. Bullard, 66 Iowa, 747, 24 N. W. Rep. 561.

<sup>2</sup> Loring v. Groomer, 110 Mo. 632, 19 S. W. Rep. 950.

<sup>3</sup> Solari v. Snow, 101 Cal. 387, 35 Pac. Rep. 1004.

<sup>4</sup> Mercantile Nat. Bank v. Parsons, 54 Minn. 56, 55 N. W. Rep. 825, 40 Am. St. Rep. 299; Marbury v. Ehlen, 72 Md. 206, 20 Am. St. Rep. 467.

<sup>5</sup> Golson v. Fielder, 2 Tex. Civ. App. 400, 21 S. W. Rep. 173.

words, and any act thereafter done by him in contravention of the trust was by the common law and by the statute void. The discharge of the mortgage was not intended for the benefit of the infants, but to deprive them of the benefit of the security, and, as we have said, was a plain breach of trust. The bank knew, or must be presumed to have known, when it took its mortgage, because an examination of the records would have disclosed the facts, (1) that the mortgage was taken by the mortgagee in trust for infants; (2) that he satisfied it before it became due; (3) that his relation to the property had changed, so that when he executed the satisfaction he was himself the owner of the land, having an adverse interest to those beneficially interested in the security; and (4) that in satisfying the mortgage he was dealing with himself.”<sup>1</sup>

**1551.** One who purchases land by a deed, which expressly recites that the premises are subject to a mortgage, has notice of the mortgage from the recital, and cannot claim against it, although it be not recorded.<sup>2</sup> In like manner, and for stronger reasons, one who has purchased land subject to a mortgage, which he agrees to pay, takes a title subject to the mortgage, although it be not recorded, or be recorded in such a way that it is not notice.<sup>3</sup>

A mortgagee, whose mortgage recites that another mortgage is a first lien upon the property, cannot claim that his mortgage takes precedence of a new mortgage afterwards executed and recorded, to correct a mistake in the description of the property in the first mortgage.<sup>4</sup> Where two mortgages made by the same person upon the same land, as parts of one transaction, though dated on different days, refer to each other, the question of priority depends upon the intention of the parties as determined by the terms in which the references are made.<sup>5</sup>

Where a mortgage takes effect only from its delivery for record, and its priority is not affected by notice of a prior unrecorded

<sup>1</sup> *Kirsch v. Tozier*, 143 N. Y. 390, 395, 38 N. E. Rep. 375, per Andrews, C. J.

<sup>2</sup> *Jones on Mortg.* §§ 736, 744; *Reeves v. Vinacke*, 1 McCrary, 213; *Westervelt v. Wyckoff*, 32 N. J. Eq. 188; *Hull v. Sullivan*, 63 Ga. 126; *Garrett v. Puckett*, 15 Ind. 485; *George v. Kent*, 7 Allen, 16; *Howard v. Chase*, 104 Mass. 249; *Kitch-*

*ell v. Mudgett*, 37 Mich. 81; *Baker v. Mather*, 25 Mich. 51.

<sup>3</sup> *Ross v. Worthington*, 11 Minn. 438, 88 Am. Dec. 95.

<sup>4</sup> *Council Bluffs Lodge v. Billups*, 67 Iowa, 674, 25 N. W. Rep. 846.

<sup>5</sup> *Iowa College v. Fenno*, 67 Iowa, 244, 25 N. W. Rep. 152.

mortgage, of course the mere mention of a prior mortgage in the deed, as, for instance, excepting it from the covenants of warranty,<sup>1</sup> does not affect the priority given by the record; yet, if the mortgage be expressly made subject to another, priority of record will avail nothing.<sup>2</sup> Moreover, one taking a mortgage made expressly subject to a prior mortgage cannot avoid it and acquire a larger lien than contracted for, although that mortgage be invalid as against the mortgagor.<sup>3</sup> When a mortgage is expressly excepted from a covenant of warranty in a deed, this exception charges the purchaser with notice of the mortgage, although the mortgage be not recorded.<sup>4</sup>

1552. Where there is a recital in a prior deed that the sale was made upon credit, a subsequent purchaser is bound to inquire whether the purchase-money has been paid, or whether the vendor has a lien for it; and the mere fact that the time of payment of the purchase-money, as recited in the deed, has elapsed does not authorize him to presume that it was paid.<sup>5</sup> No more than ordinary prudence and diligence is required, however, on the part of a purchaser, and therefore, if the reference be to an incumbrance which has been discharged of record, it does not charge him with notice of the existence of another and entirely different incumbrance.<sup>6</sup>

The reservation by deed of a vendor's lien is a substantial charge upon the land and affects all subsequent purchasers;<sup>7</sup> and a reservation of such a lien in a final decree of a court of record has the same effect.<sup>8</sup>

1553. As elsewhere shown, where the mortgaged premises have been sold in parcels to different persons at different times, in the absence of any intervening equities the several parcels are subject to the mortgage, and are to be resorted to in the inverse order of alienation.<sup>9</sup> When, however, the first purchaser

<sup>1</sup> *Bercaw v. Cockerill*, 20 Ohio St. 163.

<sup>2</sup> *Coe v. Col., P. & Ind. R. R. Co.* 10 Ohio St. 372, 406, 75 Am. Dec. 518.

<sup>3</sup> *Hardin v. Hyde*, 40 Barb. 435; *Freeman v. Auld*, 44 N. Y. 50, reversing 44 Barb. 14, 37 Barb. 587.

<sup>4</sup> *Morrison v. Morrison*, 38 Iowa, 73.

<sup>5</sup> *Deason v. Taylor*, 53 Miss. 697; *Cordova v. Hood*, 17 Wall. 1; *Tydings v. Pitcher*, 82 Mo. 379; *Orrick v. Durham*, 79 Mo. 174; *Willis v. Gay*, 48 Tex. 463,

26 Am. Rep. 328; *Lytle v. Turner*, 12 Lea, 641; *Wiseman v. Hutchinson*, 20 Ind. 40.

<sup>6</sup> *Cambridge Valley Bank v. Delano*, 48 N. Y. 326.

<sup>7</sup> *Lincoln v. Purcell*, 2 Head, 142, 73 Am. Dec. 196.

<sup>8</sup> *Martin v. Neblett*, 86 Tenn. 383, 7 S. W. Rep. 123.

<sup>9</sup> *Iglehart v. Crane*, 42 Ill. 261; *McKinney v. Miller*, 19 Mich. 142. See *Jones on Mortg.* § 1620.

expressly takes subject to the mortgage, he has, of course, no equity as against the mortgagor that the portion still held by the latter shall be first applied to the payment of the incumbrance; and, having no equity against him, he has none against his grantee. By taking such a deed he consents that the land shall remain subject to its *pro rata* share of the debt.<sup>1</sup>

1554. A purchaser having actual notice of a mortgage is affected with notice of any other incumbrances which are referred to in that mortgage, or in other deeds to which the deeds first referred to may in turn refer.<sup>2</sup> Having notice of the mortgage the purchaser is bound to know the contents of it, and that would lead him to other deeds, in which, pursued from one to another, the whole case would be discovered to him.<sup>3</sup> Though the contents of a deed be stated to a purchaser, and he relies upon such statement, and the statement be erroneous, he is bound by its real contents;<sup>4</sup> and in like manner, if he has knowledge of an unrecorded mortgage, and rests upon the vendor's assurance that the debt secured by it has been satisfied, he does so at his peril.<sup>5</sup>

1555. A general description of the debt is sufficient to put all parties interested upon inquiry, and to charge them with notice of all facts that could be obtained by the exercise of ordinary diligence and the prosecution of the inquiry in the right direction.<sup>6</sup> A party wilfully closing his eyes against the lights to which his attention has been directed, and which, if followed, would lead to a knowledge of all the facts, is chargeable with notice of every fact that he could have obtained by the exercise of reasonable diligence.<sup>7</sup> It is sufficient notice of an incumbrance to put a pur-

<sup>1</sup> *Briscoe v. Power*, 47 Ill. 447.

<sup>2</sup> *Bisco v. Banbury*, 1 Ch. Ca. 287; *Coplin v. Fernyhough*, 2 Bro. C. C. 291; *Hope v. Liddell*, 21 Beav. 183; *Howard Ins. Co. v. Halsey*, 8 N. Y. 271, 59 Am. Dec. 478; *Green v. Slayter*, 4 Johns. Ch. 38. See *Cambridge Valley Bank v. Delano*, 48 N. Y. 326. And see *Bent v. Coleman*, 89 Ill. 364, 7 Reporter, 366; *Fidelity Ins. Co. v. Shenandoah Val. R. Co.* 32 W. Va. 244, 9 S. E. Rep. 180.

<sup>3</sup> *Bisco v. Banbury*, 1 Ch. Ca. 287, per Lord Chancellor.

<sup>4</sup> *Jones v. Smith*, 1 Hare, 43, on appeal affirmed, 1 Ph. 244 and cases cited. But

see *Drysdale v. Mace*, 2 Sm. & G. 225, 5 De G., M. & G. 103.

<sup>5</sup> *Price v. McDonald*, 1 Md. 403, 54 Am. Dec. 657; *Hudson v. Warner*, 2 Harris & G. 415.

<sup>6</sup> *Seymour v. Darrow*, 31 Vt. 122; *Pasumpsic Sav. Bank v. First Nat. Bank*, 53 Vt. 82. See, however, *Morris v. Murray*, 82 Ky. 36; *Bullock v. Battenhausen*, 108 Ill. 28; *McCrea v. Newman*, 46 N. J. Eq. 473, 19 Atl. Rep. 198; *Clementz v. Jones Lumber Co.* 82 Tex. 424, 18 S. W. Rep. 599.

<sup>7</sup> *Jackson, L. & S. R. Co. v. Davison*,

chase upon inquiry that the mortgage, duly recorded, names a sum of \$500 in addition to a note secured.<sup>1</sup>

In like manner, where a mortgage secured several notes, but in the record the description of one of them was omitted, though the aggregate amount of the notes was given correctly, it was held that the mortgage was notice to a purchaser for the full amount of the mortgage notes.<sup>2</sup> Where a deed was made subject to "two mortgages for \$2,000," with warranty against all claims, "except said mortgages," and there were two prior mortgages, one for \$1,500, which was recorded, and of which the purchaser had actual knowledge, and one of \$2,000, which was not recorded, and of which he had no notice except such as was given by the deed, it was held that the recitals in the deed were sufficient to put him upon inquiry, and to charge him with actual knowledge of the unrecorded mortgage.<sup>3</sup>

A mortgage which describes the note secured, save that the amount of the note is not given, is constructive notice of the mortgage note and its amount.<sup>4</sup>

1556. The limit of inquiry necessary in any case is that required by the use of reasonable diligence. What is reasonable diligence cannot be determined by any general rule, but must vary with the circumstances of each case. Thus, where a mortgage was given to a retiring partner to secure him against the liabilities of the partnership, and also for the "balance which should be due him on the purchase of such property," and notes were given for such purchase-money, but no mention of them was made in the mortgage, it was held that a second mortgagee, who had taken his mortgage after inquiring of both the mortgagor and

65 Mich. 416, 37 N. W. Rep. 537; *Converse v. Blumrich*, 14 Mich. 109, 120.

<sup>1</sup> *Passumpsic Sav. Bank v. First Nat. Bank*, 53 Vt. 82, quoting text; *Babcock v. Lisk*, 57 Ill. 327; *Heaton v. Prather*, 84 Ill. 330. See *Vredenburg v. Burnet*, 31 N. J. Eq. 229.

<sup>2</sup> *Dargin v. Beeker*, 10 Iowa, 571.

<sup>3</sup> *Hamilton v. Nutt*, 34 Conn. 501. See, however, *McCrea v. Newman*, 46 N. J. Eq. 473, 19 Atl. Rep. 198.

<sup>4</sup> *Clementz v. Jones Lumber Co.* 82 Tex. 424, 18 S. W. Rep. 599, citing *Stoughton v. Pasco*, 5 Conn. 442, 13 Am.

Dec. 72; *Babcock v. Lisk*, 57 Ill. 327, 329; *Ricketson v. Richardson*, 19 Cal. 330, 350; *Michigan Ins. Co. v. Brown*, 11 Mich. 265, 270; *Byram v. Gordon*, 11 Mich. 531; *Aull v. Lee*, 61 Mo. 160, 165; *Williams v. Moniteau Nat. Bank*, 72 Mo. 292, 295; *Keyes v. Bump*, 59 Vt. 391, 397; *Barker v. Barker*, 62 N. H. 366; *Somersworth Sav. Bank v. Roberts*, 38 N. H. 22, 24; *Wade on Notices*, §§ 180-183; *Jones on Chat. Mortg.* § 86; 1 *Jones on Mortg.* § 344; *Kellogg v. Frazier*, 40 Iowa, 502; *Gill v. Pinney*, 12 Ohio St. 38, 46.



the mortgagee whether anything was due for purchase-money, and received the answer from both that it was all paid, was entitled to priority over the prior mortgagee, and even as against the assignee of one of the notes given for purchase-money.<sup>1</sup>

The record of a foreclosure suit may affect one who derives title under a foreclosure sale with knowledge of another unsatisfied mortgage upon the premises, and of the equity of the holder of that mortgage as against the purchaser at that sale.<sup>2</sup>

**1557.** A conveyance of land to the mortgagee subject to a mortgage may or may not imply that he has assigned the mortgage. It has already been noticed that a deed conveying land subject to a certain mortgage, or warranting it against all incumbrances except the mortgage, is notice to all persons claiming under such deed of the existence of the mortgage. If such a deed of the equity of redemption be made to the mortgagee himself, it is a question of fact for a jury whether such recital or warranty implies that the mortgage is not then held by the mortgagee, or is notice to his attaching creditors that the mortgage has been assigned to another.<sup>3</sup>

The record of a purchase-money mortgage is not notice of the conveyance for which such mortgage was given, so as to invalidate the title of one who subsequently purchases of the vendor before the first deed given by him is recorded.<sup>4</sup>

**1558.** One who merely takes a release of all the interest of the mortgagor, while an unrecorded mortgage made by him is

<sup>1</sup> *Passumpsic Sav. Bank v. First Nat. Bank*, 53 Vt. 82. Veazey, J., delivering the opinion of the court, said: "Where the form or specification of the obligation intended to be secured is described or referred to, or where the description indicates that the debt is specified in some written form, or is of such a character that it is practicable to be pursued by inquiry beyond the parties to the mortgage, and the facts as to its payment determined, the authorities indicate that a purchaser or subsequent incumbrancer proceeds at his peril. The parties to the mortgage have furnished him the means of finding out the facts; therefore he must find them out. But such is not this case. Here the parties gave no clue to any discovery attain-

able beyond themselves. Under such circumstances, it seems to us that inquiry of those persons is the use of that degree of diligence which the law requires; and that, in view of the facts alluded to, the defendant's mortgage should prevail." See, also, *Cambridge Valley Bank v. Delano*, 48 N. Y. 326; *Blatchley v. Osborn*, 33 Conn. 226; *Maupin v. Emmons*, 47 Mo. 304; *Leiman's Estate*, 32 Md. 225.

<sup>2</sup> *Locker v. Riley*, 30 N. J. Eq. 104.

<sup>3</sup> *Clark v. Jenkins*, 5 Pick. 280.

<sup>4</sup> *Pierce v. Taylor*, 23 Me. 246; *Losey v. Simpson*, 11 N. J. Eq. 246. But it is notice of such deed to one claiming under the mortgagee. *Center v. Planters' & M. Bank*, 22 Ala. 743.

outstanding, obtains only the mortgagor's equity of redemption subject to such mortgage.<sup>1</sup>

### V. *Lis Pendens*.

1559. The force and effect of the recording of a deed or mortgage are limited not only by the actual notice which the grantee may have of prior unrecorded conveyances, but also by constructive notice of rights and claims of other parties, furnished by the pendency of an action in relation to the title of the property, notice of the pendency of which has been filed according to law.<sup>2</sup> The doctrine of *lis pendens* is founded upon the consid-

<sup>1</sup> Smith v. Br. Bank, 21 Ala. 125.

<sup>2</sup> Tyler v. Thomas, 25 Beav. 47; Worsley v. Scarborough, 3 Atk. 392; Bellamy v. Sabine, 1 De G. & J. 566, 580; 2 White & Tudor's Lead, Cas. in Eq. 4th Am. ed. pt. 1, pp. 192 *et seq.* Whiteside v. Haselton, 110 U. S. 296, 4 Sup. Ct. Rep. 1; Tilton v. Cofield, 93 U. S. 163; Lacassagne v. Chapuis, 144 U. S. 119, 12 Sup. Ct. Rep. 659. See 2 Jones on Mortgages, § 1411. **Alabama**: Center v. P. & M. Bank, 22 Ala. 743. The suit is notice from the time when service is perfected. Hoole v. Attorney-General, 22 Ala. 190. **Arkansas**: Holman v. Patterson, 29 Ark. 357; Ashley v. Cunningham, 16 Ark. 168; Galbreath v. Estes, 38 Ark. 599. **California**: Wattson v. Dowling, 26 Cal. 124; Long v. Neville, 29 Cal. 131; Sharp v. Lumley, 34 Cal. 611; Montgomery v. Byers, 21 Cal. 107. **Connecticut**: Norton v. Birge, 35 Conn. 250; King v. Bill, 28 Conn. 593. **Georgia**: Seabrook v. Brady, 47 Ga. 650. **Illinois**: Loomis v. Riley, 24 Ill. 307; Jackson v. Warren, 32 Ill. 331; Roberts v. Fleming, 53 Ill. 196; Walker v. Douglas, 89 Ill. 425. **Indiana**: Truitt v. Truitt, 38 Ind. 16; Kern v. Hazelrigg, 11 Ind. 443, 71 Am. Dec. 360. **Iowa**: Blanchard v. Ware, 37 Iowa, 305, 43 Iowa, 530; McGregor v. McGregor, 21 Iowa, 441; Tredway v. McDonald, 51 Iowa, 663, 2 N. W. Rep. 567. **Kentucky**: Wallace v. Marquett, 88 Ky. 130; Kellar v. Stanley, 86 Ky. 240, 5 S. W. Rep. 477; Gossom v. Donaldson, 18 B. Mon. 230, 68 Am. Dec. 723. **Maine**: Snowman v. Harford, 62

Me. 434; Berry v. Whittaker, 58 Me. 422. **Maryland**: Tongue v. Morton, 6 Har. & J. 21; Inloes v. Harvey, 11 Md. 519; Boulden v. Lanahan, 29 Md. 200. **Massachusetts**: Haven v. Adams, 8 Allen, 363; Borrowscale v. Tuttle, 5 Allen, 377. **Mississippi**: Allen v. Poole, 54 Miss. 323. **Missouri**: Hart v. Steedman, 98 Mo. 452; Real Est. Sav. Inst. v. Collonious, 63 Mo. 290; Turner v. Babb, 60 Mo. 342. **Nevada**: Powell v. Campbell, 20 Nev. 156, 19 Am. St. Rep. 350. **New Jersey**: McPherson v. Housel, 13 N. J. Eq. 299. **New York**: Ayrault v. Murphy, 54 N. Y. 203; Hovey v. Elliott, 118 N. Y. 124, 23 N. E. Rep. 475; Murray v. Ballou, 1 Johns. Ch. 566; Mitchell v. Smith, 53 N. Y. 413; Young v. Guy, 23 Hun, 1, affirmed 87 N. Y. 457; Lawrence v. Conklin, 17 Hun, 228; Harrington v. Slade, 22 Barb. 161. **North Carolina**: Arrington v. Arrington, 114 N. C. 151, 19 S. E. Rep. 351; Collingwood v. Brown, 106 N. C. 362, 10 S. E. Rep. 868; Spencer v. Credle, 102 N. C. 68, 8 S. E. Rep. 901. **Ohio**: Brundage v. Biggs, 25 Ohio St. 652; Ludlow v. Kidd, 2 Ohio, 372. **Pennsylvania**: Hersey v. Turbett, 27 Pa. St. 418; Youngman v. Elmira R. Co. 65 Pa. St. 278. **Tennessee**: Martin v. Neblett, 86 Tenn. 383, 7 S. W. Rep. 123; Tharpe v. Dunlap, 4 Heisk. 674. **Texas**: Lee v. Salinas, 15 Tex. 495; Cassidy v. Kluge, 73 Tex. 154; Yoe v. Milam County Cotton Alliance (Tex. Civ. App.), 32 S. W. Rep. 111; Dwyer v. Rippetoe, 72 Tex. 520, 10 S. W. Rep. 668. **Virginia**: Wood v.

eration that no suit could be successfully terminated if, during its pendency, the property could be transferred so that it would not be bound by the decree or judgment in the hands of the assignee.<sup>1</sup> This doctrine of *lis pendens*, however, is not carried to the extent of making it constructive notice of a prior unregistered deed;<sup>2</sup> as, for instance, proceedings to foreclose an unrecorded mortgage do not constitute such a *lis pendens* as would be notice to a purchaser of the mortgaged property.

Administration proceedings in a probate court are not considered as *lis pendens*, so as to afford notice of all the property belonging to the estate. "*Lis pendens* is a harsh rule in all cases, and especially so under our statute, which does not require a filing or recording in the office of the register of deeds, and a court will not extend its provisions beyond that absolutely required by the strict necessities of the case. It has never been applied, so far as our investigation goes, except where property, generally real estate, has been in actual litigation, and the pleadings disclose the identical property which is the subject thereof."<sup>3</sup>

Only those persons are charged with notice, or are affected by a *lis pendens*, who pending the suit purchase from a party to the suit,<sup>4</sup> or derive title from one so purchasing.<sup>5</sup>

It is now generally provided by statute that notice of *lis pendens*, in order to affect subsequent purchasers, shall be filed in the registry of deeds where the land is situated.

If the case is transferred to another county by consent, on the

Krebbs, 30 Gratt. 708. Wisconsin: Helms v. Chadbourne, 45 Wis. 60. In Louisiana, a purchaser is not chargeable with notice of judicial proceedings in which the title of the property is involved, unless he is a party to such proceedings. Notice in this State is not as a rule equivalent to registry. Boyer v. Joffrion, 40 La. Ann. 657, 4 So. Rep. 872.

<sup>1</sup> Hiern v. Mill, 13 Ves. 114; Allen v. Poole, 54 Miss. 323; Arrington v. Arrington, 114 N. C. 151, 161, 19 S. E. Rep. 351; Turner v. Houpt (N. J. Eq.), 33 Atl. Rep. 28; Haughwout v. Murphy, 22 N. J. Eq. 531, 544; Chancellor Kent, in Murray v. Ballou, 1 Johns. Ch. 566, and Murray v. Lylburn, 2 Johns. Ch. 441, examined all the authorities to that date, and puts

the foundation of the maxim on necessity, whether it be applied at law or in equity.

<sup>2</sup> 1 Story's Eq. Jur. § 406; Douglass v. McCrackin, 52 Ga. 596; Newman v. Chapman, 2 Rand. 93, 14 Am. Dec. 766.

<sup>3</sup> Seibel v. Bath (Cal.), 40 Pac. Rep. 756, per Potter, J.

<sup>4</sup> Green v. Rick, 121 Pa. St. 130, 15 Atl. Rep. 497; Bright v. Buckman, 39 Fed. Rep. 243; Allen v. Morris, 34 N. J. L. 159; Parks v. Jackson, 11 Wend. 442, 25 Am. Dec. 656; Stuyvesant v. Hone, 1 Sandf. Ch. 419; Parsons v. Hoyt, 24 Iowa, 154; Herrington v. Herrington, 27 Mo. 560; Scarlett v. Gorham, 28 Ill. 319; French v. Loyal Co. 5 Leigh, 627.

<sup>5</sup> Norton v. Birge, 35 Conn. 250.

original papers, the notice which they had supplied in the former county fails.<sup>1</sup>

1560. Notice from a *lis pendens* arises from the time of the service of the writ, and not from the time of the issuance of it, or the time of filing the bill.<sup>2</sup> The *lis pendens* is notice of every fact in the pleadings pertinent to the matter in issue or the relief sought, and of the contents of the exhibits filed and proved,<sup>3</sup> and of all equities arising out of the subject of litigation.<sup>4</sup> But, in order that the notice may attach, the property involved in the suit must be so pointed out in the proceedings that it may be identified by those interested in it.<sup>5</sup> The law of *lis pendens* does not, therefore, apply to a suit for divorce and alimony,<sup>6</sup> unless the petition is that the alimony be assigned out of a particular parcel of land.<sup>7</sup> Neither does it apply to a common lawsuit brought to obtain judgment for a debt.<sup>8</sup>

<sup>1</sup> Arrington v. Arrington, 114 N. C. 151, 19 S. E. Rep. 351. Per Shepherd, C. J.: "While recognizing the *lis pendens* as absolutely binding in its effect, the rigor of the rule has been softened by the equitable requirement that the means of information should be accessible to those who are careful enough to search for it."

<sup>2</sup> Murray v. Ballou, 1 Johns. Ch. 566; Hayden v. Bucklin, 9 Paige, 512; Fuller v. Scribner, 76 N. Y. 190; Leitch v. Wells, 48 N. Y. 585; Allen v. Poole, 54 Miss. 323; Allen v. Mandaville, 26 Miss. 397; Haughwout v. Murphy, 22 N. J. Eq. 531, 545; Majors v. Cowell, 51 Cal. 478; Farmers' Nat. Bank v. Fletcher, 44 Iowa, 252; Center v. Planters' & Merchants' Bank, 22 Ala. 743; Bennet v. Williams, 5 Ohio, 461; Staples v. White, 88 Tenn. 30; Franklin Sav. Bank v. Taylor, 131 Ill. 376, 23 N. E. Rep. 397.

In Arkansas a *lis pendens* begins when a complaint is filed, and a summons is issued thereon. Burleson v. McDermott, 57 Ark. 229, 21 S. W. Rep. 222.

<sup>3</sup> Allen v. Poole, 54 Miss. 323; Center v. Planters' & Merchants' Bank, 22 Ala. 743; Jones v. McNarrin, 68 Me. 334, 28 Am. Rep. 66; Mullanphy Sav. Bank v. Schott, 135 Ill. 655, 25 Am. St. Rep. 401.

<sup>4</sup> Lockwood v. Bates, 1 Del. Ch. 435, 12 Am. Dec. 121; Powell v. Campbell, 20 Nev. 232, 19 Am. St. Rep. 350, 20 Pac. Rep. 156.

<sup>5</sup> Miller v. Sherry, 2 Wall. 237; Allen v. Poole, 54 Miss. 323; Low v. Pratt, 53 Ill. 438; Green v. Slayter, 4 Johns. Ch. 38; Todd v. Outlaw, 79 N. C. 235; Drake v. Crowell, 40 N. J. L. 58; Arrington v. Arrington, 114 N. C. 151, 19 S. E. Rep. 351.

The *lis pendens*, in an action for specific performance of an agreement to sell land and divide the proceeds with another, is no notice to a subsequent mortgagee of a part of the land which was not included in the complaint; and the rights of such mortgagee, who is a stranger to the action, will not be affected by an agreement between the parties thereto to insert in the judgment the land covered by his mortgage. Oliphant v. Burns, 146 N. Y. 218, 40 N. E. Rep. 980, affirming 23 N. Y. Supp. 1144.

<sup>6</sup> Hamlin v. Bevans, 7 Ohio, 161, 28 Am. Dec. 625; Feigley v. Feigley, 7 Md. 537, 61 Am. Dec. 375.

<sup>7</sup> Brightman v. Brightman, 1 R. I. 112; Daniel v. Hodges, 87 N. C. 95.

<sup>8</sup> White v. Perry, 14 W. Va. 66.

Where the suit has been prosecuted with proper diligence, the *lis pendens* continues until final judgment.<sup>1</sup> It is notice of matters alleged in an amended bill.<sup>2</sup>

A subsequent incumbrancer is bound by all proceedings taken in the action, after the filing of the notice, to the same extent as if he was a party to the action. But a judgment for costs in a suit for land which is not declared a lien upon the land does not take priority over a mortgage on the land given after the notice was filed, but before the judgment was rendered, as such judgment becomes a lien on the land only by the filing of a transcript with the county clerk.<sup>3</sup>

**1561. Lis pendens as affected by actual notice.**—If the plaintiff in a suit, before filing the statutory notice of *lis pendens*, had knowledge that the defendant had conveyed his land by a valid deed, but that the purchaser had not recorded it, he cannot by a levy upon the land of an execution obtained in such writ acquire any lien upon such land as against the purchaser.<sup>4</sup> On the other hand, one who purchases with actual notice of the pendency of a suit affecting the land cannot object that statutory notice of the pendency of the suit was not filed.<sup>5</sup>

**1562. Notice by lis pendens is notice only of pending proceedings.** A dismissal of the action defeats *lis pendens* as to a grantee of the holder of the legal title without notice.<sup>6</sup> It is not notice to a purchaser whose conveyance was made before the commencement of the action,<sup>7</sup> though his deed is not recorded until after a notice of *lis pendens* is filed in the recorder's office.<sup>8</sup> A notice of *lis pendens*, though recorded in the office of the register of deeds, is not a conveyance within the meaning of the

<sup>1</sup> Arrington v. Arrington, 114 N. C. 151, 19 S. E. Rep. 351.

<sup>2</sup> Turner v. Houtt (N. J. Eq.), 33 Atl. Rep. 28.

<sup>3</sup> Crocker v. Lewis, 144 N. Y. 140, 39 N. E. Rep. 1, affirming 29 N. Y. Supp. 798.

<sup>4</sup> Lamont v. Cheshire, 65 N. Y. 30. And see Rockwell v. Coffey, 20 Colo. 397, 38 Pac. Rep. 376.

<sup>5</sup> Baker v. Pierson, 5 Mich. 456.

<sup>6</sup> Karr v. Burns (Kans.), 40 Pac. Rep. 1087.

<sup>7</sup> Farmers' Nat. Bank v. Fletcher, 44

Iowa, 252; Parks v. Jackson, 11 Wend. 442, 25 Am. Dec. 656; Jackson v. Dickenson, 15 Johns. 309, 8 Am. Dec. 236.

<sup>8</sup> Warnock v. Harlow, 96 Cal. 298, 31 Pac. Rep. 166, 31 Am. St. Rep. 209; Sprague v. White, 73 Iowa, 670, 35 N. W. Rep. 751; Collingwood v. Brown, 106 N. C. 362, 10 S. E. Rep. 868; Hammond v. Paxton, 58 Mich. 393, 25 N. W. Rep. 321; Smith v. Williams, 44 Mich. 240, 6 N. W. Rep. 662; Hall v. Nelson, 23 Barb. 88. See, however, Smith v. Hodsdon, 78 Me. 180, 3 Atl. Rep. 276; Norton v. Birge, 35 Conn. 250.

recording acts, nor an instrument transferring title,<sup>1</sup> and therefore it has no priority of a previous unrecorded conveyance merely by reason of priority of record. When litigation is ended, and the rights of all parties have been determined, the notice ceases.<sup>2</sup>

If a party fails to prosecute his suit, or the cause is removed to another county, a purchaser might well infer that the *lis pendens* had been abandoned. "The rule *lis pendens*, while founded upon principles of public policy, and absolutely necessary to give effect to the decrees of the courts, is nevertheless, in many instances, very harsh in its operation; and one who relies upon it to defeat a *bona fide* purchaser must understand that his case is *strictissimi juris*. Certainly he cannot claim its protection when, as we have observed, he has done anything that prevents the purchaser from learning the nature of his claim by an inspection of the records. That the doctrine of estoppel may be invoked in bar of the enforcement of the rule is well settled. It is applied in cases of negligence in failing to prosecute the action, and also where the plaintiff makes such a disposition of the case that it may be inferred that the right to enforce the *lis pendens* has been abandoned."<sup>3</sup>

#### VI. *How far Possession is Notice.*

**1563.** Possession by one who is not the owner of record is a fact which should induce one proposing to purchase to inquire whether the possession is founded on any right or title. It is notice of the rights of the occupant, whatever they may be; and if he claim by deed, his possession is regarded by most authorities as equivalent to the recording of such deed.<sup>4</sup> Thus the posses-

<sup>1</sup> Warnock v. Harlow, 96 Cal. 298, 31 Pac. Rep. 166, 31 Am. St. Rep. 209; Hoag v. Howard, 55 Cal. 564.

<sup>2</sup> Page v. Waring, 76 N. Y. 463.

<sup>3</sup> Arrington v. Arrington, 114 N. C. 151, 19 S. E. Rep. 351, per Shepherd, C. J.

<sup>4</sup> James v. Lichfield, L. R. 9 Eq. 51; Taylor v. Stibbert, 2 Ves. Jun. 437; Daniels v. Davison, 16 Ves. 249; Holmes v. Powell, 8 De G., M. & G. 572; Bailey v. Richardson, 9 Hare, 734; Moreland v. Richardson, 24 Beav. 33; Wilson v. Hart, L. R. 1 Ch. App. 463, 467; Noyes v. Hall,

97 U. S. 34; Ewing v. Burnet, 11 Pet. 41; Hughes v. United States, 4 Wall. 232; Horback v. Porter (U. S.), 14 Sup. Ct. Rep. 1160; Landes v. Brant, 10 How. 348; Lea v. Polk Co. Copper Co. 21 How. 493; Weld v. Madden, 2 Cliff. 584; Johnston v. Glancy, 4 Blackf. 94, 28 Am. Dec. 45. Alabama: Phillips v. Costley, 40 Ala. 486; Garrett v. Lyle, 27 Ala. 586; Reynolds v. Kirk (Ala.), 17 So. Rep. 95; Burt v. Cassety, 12 Ala. 734; Tutwiler v. Montgomery, 73 Ala. 263; Brunson v. Brooks, 68 Ala. 248; Bernstein v. Humes, 71 Ala. 260; Headley v. Bell, 84 Ala. 346, 4 So.

sion of a tenant is notice of his interest in the land, whatever that interest may be, and perhaps notice also of his landlord's

- Rep. 391; *Price v. Bell*, 91 Ala. 180, 8 So. Rep. 565; *Carter v. Challen*, 83 Ala. 135, 3 So. Rep. 313; *Munn v. Achey* (Ala.), 18 So. Rep. 299. **Arkansas**: *Byers v. Engles*, 16 Ark. 543; *Gill v. Hardin*, 48 Ark. 409; *Turman v. Bell*, 54 Ark. 273, 15 S. W. Rep. 886; *Long v. Langsdale*, 56 Ark. 239, 19 S. W. Rep. 603. **California**: *Smith v. Yule*, 31 Cal. 180, 89 Am. Dec. 167; *Jones v. Marks*, 47 Cal. 242; *Thompson v. Pioche*, 44 Cal. 508; *Fair v. Stevenot*, 29 Cal. 486; *Peasley v. McFadden*, 68 Cal. 611, 10 Pac. Rep. 179; *Moss v. Atkinson*, 44 Cal. 3; *Scheerer v. Cuddy*, 85 Cal. 270, 24 Pac. Rep. 713. **Connecticut**: *Harral v. Leverty*, 50 Conn. 46, 47 Am. Rep. 608. **Florida**: *Massey v. Hubbard*, 18 Fla. 688; *McRae v. Mc-Minn*, 17 Fla. 876. **Georgia**: *Sewell v. Holland*, 61 Ga. 608; *Finch v. Beal*, 68 Ga. 594; *Cox v. Jones*, 76 Ga. 296. **Idaho**: *Feirbaugh v. Masterson*, 1 Idaho, 135; *Noyes v. Hall*, 97 U. S. 34. **Illinois**: *Brainard v. Hudson*, 103 Ill. 218; *Jaques v. Lester*, 118 Ill. 246, 8 N. E. Rep. 795; *Truesdale v. Ford*, 37 Ill. 210, 213; *Clevinger v. Ross*, 109 Ill. 349; *White v. White*, 105 Ill. 313; *Morrison v. Kelly*, 22 Ill. 610; *Stagg v. Small*, 4 Bradw. 192; *Keys v. Test*, 33 Ill. 316; *Cowen v. Loomis*, 91 Ill. 132; *Strong v. Shea*, 83 Ill. 575; *Brown v. Gaffney*, 28 Ill. 149, 157; *Cabeen v. Breckenridge*, 48 Ill. 91. **Indiana**: *Sutton v. Jervis*, 31 Ind. 265, 99 Am. Dec. 631; *Barnes v. Union School Township*, 91 Ind. 301. **Iowa**: *Moore v. Pierson*, 6 Iowa, 279, 71 Am. Dec. 409; *Leebrick v. Stahle*, 68 Iowa, 515, 27 N. W. Rep. 490; *Krueger v. Walker* (Iowa), 63 N. W. Rep. 320. **Kansas**: *Lyons v. Bodenhamer*, 7 Kans. 455; *Greer v. Higgins*, 20 Kans. 420; *Johnson v. Clark*, 18 Kans. 157; *School District v. Taylor*, 19 Kans. 287; *Deetjen v. Richter*, 33 Kans. 410, 6 Pac. Rep. 595. **Kentucky**: *Hackwith v. Damron*, 1 Mon. 235; *Goins v. Allen*, 4 Bush, 608. **Maine**: Prior to R. S. of 1841, *Webster v. Maddox*, 6 Me. 256; *Matthews v. Demerritt*, 22 Me. 312; *Hull v. Noble*, 40 Me. 459; *Hanly v. Morse*, 32 Me. 287; *Clark v. Bosworth*, 51 Me. 528; *Beal v. Gordon*, 55 Me. 482. **Maryland**: *Ringgold v. Bryan*, 3 Md. Ch. 488; *Bryan v. Harvey*, 18 Md. 113; *Border State Sav. Inst. v. Wilcox*, 63 Md. 525. **Michigan**: *Allen v. Cadwell*, 55 Mich. 8, 20 N. W. Rep. 692; *McKee v. Wilcox*, 11 Mich. 358, 83 Am. Dec. 743; *Doyle v. Stevens*, 4 Mich. 87; *Russell v. Swezey*, 22 Mich. 235; *Parsell v. Thayer*, 39 Mich. 467; *Weisberger v. Wisner*, 55 Mich. 246, 21 N. W. Rep. 331. **Minnesota**: *New v. Wheaton*, 24 Minn. 406; *Groff v. Ramsey*, 19 Minn. 44; *Morrison v. March*, 4 Minn. 422. **Mississippi**: *Taylor v. Mosely*, 57 Miss. 544; *Strickland v. Kirk*, 51 Miss. 795. **Missouri**: *Vaughn v. Tracy*, 22 Mo. 415, 25 Mo. 318, 69 Am. Dec. 471; *Roberts v. Moseley*, 64 Mo. 507; *Bartlett v. Glasscock*, 4 Mo. 62; *Pike v. Robertson*, 79 Mo. 615. **Nebraska**: *Lipp v. Land Syndicate*, 24 Neb. 692, 40 N. W. Rep. 129; *Conlee v. McDowell*, 15 Neb. 184; *Uhl v. May*, 5 Neb. 157; *Scharman v. Scharman*, 38 Neb. 39, 56 N. W. Rep. 704; *Pleasants v. Blodgett*, 39 Neb. 741, 58 N. W. Rep. 423; *Izard v. Kimmel*, 26 Neb. 51, 41 N. W. Rep. 1068. **Nevada**: *Brophy Min. Co. v. Brophy & D. Gold Min. Co.* 15 Nev. 101. **New Hampshire**: *Rogers v. Jones*, 8 N. H. 264; *Patten v. Moore*, 32 N. H. 382; *Emmons v. Murray*, 16 N. H. 385; *Forest v. Jackson*, 56 N. H. 357; *Janvrin v. Janvrin*, 60 N. H. 169. **New Jersey**: *Van Keuren v. Central R. Co.* 38 N. J. L. 165; *Holmes v. Stout*, 10 N. J. Eq. 419; *Losey v. Simpson*, 11 N. J. Eq. 246; *Roll v. Rea*, 50 N. J. L. 264, 12 Atl. Rep. 905; *Hodge v. Amerman*, 40 N. J. Eq. 99, 2 Atl. Rep. 257. **New York**: *Phelan v. Brady*, 119 N. Y. 587, 23 N. E. Rep. 1109; *Westbrook v. Gleason*, 79 N. Y. 23; *Brown v. Volkening*, 64 N. Y. 76; *Pope v. Allen*, 90 N. Y. 298; *Chesterman v. Gardner*, 5 Johns. Ch. 29; *Webster v. Van Steen-*

title;<sup>1</sup> and thus, also, the possession of a *cestui que trust* is notice of his beneficial interest in the property.<sup>2</sup>

Possession by a vendee under a contract of purchase, whether it be personal or by tenant, is constructive notice of his equitable rights as purchaser, and any one taking a conveyance under such circumstances from his vendor takes subject to his rights.<sup>3</sup> The mortgage lien in such case covers the property only to the extent of the unpaid purchase-money.<sup>4</sup>

A purchaser with an unrecorded deed, but with continuous possession of the land, has precedence of a subsequent purchaser or mortgagee having a deed duly recorded, although the latter had no actual notice of the prior deed; for the possession of the prior purchaser is notice of his rights.<sup>5</sup>

bergh, 46 Barb. 211; Grimstone v. Carter, 3 Paige Ch. 421; Seymour v. McKinstry, 106 N. Y. 230; Farmers' Loan & Trust Co. v. Maltby, 8 Paige, 361; Gouverneur v. Lynch, 2 Paige, 300; Bank v. Flagg, 3 Barb. Ch. 316; Moyer v. Hinman, 13 N. Y. 180; Tuttle v. Jackson, 6 Wend. 213; Trustees v. Wheeler, 61 N. Y. 88, 98; Cavalli v. Allen, 57 N. Y. 508. **North Carolina**: Tankard v. Tankard, 79 N. C. 54; Edwards v. Thompson, 71 N. C. 177; Mayo v. Leggett, 96 N. C. 237, 1 S. E. Rep. 622; Staton v. Davenport, 95 N. C. 11. So by statute. Laws 1885, ch. 147, § 1. **Ohio**: Ranney v. Hardy, 43 Ohio St. 157, 1 N. E. Rep. 523; Kelley v. Stanbery, 13 Ohio, 408; McKinzie v. Perrill, 15 Ohio St. 162. **Oregon**: Manaudas v. Mann, 14 Oreg. 450, 13 Pac. Rep. 449; Rayburn v. Davisson, 22 Oreg. 242, 29 Pac. Rep. 738. **Pennsylvania**: Bugbee's App. 110 Pa. St. 331; Kerr v. Day, 14 Pa. St. 112, 53 Am. Dec. 526; Randall v. Silverthorn, 4 Pa. St. 173; Rowe v. Ream, 105 Pa. St. 543; Woods v. Farmere, 7 Watts, 372, 32 Am. Dec. 772. **Rhode Island**: Harris v. Arnold, 1 R. I. 125. **South Carolina**: Graham v. Nesmith, 24 S. C. 285; Sheorn v. Robinson, 22 S. C. 32; Biemann v. White, 23 S. C. 490; Daniel v. Hester, 29 S. C. 147, 7 S. E. Rep. 65. **Texas**: Hawley v. Bullock, 29 Tex. 216; Markham v. Parker (Tex. Civ. App.), 31 S. W. Rep. 82; Mullins v. Wim-

berly, 50 Tex. 457; Glendenning v. Bell, 70 Tex. 632, 8 S. W. Rep. 324. **Utah**: Ayers v. Jack, 7 Utah, 249, 26 Pac. Rep. 300; Toland v. Corey, 6 Utah, 392, 24 Pac. 190; Neponset Land Co. v. Dixon, 10 Utah, 334, 37 Pac. Rep. 573; Stahn v. Hall, 10 Utah, 400, 37 Pac. Rep. 585. **Vermont**: Perkins v. West, 55 Vt. 265; Rublee v. Mead, 2 Vt. 544. **Virginia**: Effinger v. Hall, 81 Va. 94; Preston v. Nash, 76 Va. 1. **West Virginia**: Western Min. & Manuf. Co. v. Peytona Cannel Coal Co. 8 W. Va. 406. **Wisconsin**: Lamoreux v. Huntley, 68 Wis. 34, 31 N. W. Rep. 331; Coe v. Manseau, 62 Wis. 81, 22 N. W. Rep. 155; Meade v. Gilfoyle, 64 Wis. 18, 24 N. W. Rep. 413; Cunningham v. Brown, 44 Wis. 72; Brinkman v. Jones, 44 Wis. 498; Wicke v. Lake, 21 Wis. 410, 94 Am. Dec. 552, 25 Wis. 71; Ehle v. Brown, 31 Wis. 405; Fery v. Pfeiffer, 18 Wis. 510.

<sup>1</sup> Ehle v. Brown, 31 Wis. 405.

<sup>2</sup> Pritchard v. Brown, 4 N. H. 397, 17 Am. Dec. 431. See, however, Scott v. Gallagher, 14 S. & R. 333, 16 Am. Dec. 508.

\* Bank v. Flagg, 3 Barb. Ch. 316; Bra-man v. Wilkinson, 3 Barb. 151. See § 464.

<sup>4</sup> Westbrook v. Gleason, 14 Hun, 245, 79 N. Y. 23; Young v. Guy, 12 Hun, 325, 23 Hun, 1, affirmed 87 N. Y. 457.

<sup>5</sup> Daniel v. Hester, 29 S. C. 147, 7 S. E. Rep. 65.



This is the rule that prevails generally in the United States. In a few States, however, "actual notice" is essential in order to dispense with registration, and consequently possession does not amount to notice, and does not have the effect of putting a purchaser upon inquiry, though proof of possession may be made in connection with evidence of actual notice.<sup>1</sup> But in these States knowledge of adverse possession, though it be open and notorious, does not of itself amount to notice of the occupant's title or right.<sup>2</sup>

1564. The prevailing rule, however, is that possession is notice although it be not actually known to the purchaser. It is a fact which the purchaser should know, and he is thereby put upon inquiry as to the possessor's rights.<sup>3</sup> Possession does not amount to constructive notice of the nature and extent of the rights of the person in possession, but it puts the purchaser upon inquiry as to such rights. He is bound to pursue the inquiry with diligence, and to ascertain what those rights are.<sup>4</sup> A purchaser who negligently or intentionally fails to inquire as to the fact of possession, or as to the title or interests of the person in possession, is affected with notice of such title or

<sup>1</sup> Connecticut: *Harral v. Levery*, 50 Conn. 46. Louisiana: *Moore v. Jourdan*, 14 La. Ann. 414; *Poydras v. Laurans*, 6 La. Ann. 770. Maine: Since R. S. of 1841, *Boggs v. Anderson*, 50 Me. 161; *Beal v. Gordon*, 55 Me. 482; *Clark v. Bosworth*, 51 Me. 528; *Goodwin v. Cloudman*, 43 Me. 577; *Porter v. Sevey*, 79 Me. 519. See, also, *Knapp v. Bailey*, 79 Me. 195. Massachusetts: *Lamb v. Pierce*, 113 Mass. 72; *Dooley v. Wolcott*, 4 Allen, 406; *Pomroy v. Stevens*, 11 Met. 244; *Sibley v. Leffingwell*, 8 Allen, 584; *Mara v. Pierce*, 9 Gray, 306; *Parker v. Osgood*, 3 Allen, 487, 490; *M'Mechan v. Griffing*, 3 Pick. 149, 15 Am. Dec. 198. Missouri: Since statute, R. S. 1889, 2420; *Maupin v. Emmons*, 47 Mo. 304; *Whitman v. Taylor*, 60 Mo. 127; *Drey v. Doyle*, 99 Mo. 459, 12 S. W. Rep. 287. Wisconsin: *Brinkman v. Jones*, 44 Wis. 498; *Hubbard v. Smith*, 2 Mich. 207.

<sup>2</sup> In Utah possession is declared to be VOL. II.

actual notice. *Toland v. Corey*, 6 Utah, 392, 24 Pac. Rep. 190.

<sup>3</sup> *Hottenstein v. Lerch*, 104 Pa. St. 454; *Kerr v. Day*, 14 Pa. St. 112, 53 Am. Dec. 526; *Betts v. Letcher*, 1 S. D. 182, 46 N. W. Rep. 193, 197; *Hodge v. Amerman*, 40 N. J. Eq. 99, 2 Atl. Rep. 257; *Ranney v. Hardy*, 43 Ohio St. 157, 1 N. E. Rep. 523; *Edwards v. Thompson*, 71 N. C. 177; *Bieman v. White*, 23 S. C. 490; *Sheorn v. Robinson*, 22 S. C. 32; *Pique v. Arendale*, 71 Ala. 91; *Loughridge v. Bowland*, 52 Miss. 546.

<sup>4</sup> *Rogers v. Jones*, 8 N. H. 264; *Williamson v. Brown*, 15 N. Y. 354; *Daniels v. Davison*, 16 Ves. 249; *Flagg v. Mann*, 2 Sumn. 486; *Grimstone v. Carter*, 3 Paige, 421, 24 Am. Dec. 230; *Kerr v. Day*, 14 Pa. St. 112, 53 Am. Dec. 526; *Thompson v. Pioche*, 44 Cal. 508; *Hopkin v. Doty*, 25 Wis. 573; *Betts v. Letcher*, 1 S. D. 182, 46 N. W. Rep. 193, 197.

interest as the possessor actually has. Such a purchaser cannot claim the position of a purchaser in good faith without notice.<sup>1</sup>

But while it is the duty of the purchaser to inquire of the party in possession by what right he holds, there is no rule of law which requires one who is about to purchase land to make inquiries of persons living near it. In the absence of some information that some particular person knows of an adverse claim to the premises in dispute, there is no duty resting upon the purchaser to make inquiries of such person, although he may live in the neighborhood in which the land lies.<sup>2</sup>

1565. Possession is not necessarily evidence of any particular title, but is only evidence of some title, and puts the purchaser upon inquiry as to the title or interest the occupant holds or claims.<sup>3</sup> If the person in possession has no title or right of possession whatever, but is a mere intruder, his possession is not notice and does not put a purchaser on inquiry.<sup>4</sup> A purchaser is not affected by possession under a deed of which he has no notice, and of which he is not bound to take notice. When the record shows a perfect chain of title, one purchasing under that title is not bound to look beyond the record to a former occupancy of the land under a deed of which he has no notice by the record or otherwise.<sup>5</sup> If the purchaser makes due inquiry, and such inquiry fails to disclose any title or interest in the person in possession, the presumptive notice from possession is rebutted.<sup>6</sup>

The doctrine of notice by possession applies to possession under a legal title as well as to possession under an equitable one.<sup>7</sup>

<sup>1</sup> *Simmons Creek Coal Co. v. Doran*, 142 U. S. 417, 12 Sup. Ct. Rep. 239; *Landes v. Brant*, 10 How. 348; *McLean v. Clapp*, 141 U. S. 429, 436, 12 Sup. Ct. Rep. 29; *French v. Loyal Co.* 5 Leigh, 627, 641; *Western M. & M. Co. v. Peytona Cannel Coal Co.* 8 W. Va. 406, 441; *Core v. Faupel*, 24 W. Va. 238.

<sup>2</sup> *Bounds v. Little*, 75 Tex. 316, 12 S. W. Rep. 1109.

<sup>3</sup> *Harris v. Arnold*, 1 R. I. 125; *Smith v. Miller*, 63 Tex. 72; *Leach v. Ansbacher*, 55 Pa. St. 85; *Munn v. Burges*, 70 Ill. 604; *Jaques v. Weeks*, 7 Watts, 261.

<sup>4</sup> *Western Mining & Manuf. Co. v. Coal*

*Co.* 8 W. Va. 406; *Wright v. Wood*, 23 Pa. St. 120.

<sup>5</sup> *Hiller v. Jones*, 66 Miss. 636, 6 So. Rep. 465.

<sup>6</sup> *Jonas v. Smith*, 1 Hare, 43; *Hewitt v. Loosemore*, 9 Hare, 449; *Flagg v. Mann*, 2 Sumn. 486; *Williamson v. Brown*, 15 N. Y. 354; *Riley v. Quigley*, 50 Ill. 304, 99 Am. Dec. 516; *Fair v. Stevenot*, 29 Cal. 486; *Thompson v. Pioche*, 44 Cal. 508; *M'Mechan v. Griffing*, 3 Pick. 149, 15 Am. Dec. 198; *Nutting v. Herbert*, 37 N. H. 346; *Rogers v. Jones*, 8 N. H. 264; *Harris v. Arnold*, 1 R. I. 125; *Betts v. Letcher*, 1 S. D. 182, 46 N. W. Rep. 193.

<sup>7</sup> *Daniel v. Hester*, 29 S. C. 147, 7 S. E. Rep. 65.

**1566.** A purchaser of land in the possession of a tenant of the vendor has notice of the actual interest of the tenant and of the whole extent of that interest, and is bound to admit the tenant's claim so far as it could be enforced against the vendor.<sup>1</sup> Whether the possession of the tenant is notice of the landlord's title as well as of the occupant's tenancy is left in some measure uncertain on the authorities,<sup>2</sup> though the weight of authority is that it affords notice of the landlord's title,<sup>3</sup> for such possession imposes upon the purchaser the obligation of inquiring by what right the tenant holds.

If the tenant changes his character by taking an agreement to purchase, or he has this right under his lease and exercises his option to purchase, his possession amounts to notice of his equitable title as purchaser.<sup>4</sup>

The fact that one had been a tenant of a portion of a building, and continued to be a tenant until he took possession under his

<sup>1</sup> *Daniels v. Davison*, 16 Ves. 249; *Cunningham v. Pattee*, 99 Mass. 248; *Chesterman v. Gardner*, 5 Johns. Ch. 29; *Seymour v. McKinstry*, 106 N. Y. 230, 12 N. E. Rep. 348, 14 N. E. Rep. 94; *Spofford v. Manning*, 6 Paige, 383; *Page v. Waring*, 76 N. Y. 463, 470; *Bassett v. Wood*, 9 N. Y. Supp. 79; *De Ruyter v. Trustees*, 2 Barb. Ch. 555; *Trustees Union College v. Wheeler*, 61 N. Y. 88; *Peasley v. McFadden*, 68 Cal. 611, 10 Pac. Rep. 179; *Hull v. Noble*, 40 Me. 459; *Kerr v. Day*, 14 Pa. St. 112, 53 Am. Dec. 526; *Marsh v. Nelson*, 101 Pa. St. 51; *Clark v. Beck*, 72 Ga. 127; *Fery v. Pfeiffer*, 18 Wis. 510; *Smith v. Gibson*, 25 Neb. 511, 41 N. W. Rep. 360; *Glendenning v. Bell*, 70 Tex. 632, 8 S. W. Rep. 324; *Bowman v. Anderson*, 82 Iowa, 210, 47 N. W. Rep. 1087.

<sup>2</sup> *Deetjen v. Richter*, 33 Kans. 410, 414, 6 Pac. Rep. 595.

<sup>3</sup> The following cases hold that the tenant's possession is notice, not only of his own rights, but of his landlord's title as well: *United States v. Sliney*, 21 Fed. Rep. 834; *Hanly v. Morse*, 32 Me. 287; *Dutton v. Warschauer*, 21 Cal. 609, 82 Am. Dec. 765; *O'Rourke v. O'Connor*, 39 Cal. 442; *Landers v. Bolton*, 26 Cal. 393; *Thomp-*

*son v. Pioche*, 44 Cal. 508; *Haworth v. Taylor*, 108 Ill. 275; *Whitaker v. Miller*, 83 Ill. 381; *Smith v. Jackson*, 76 Ill. 254; *Franz v. Orton*, 75 Ill. 100; *Kerr v. Day*, 14 Pa. St. 112, 53 Am. Dec. 526; *Hood v. Fahnestock*, 1 Pa. St. 470, 44 Am. Dec. 147; *Bank v. Flagg*, 3 Barb. Ch. 316; *Purcell v. Enright*, 31 N. J. Eq. 74; *Morrison v. March*, 4 Minn. 422; *Dickey v. Lyon*, 19 Iowa, 544; *Conlee v. McDowell*, 15 Neb. 184; *Glendenning v. Bell*, 70 Tex. 632, 8 S. W. Rep. 324; *Woodson v. Collins*, 56 Tex. 168; *Massie v. Yates* (Tex. Civ. App.), 29 S. W. Rep. 1132; *Clark v. Beck*, 72 Ga. 127.

On the other hand, the following cases hold that his possession is not notice of the landlord's title, but only of the tenant's right: *Hanbury v. Litchfield*, 2 Mylne & K. 629; *Flagg v. Mann*, 2 Sumn. 486; *Beatie v. Butler*, 21 Mo. 313, 64 Am. Dec. 234.

<sup>4</sup> *Knight v. Bowyer*, 23 Beav. 609, 641; *Taylor v. Stibbert*, 2 Ves. Jr. 437, 440; *Kerr v. Day*, 14 Pa. St. 112; *Coari v. Olsen*, 91 Ill. 273; *Smith v. Gibson*, 25 Neb. 511, 41 N. W. Rep. 360; *Russell v. Moore*, 3 Met. (Ky.) 436; *Chesterman v. Gardner*, 5 Johns. Ch. 29, 32, 9 Am. Dec. 265.

contract of purchase, does not impair the notice imparted by such possession.<sup>1</sup>

**1567. Possession is notice only during its continuance.** A purchaser is not bound to take notice of an antecedent possession which has ceased prior to his negotiations to purchase, and he need not inquire as to the title or right of the former occupant.<sup>2</sup> A former possession which has ceased is not notice, though there may be evidence of such possession still remaining upon the ground. Thus the use of a part of a tract of land as a private burying-ground might be such as to afford notice of the rights of a former owner who had maintained it as a burial-place for his family and friends. "It is true the dead are incapable of possessing the land. It is the act of the living in burying the dead which constitutes exercise of dominion over and the assertion of claim of right to it." But if the place does not present the appearance of being maintained as a family burial-ground by any person, but contains gravestones bearing the names of other persons and other families, is not inclosed, and has a neglected and abandoned appearance, it cannot be regarded as affording notice to a purchaser of the record title that some former owner still has rights in the land.<sup>3</sup>

**1568. Possession, to operate as implied notice, must be visible and open, notorious and exclusive, and not merely a constructive possession.**<sup>4</sup> Possession of land by one who has built

<sup>1</sup> *Phelan v. Brady*, 119 N. Y. 587, 23 N. E. Rep. 1109.

<sup>2</sup> *Hewes v. Wiswell*, 8 Me. 94; *Campbell v. Brackenridge*, 8 Blackf. 471; *Ehle v. Brown*, 31 Wis. 405; *Meehan v. Williams*, 48 Pa. St. 238; *Hiller v. Jones*, 66 Miss. 636, 6 So. Rep. 465.

<sup>3</sup> *Roussain v. Norton*, 53 Minn. 560, 55 N. W. Rep. 747.

<sup>4</sup> *Noyes v. Hall*, 97 U. S. 34; *Gum v. Equitable Trust Co.* 1 McCrary, 51; *Townsend v. Little*, 109 U. S. 504, 3 Sup. Ct. Rep. 357; *Simmons Creek Coal Co. v. Doran*, 142 U. S. 417, 12 Sup. Ct. Rep. 239; *McLean v. Clapp*, 141 U. S. 429, 436, 12 Sup. Ct. Rep. 29. **Alabama:** *Bernstein v. Humes*, 71 Ala. 260. **California:** *Fair v. Stevenot*, 29 Cal. 486; *Smith v. Yule*, 31 Cal. 180, 89 Am. Dec. 167; *Dutton v. Warschauer*, 21 Cal. 609,

82 Am. Dec. 765. **Illinois:** *Mason v. Mullahy*, 145 Ill. 383, 34 N. E. Rep. 36; *Rock Island & P. Ry. Co. v. Dimick*, 144 Ill. 628, 32 N. E. Rep. 291, 19 L. R. A. 105; *Partridge v. Chapman*, 81 Ill. 137; *Smith v. Jackson*, 76 Ill. 254; *Truesdale v. Ford*, 37 Ill. 210; *Davis v. Hopkins*, 15 Ill. 519; *Springfield Homestead Asso. v. Roll*, 137 Ill. 205, 27 N. E. Rep. 184; *Morrison v. Kelly*, 22 Ill. 610, 74 Am. Dec. 169; *Bogue v. Williams*, 48 Ill. 371; *Smith v. Jackson*, 76 Ill. 254. **Indiana:** *Jeffersonville, M. & T. R. Co. v. Oyler*, 82 Ind. 394. **Kansas:** *Trezise v. Lacy*, 22 Kans. 742; *Beaubien v. Hindman*, 38 Kans. 471, 16 Pac. Rep. 796. **Maine:** *Butler v. Stevens*, 26 Me. 484; *Hawes v. Wiswell*, 8 Me. 94. **Massachusetts:** *Kendall v. Lawrence*, 22 Pick. 540; *M'Mechan v. Griffing*, 3 Pick. 149,

a house upon it and is living in it, or by one who has built fences around his lot, is sufficiently open and patent to put parties in interest upon inquiry, and to charge them with notice of all they might learn by such inquiry.<sup>1</sup> But neither actual occupancy, nor cultivation, nor residence is necessary to constitute actual possession. Where the property is so situated as not to admit of any permanent useful improvements, and the continued claim of the party has been evidenced by public acts of ownership, such as he would exercise over property which he claimed in his own right, and would not exercise over property he did not claim, such possession will create a bar under the statute of limitations. What acts may or may not constitute a possession are necessarily varied, and depend to some extent upon the nature, locality, and use to which the property may be applied, the situation of the parties, and a variety of circumstances which have necessarily to be taken into consideration in determining the question.<sup>2</sup>

Possession by the purchaser of a tenement house who had formerly been a tenant of a part of the house, and who, on purchase, removed to the rooms before occupied by the housekeeper of the vendor, and was known as owner, and collected the rent from all the tenants, is sufficiently open and visible to be notice of his ownership, so as to defeat a mortgage taken before his deed is recorded, and without knowledge of it.<sup>3</sup>

15 Am. Dec. 198. **Michigan**: *Smith v. Greenop*, 60 Mich. 61, 26 N. W. Rep. 832; *McKee v. Wilcox*, 11 Mich. 358, 83 Am. Dec. 743. **Nevada**: *Brophy Mining Co. v. Brophy & Dale G. & S. M. Co.* 15 Nev. 101. **New Hampshire**: *Patten v. Moore*, 32 N. H. 382; *Bell v. Twilight*, 22 N. H. 500. **New Jersey**: *Coleman v. Barklew*, 27 N. J. L. 357; *Holmes v. Stout*, 10 N. J. Eq. 419; *McCall v. Yard*, 11 N. J. Eq. 58. **New York**: *Webster v. Van Steenberg*, 46 Barb. 211; *Tuttle v. Jackson*, 6 Wend. 213, 226, 21 Am. Dec. 306; *Page v. Waring*, 76 N. Y. 463; *Brown v. Volkening*, 64 N. Y. 76; *Pope v. Allen*, 90 N. Y. 298. **North Carolina**: *Tankard v. Tankard*, 79 N. C. 54; *Webber v. Taylor*, 2 Jones Eq. 9. **Ohio**: *Ranney v. Hardy*, 43 Ohio St. 157; 1 N. E. Rep. 523; *Williams v. Sprigg*, 6 Ohio St. 585. **Pennsylvania**: *Boyce v. McCulloch*,

3 Watts & S. 429, 39 Am. Dec. 35; *Meehan v. Williams*, 48 Pa. St. 238; *Martin v. Jackson*, 27 Pa. St. 504, 67 Am. Dec. 489. **South Carolina**: *Ellis v. Young*, 31 S. C. 322, 9 S. E. Rep. 955. **South Dakota**: *Betts v. Letcher*, 1 S. D. 182, 46 N. W. Rep. 193. **Texas**: *Satterwhite v. Rosser*, 61 Tex. 166; *Blankenship v. Douglas*, 26 Tex. 225, 82 Am. Dec. 608. **West Virginia**: *Core v. Faupel*, 24 W. Va. 238; *Western Min. Co. v. Peytona Coal Co.* 8 W. Va. 406, 441. **Wisconsin**: *Ely v. Wilcox*, 20 Wis. 523, 91 Am. Dec. 436.

<sup>1</sup> *Bright v. Buckman*, 39 Fed. Rep. 243; *Moore v. Tarrant Co. Agricultural Asso.* (Tex. Civ. App.) 31 S. W. Rep. 709.

<sup>2</sup> *Ewing v. Burnet*, 11 Pet. 41, 53; *Simmons Creek Coal Co. v. Doran*, 142 U. S. 417, 12 Sup. Ct. Rep. 239.

<sup>3</sup> *Phelan v. Brady*, 119 N. Y. 587, 23 N. E. Rep. 1109.

The cutting of wood or timber continued year after year or continuously is an act showing possession, and indicating a right or title.<sup>1</sup> So the growing and cutting of willows upon land every year, for basket-making.<sup>2</sup> So does openly ploughing or cultivating a field,<sup>3</sup> or fastening the doors and nailing up the windows of a house in which there is furniture.<sup>4</sup>

The occasional cutting of wood upon the land under such circumstances that these acts might be regarded as acts of trespass rather than acts of ownership is not evidence of actual possession such as constitutes notice.<sup>5</sup> Nor is the use of a vacant lot for the occasional hanging out of clothes and the like.

A notice upon a board set up upon the land that it is for sale, by an agent whose name and address is given, is notice of the owner's rights sufficient to put a purchaser upon inquiry.<sup>6</sup>

The possession must be exclusive, and therefore possession by a purchaser under an unrecorded conveyance is no notice of title as against a subsequent incumbrancer, where the grantor also lived on the premises as a member of the grantee's family.<sup>7</sup>

**1569. Occupation of an easement.** — The easement may be patent, as in the case of a footpath; or there may be such occupation of it as to put a purchaser upon inquiry. The owner of a house sold to his adjoining neighbor the right of using two chimneys in the partition wall and received the consideration, but never made any grant of the easement. He afterwards sold the house without saying anything about his neighbor's right to use two of the chimneys. But as there were fourteen chimney-pots on the wall, and only twelve flues in the house, the court held that the purchaser was put upon inquiry and had constructive notice of the neighbor's right.<sup>8</sup> The occupation by a grantor of an

<sup>1</sup> *Nolan v. Grant*, 51 Iowa, 519, 1 N. W. Rep. 709; *Krider v. Lafferty*, 1 Whart. 303.

<sup>2</sup> *Banner v. Ward*, 21 Fed. Rep. 820.

<sup>3</sup> *Lyman v. Russell*, 45 Ill. 281; *Wickes v. Lake*, 25 Wis. 71; *Buck v. Holt*, 74 Iowa, 294, 37 N. W. Rep. 377. See, however, *Sanford v. Weeks*, 38 Kans. 319, 16 Pac. Rep. 465.

<sup>4</sup> *Wrede v. Cloud*, 52 Iowa, 371, 3 N. W. Rep. 400.

<sup>5</sup> *Holmes v. Stout*, 10 N. J. Eq. 419.

<sup>6</sup> *Hatch v. Bigelow*, 39 Ill. 546.

<sup>7</sup> *Puckett v. Reed*, 3 Tex. Civ. App. 350, 22 S. W. Rep. 515.

<sup>8</sup> *Hervey v. Smith*, 22 Bear. 299, 302. The Master of the Rolls said: "Here the defendant buys the house, and finds twelve flues in it, but fourteen chimneys in the wall. The question is, was he not bound to see that he alone had twelve out of the fourteen, and does it not follow that two must have been used by the adjoining neighbor? He might not have thought fit to count them or look at them, but I think he was put on inquiry, and that he

easement in adjoining land which he has conveyed without a reservation of the easement, being inconsistent with the grant, is notice, to a purchaser from the grantee, of a parol reservation of the easement.<sup>1</sup>

The existence of a railroad over a tract of land, with its embankments, excavations, and tracks, is notice to a purchaser of such land of an outstanding right or easement inconsistent with an absolute and exclusive title in the grantor. It is the duty of the purchaser to inquire by what right the railroad is built over the land, and he has notice of such rights as the owners of the railroad may have acquired.<sup>2</sup> The possession is not restricted to the land actually fenced in.<sup>3</sup> But the adverse possession indicated by the company's track would be confined to the amount of land which the company could acquire as a right of way by condemnation proceedings, and which would be reasonably necessary for the convenient use and maintenance of the railway in the customary mode, and therefore would not include a lot situated a hundred and thirty-two feet from the track.<sup>4</sup>

**1570.** An equivocal, occasional, or temporary possession will not take the case out of the operation of the registry laws.<sup>5</sup> The protection furnished by these laws cannot be taken away except upon clear proof of a want of good faith in the party claiming their protection, and a clear right in him who seeks to establish notice by means of possession.<sup>6</sup> The circumstances must be such that a prudent man would be put upon inquiry, and would be chargeable with bad faith if he did not inquire. "We would observe," said Chief Justice Parsons in an early case in Massachusetts,<sup>7</sup> "that the statute requiring the registry of conveyances

cannot now say that he had no notice of the agreement by which Felton sold the right to Cubitt."

<sup>1</sup> *Randall v. Silverthorn*, 4 Pa. St. 173.

<sup>2</sup> *Chicago & E. I. R. Co. v. Wright*, 153 Ill. 307, 38 N. E. Rep. 1062; *Indiana, B. & W. Ry. Co. v. McBroom*, 114 Ind. 198, 15 N. E. Rep. 831; *Paul v. Connersville & N. Junc. R. Co.* 51 Ind. 527; *Jeffersonville, M. & I. R. Co. v. Oyler*, 60 Ind. 383. See § 1518.

<sup>3</sup> *Warner v. Fountain*, 28 Wis. 405.

<sup>4</sup> *Gulf, &c. Ry. Co. v. Gill*, 5 Tex. Civ. App. 496, 23 S. W. Rep. 142; *Day v. Railroad Co.* 41 Ohio St. 392.

<sup>5</sup> *Boynton v. Rees*, 8 Pick. 329, 19 Am. Dec. 326; *Williams v. Sprigg*, 6 Ohio St. 585; *Masterson v. West End N. G. R. Co.* 72 Mo. 342; *Elliot v. Lane*, 82 Iowa, 484, 31 Am. St. Rep. 504.

<sup>6</sup> *Brown v. Volkening*, 64 N. Y. 76, 2 N. Y. W. Dig. 86; *Union College v. Wheeler*, 59 Barb. 585; *Bogue v. Williams*, 48 Ill. 371; *Butler v. Stevens*, 26 Me. 484; *Merritt v. Northern R. Co.* 12 Barb. 605; *Sanford v. Weeks*, 38 Kans. 319, 16 Pac. Rep. 465; *Coleman v. Barklew*, 27 N. J. L. 357.

<sup>7</sup> *Norcross v. Widgery*, 2 Mass. 506.

being so very beneficial, and it being so easy to conform to it, when a prior conveyance not recorded until after one of a subsequent date is attempted to be supported on the ground of fraud in the second purchaser, the fraud must be very clearly proved." The using of lands for pasturing, or for cutting timber, is not such an occupancy as will charge a purchaser with notice. The possession must be accompanied by improvement of the property to constitute notice.<sup>1</sup>

One purchasing or taking a mortgage of premises in the possession of a tenant is bound to inquire into the nature and extent of the tenant's interest, and is affected with notice of that interest whatever it may be.<sup>2</sup> Such possession is also held to be notice of a collateral agreement held by the tenant for the purchase of the property.<sup>3</sup>

A husband and wife, who had long occupied a farm, conveyed it to their son, and took back a mortgage conditioned for their support, but omitted to record it. They continued upon the farm, they and the son constituting one family, all contributing to its support. Some years afterwards the son made a second mortgage, which was duly recorded; but the second mortgagee was regarded as having had notice of the legal title of the first mortgagees.<sup>4</sup>

A joint residence of husband and wife does not give notice of any claim of interest in the land by the wife.<sup>5</sup> Where a husband and wife live upon land together, the possession is presumptively in him.<sup>6</sup>

If the owner of land conveys only a partial interest in it, as, for instance, the wood and timber growing upon it, and takes back a mortgage which is not recorded, his continued possession is not notice of his claim to the wood and timber, as against one who has purchased upon the faith of his bill of sale.<sup>7</sup>

1571. Actual possession of land, by one who holds an unrecorded contract of purchase, or a bond for a deed, is notice of

<sup>1</sup> *M'Mechan v. Griffing*, 3 Pick. 149, 15 Am. Dec. 198, and cases cited; *Holmes v. Stout*, 10 N. J. Eq. 419; *Union College v. Wheeler*, 59 Barb. 585, and cases cited.

<sup>2</sup> *Cunningham v. Pattee*, 99 Mass. 248, 252.

<sup>3</sup> *Knight v. Bowyer*, 23 Beav. 609, 641; *Taylor v. Stibbert*, 2 Ves. Jr. 437; *Kerr v. Day*, 14 Pa. St. 112, 53 Am. Dec. 526.

<sup>4</sup> *Boggs v. Anderson*, 50 Me. 161. See *Harrison v. N. J. R. & T. Co.* 19 N. J. Eq. 488.

<sup>5</sup> *Neal v. Perkerson*, 61 Ga. 345.

<sup>6</sup> *Garrard v. Hull*, 92 Ga. 787, 20 S. E. Rep. 357; *Primrose v. Browning*, 59 Ga. 499.

<sup>7</sup> *Patten v. Moore*, 32 N. H. 382.



his rights to one who takes a mortgage on the land from the vendor, and the mortgagee will take a lien only on the vendor's right.<sup>1</sup> Such vendee in possession is not bound to examine the records for subsequent incumbrances of the land by his vendor, nor is the record notice thereof to him.<sup>2</sup> Though the vendor executes a mortgage while the vendee is in possession under his contract, until actual notice of the mortgage the purchaser may safely continue to make payments of the purchase-money to his vendor.

But a mortgage made by the vendor, while such vendee is in possession, creates a valid lien on the interest remaining in the vendor at the time of its execution, which, before conveyance, is the legal title, and a beneficial estate in the lands to the extent of the unpaid purchase-money; and payments made on the purchase-money to the vendor by the purchaser, after he has knowledge of the mortgage, will be unavailing as against the mortgagee.<sup>3</sup> But the possession of a mortgagee whose mortgage is recorded is not notice of his claim under an agreement to purchase the premises, although a rumor of his purchase was current in the neighborhood;<sup>4</sup> for in such case his possession is consistent with his record title, and it may well be taken for granted that he holds under the recorded title. Possession is notice only of the legal or equitable interest in the land of the person in possession. It vests the purchaser with notice of every fact and circumstance which he might have learned by making inquiry of the occupant, but it does not impose upon him the duty of searching the record in the name of such occupant to ascertain what title he has parted with.<sup>5</sup>

**1572. Possession, to operate as notice, should be inconsis-**

<sup>1</sup> *Doolittle v. Cook*, 75 Ill. 354; *Bright v. Buckman*, 39 Fed. Rep. 243; *Moyer v. Hinman*, 13 N. Y. 180; *Gouverneur v. Lynch*, 2 Paige, 300; *Jaeger v. Hardy*, 48 Ohio St. 335, 27 N. E. Rep. 863.

<sup>2</sup> *Jaeger v. Hardy*, 48 Ohio St. 335, 27 N. E. Rep. 863.

<sup>3</sup> *Jaeger v. Hardy*, 48 Ohio St. 335, 27 N. E. Rep. 863; *Lefferson v. Dallas*, 20 Ohio St. 68; *Ten Eick v. Simpson*, 1 Sandf. Ch. 244; *Young v. Guy*, 87 N. Y. 457; *Fasholt v. Reed*, 16 Serg. & R. 266.

In *Jaeger v. Hardy*, 48 Ohio St. 335, 27 N. E. Rep. 863, Chief Justice Williams on this point further said: "If it be conceded, as some authorities maintain,

that, as the vendor is a mere trustee of the lands for the vendee, and that the latter is the trustee of the purchase-money for the former, the lien of a mortgage executed by the vendor, after the contract of sale, does not attach to the lands, but only to his claim against his vendee for whatever may then remain unpaid on the purchase, still, the mortgage would, at least, be operative to transfer to the mortgagee, for his security, the mortgagor's claim against the purchaser."

<sup>4</sup> *Plumer v. Robertson*, 6 Serg. & R. 179.

<sup>5</sup> *Losey v. Simpson*, 11 N. J. Eq. 246; *Bassett v. Wood*, 9 N. Y. Supp. 79, quoting text.

tent with the title upon which the purchaser relies.<sup>1</sup> If the possession is consistent with the record title, the purchaser is not bound to make any inquiry concerning the title as indicated by the possession. No inquiry is suggested by the possession.<sup>2</sup> A deed to one in his own right, when recorded, becomes notice to all persons that his possession under the deed is in his own right, and a purchaser from him is not required to make further inquiry as to the right by which he holds possession.<sup>3</sup> His possession is not notice of any title or claim beyond that which he holds under his recorded deed.<sup>4</sup> The owner and occupant of a house conveyed it in fee to a son, and, taking back a lease for life, remained in possession. The son, before the lease was recorded, gave a mortgage on the property to one who made reasonable inquiries as to liens. It was held that the possession of the former owner under the lease was not such as to give the mortgagee notice of any rights in the premises.<sup>5</sup>

The owner of a farm conveyed it to his three sons by a deed which acknowledged the receipt of the purchase-money and was duly recorded. The sons afterwards mortgaged the farm to secure a loan. At the time of such loan, the widow of the vendor resided in one of the houses on the farm, and, with her daughters and minor children, cultivated a part of the same. The three sons also lived there, with their families, conducting farming operations, and claiming that the property belonged wholly to them, free from any incumbrance. It was held that the mere fact that complainant resided on the place, and cultivated a portion of the land, was not constructive notice to the mortgagee that she held a vendor's lien thereon, under an alleged transfer from her husband of purchase-money notes executed by the sons.<sup>6</sup>

**1573.** Possession of a part of the premises described in a deed or mortgage may be notice to a purchaser or mortgagee of the condition of the title of the entire tract, if the purchaser or

<sup>1</sup> *Staples v. Fenton*, 5 Hun, 172; *Smith v. Yule*, 31 Cal. 180, 89 Am. Dec. 167; *McNeil v. Polk*, 57 Cal. 323.

<sup>2</sup> *Plumer v. Robertson*, 6 Serg. & R. 179.

<sup>3</sup> *Fargason v. Edrington*, 49 Ark. 207, 4 S. W. Rep. 763.

<sup>4</sup> *Great Falls Co. v. Worster*, 15 N. H. 412; *Dutton v. McReynolds*, 31 Minn. 66, 16 N. W. Rep. 468.

<sup>5</sup> *Staples v. Fenton*, 5 Hun, 172. A like

discussion on similar facts was made in *Bell v. Twilight*, 18 N. H. 159, 45 Am. Dec. 367, but the same reasons were not assigned. The same view was taken in a case where the grantors conveyed a farm to their son, and took back a mortgage conditioned for their support. *Boggs v. Anderson*, 50 Me. 161.

<sup>6</sup> *Munn v. Achey* (Ala.), 18 So. Rep. 299.

mortgagee has actual notice of the possession; for, having such notice, he is bound to follow up the inquiry, and, if that would necessarily lead to the knowledge of the possession of the other part by another person under the same title, he is affected with notice of possession of such other part.<sup>1</sup> But if his notice of the possession of a part be constructive only, its effect cannot be extended to lands outside the limits of the possession.<sup>2</sup> Possession of an improved portion of a tract of land under a conveyance of the whole is construed to be notice of title to the whole.<sup>3</sup>

But in cases where there are no unusual circumstances, mere possession by a vendee is notice of the vendee's rights to the land actually occupied, and no more.<sup>4</sup>

If a grantor sells a part of his land, and the grantee enters into possession of this part, his possession is notice of his title, though this rests in parol or the deed has not been recorded.<sup>5</sup>

**1574. Possession may be notice of the homestead rights of the possessor.** Thus in Texas, the Constitution of which State provides that no mortgage of the homestead shall be valid except for purchase-money, or for improvements thereon,<sup>6</sup> the fact that certain land is occupied and used by the owner as a homestead is to be determined by the visible facts of use and enjoyment, though the husband and wife, in order to obtain a mortgage loan, have falsely declared under oath that the lands mortgaged are not their homestead. Their representations do not estop them from claiming their homestead exemption under the statute, such representations being contrary to the visible and actual facts. The court in this case say: "The fact of actual possession and use as the home of the family was one against which the lender could not shut his eyes. Every person dealing with land must take notice of an actual, open, and exclusive possession; and where this, concurring with interest in the possessor, makes it a homestead, the lender stands charged with notice of that fact, it matters not what declarations to the contrary the borrower may make."<sup>7</sup>

<sup>1</sup> *Nolan v. Grant*, 51 Iowa, 519, 1 N. W. Rep. 709; *Watkins v. Edwards*, 23 Tex. 443.

<sup>2</sup> *Daggs v. Ewell*, 3 Woods, 344; *Jeffersonville, M. & I. R. Co. v. Oyler*, 82 Ind. 394.

<sup>3</sup> *Ewing v. Burnet*, 11 Pet. 41, 52.

<sup>4</sup> *Krider v. Lafferty*, 1 Whart. 303;

*Jeffersonville, M. & I. R. Co. v. Oyler*, 82 Ind. 394; *Cincinnati, Ind. & C. Ry. Co. v. Smith*, 127 Ind. 461, 26 N. E. Rep. 1009.

<sup>5</sup> *Patton v. Hollidaysburg*, 40 Pa. St. 206. *Contra*, *Jeffersonville, M. & I. R. Co. v. Oyler*, 82 Ind. 394.

<sup>6</sup> Art. xvi. § 50.

<sup>7</sup> *Texas L. & L. Co. v. Blalock*, 76 Tex.

1575. Possession by a grantor, after a full recorded conveyance, is not constructive notice to subsequent purchasers of any right reserved in the land or claimed by the grantor.<sup>1</sup> Thus where a grantor took a mortgage while in possession from his grantee after the latter had given a mortgage to another, the last-named mortgage, being first recorded, was held to have priority.<sup>2</sup> The reason for this exception to the general rule is in some cases said to be, that a subsequent purchaser is entitled to rely upon the presumption that possession retained after a conveyance may be presumed to be a mere holding-over at will until it becomes convenient for the grantor to remove from the land. Moreover, a party ought not to be allowed to contradict the force and effect of a full conveyance by the mere fact of possession after his deed has been recorded.<sup>3</sup> He is estopped from setting up any claim

85, 13 S. W. Rep. 12, per Chief Justice Stayton; *Equitable Mortgage Co. v. Lowry*, 55 Fed. Rep. 165.

<sup>1</sup> *Arkansas*: *Gill v. Hardin*, 48 Ark. 409, 3 S. W. Rep. 519, per Hemingway, J., in *Turman v. Bell*, 54 Ark. 273, 15 S. W. Rep. 886. "On the other side it is said that the execution of a warranty deed without reservation is a most solemn declaration by the grantor that he has parted with all his rights in the property, and directly negatives the reservation of any right; that those who see the deed are warranted in relying upon such declaration as much as if it had been made to them orally upon an inquiry; and that, if they acquire interests in faith of such reliance, the grantor in possession will be estopped to assert any right secretly reserved from the grant; that, as the grantor has declared that he parted with his entire estate, strangers about to deal with the property would reasonably refer his continuous possession to the sufferance of the grantee, and would not reasonably think to refer it to a reserved right." *Indiana*: *Quick v. Milligan*, 108 Ind. 419, 58 Am. Rep. 49; *Crassen v. Swordland*, 22 Ind. 427; *Tuttle v. Churchman*, 74 Ind. 311. *Iowa*: *Koon v. Tramel*, 71 Iowa, 132, 32 N. W. Rep. 243; *Sprague v. White*, 73 Iowa, 670, 35 N. W. Rep. 751; *May v. Sturdivant*, 75 Iowa, 116, 39 N. W. Rep.

221, 9 Am. St. Rep. 463; *Dodge v. Davis*, 85 Iowa, 77, 52 N. W. Rep. 2. *Massachusetts*: *Newhall v. Pierce*, 5 Pick. 450. *Michigan*: *Dawson v. Danbury Bank*, 15 Mich. 489; *Abbott v. Gregory*, 39 Mich. 68; *Humphrey v. Hurd*, 29 Mich. 44; *Bloomer v. Henderson*, 8 Mich. 395, 77 Am. Dec. 453. *Mississippi*: *Hafter v. Strange*, 65 Miss. 323, 3 So. Rep. 190, 7 Am. St. Rep. 659. *Nebraska*: *Burt v. Baldwin*, 8 Neb. 487. *Nevada*: *Brophy Min. Co. v. Brophy & Dale G. & S. Min. Co.* 15 Nev. 101. *New Hampshire*: *Bell v. Twilight*, 18 N. H. 159. *New Jersey*: *Van Keuren v. Central R. Co.* 38 N. J. L. 165; *Groton Sav. Bank v. Batty*, 30 N. J. Eq. 126. *New York*: *Seymour v. McKinstrey*, 106 N. Y. 230, 12 N. E. Rep. 348, 14 N. E. Rep. 94; *Staples v. Fenton*, 5 Hun, 172; *New York L. Ins. Co. v. Cutler*, 3 Sandf. Ch. 176. *Texas*: *Eylar v. Eylar*, 60 Tex. 315; *Hurt v. Cooper*, 63 Tex. 362; *Hoffman v. Blume*, 64 Tex. 334; *Love v. Breedlove*, 75 Tex. 649, 13 S. W. Rep. 222. *Wisconsin*: *Denton v. White*, 26 Wis. 679; *Schwallback v. Milwaukee & C. P. R. Co.* 69 Wis. 292, 2 Am. St. Rep. 740, 34 N. W. Rep. 128; *Mateskey v. Feldman*, 75 Wis. 103, 43 N. W. Rep. 733.

<sup>2</sup> *Koon v. Tramel*, 71 Iowa, 132, 32 N. W. Rep. 243.

<sup>3</sup> *Koon v. Tramel*, 71 Iowa, 132, 32

or title founded upon possession against the terms of his own deed.<sup>1</sup>

When, however, the grantor's right or title under which he holds possession was acquired after the making of his deed, he is entitled to the same protection as a third person, and his possession is notice of his rights to the same extent that the possession of a third person is notice of his rights. Some courts, however, hold that the grantor's possession after a conveyance by him, especially if long continued, is notice of some interest or title in him not disclosed in his deed. Possession by the grantor is not regarded as substantially different from possession by a third person.<sup>2</sup> This view has frequently been recognized in cases where a grantor has given an absolute deed, which was intended to operate merely as a mortgage, there being no defeasance, or the defeasance given not being recorded.<sup>3</sup>

**1576.** When the grantor's possession has continued for a long period, the presumption of a claim of right hostile to the title granted arises in every case where such possession is inconsistent with the rights of the grantee; and in such case a court or jury might find the possession adverse from the nature of the

N. W. Rep. 243; *Eylar v. Eylar*, 60 Tex. 315; *Bloomer v. Henderson*, 8 Mich. 395, 404, 77 Am. Dec. 453; *Mateskey v. Feldman*, 75 Wis. 103, 43 N. W. Rep. 733; *Haftor v. Strange*, 65 Miss. 323, 3 So. Rep. 190.

<sup>1</sup> *Van Keuren v. Cent. Ry. Co.* 38 N. J. L. 165.

<sup>2</sup> **Arkansas**: *Turman v. Bell*, 54 Ark. 273, 15 S. W. Rep. 886, where Hemingway, J., delivering the opinion, said: "Those that sustain the application of this rule say that by the terms of the deed the grantor has not the right of possession, and that his continuing possession gives notice that he has rights reserved not expressed in the deed; that, inasmuch as the records disclose no right of possession, it is but reasonable to conclude that the continuing possession rests upon some right not disclosed by the records, and that the reasonableness of such conclusion imposes upon persons about to deal with the land the duty to make inquiry." **California**: *Pell v. McElroy*, 36 Cal. 268;

*Daubenspeck v. Platt*, 22 Cal. 330. **Illinois**: *Ford v. Marcall*, 107 Ill. 136; *White v. White*, 89 Ill. 460; *Illinois Cent. R. Co. v. McCullough*, 59 Ill. 166. **Kentucky**: *Hopkins v. Garrard*, 7 B. Mon. 312. **Maine**: *Webster v. Maddox*, 6 Me. 256; *McLaughlin v. Shepherd*, 32 Me. 143, 52 Am. Dec. 646; *Boggs v. Anderson*, 50 Me. 161; *M'Kechnie v. Hoskins*, 23 Me. 230. **Minnesota**: *New v. Wheaton*, 24 Minn. 406; *Groff v. Ramsey*, 19 Minn. 44; *Morrison v. March*, 4 Minn. 422. See *Palmer v. Bates*, 22 Minn. 532; *Groff v. State Bank*, 50 Minn. 234, 52 N. W. Rep. 651. **Vermont**: *Wright v. Bates*, 13 Vt. 341.

<sup>3</sup> *Stevens v. Hulin*, 53 Mich. 93, 18 N. W. Rep. 569; *Bennett v. Robinson*, 27 Mich. 26. This case is distinguished from *Bloomer v. Henderson*, 8 Mich. 395, above cited, for the reason that the possession in that case was comparatively recent, while the possession in *Bennett v. Robinson* had continued for nearly three years.

possession, without proof of an express declaration on the part of the occupant that he claimed to hold in hostility to his grant.<sup>1</sup> If, on the other hand, the possession has continued after the making of the deed but a short time, it might be reasonably referred to the sufferance of the grantee.<sup>2</sup>

If the grantor's possession is consistent with all the rights of his grantee, notice may be imparted by it.<sup>3</sup> No notice is imparted by the joint possession of the grantor and grantee.<sup>4</sup>

The possession of a *cestui que trust*, exercising all the rights of ownership, does not impart notice to a purchaser of the legal title from the trustee. His possession does not become adverse until the legal title is conveyed in violation of the trust.<sup>5</sup>

1577. The continued possession of the mortgagor after the premises have been sold under a foreclosure against him is not deemed constructive notice of any subsequent title or interest he may have acquired which does not appear of record.<sup>6</sup> Due diligence on the part of the mortgagee in obtaining information, after having been put upon inquiry, is a test of good faith.<sup>7</sup> A judgment debtor, continuing in possession of land which has been sold under execution against him, may be presumed to hold under the title of the purchaser. The debtor's possession suggests no further inquiry.<sup>8</sup>

1578. If the mortgage be by an absolute deed, the defeasance of which is not recorded, the mortgagor's continued possession and occupation of the premises, within the knowledge of grantees of the mortgagee, is held by some courts to be sufficient notice of the mortgagor's title;<sup>9</sup> but by others his possession is not regarded as notice of the defeasance,<sup>10</sup> for the principle that posses-

<sup>1</sup> Brinkman v. Jones, 44 Wis. 498, per Taylor, J.; Emmons v. Murray, 16 N. H. 385; Turman v. Bell, 54 Ark. 273, 15 S. W. Rep. 886.

<sup>2</sup> Turman v. Bell, 54 Ark. 273, 15 S. W. Rep. 886.

<sup>3</sup> Brinkman v. Jones, 44 Wis. 498; Butler v. Phelps, 17 Wend. 642; Cramer v. Benton, 4 Lans. 291; Chalfin v. Malone, 9 B. Mon. 496, 1 Am. Dec. 525.

<sup>4</sup> McCarthy v. Nicrosi, 72 Ala. 332, 47 Am. Rep. 418; Bell v. Twilight, 18 N. H. 159, 45 Am. Dec. 367; Billington v. Welsh, 5 Binn. 129, 6 Am. Dec. 406; Butler v. Stevens, 26 Me. 484; Jefferson-

ville, M. & I. R. Co. v. Oyler, 82 Ind. 394.

<sup>5</sup> Scott v. Gallagher, 14 S. & R. 333, 16 Am. Dec. 508. This doctrine is, however, repudiated in Pell v. McElroy, 36 Cal. 268, 276.

<sup>6</sup> Dawson v. Danbury Bank, 15 Mich. 489. And see Cook v. Travis, 20 N. Y. 400.

<sup>7</sup> Reed v. Gannon, 50 N. Y. 345, 350.

<sup>8</sup> Cook v. Travis, 20 N. Y. 400.

<sup>9</sup> Daubenspeck v. Platt, 22 Cal. 330; New v. Wheaton, 24 Minn. 406; Pell v. McElroy, 36 Cal. 268.

<sup>10</sup> Crassen v. Swoveland, 22 Ind. 427;

sion is notice of the possessor's title is intended to protect only equitable rights, and not to cover the possessor's fraud, or to protect him when he has no equity.<sup>1</sup> The fact that a grantor after an absolute conveyance remains in possession has frequently been regarded as a circumstance tending to show that the transaction was a mortgage, and sufficient to put others upon inquiry as to the fact.<sup>2</sup> In like manner it has been held that where land is conveyed, and at the same time mortgaged back for the security of the purchase-money, and the grantor becoming the mortgagee continues in actual possession and occupation of the land, but neither the deed nor the mortgage is recorded, and the mortgagor in the mean time makes another mortgage of it to a third person, the mortgage for the purchase-money is entitled to priority.<sup>3</sup>

If a mortgagee by an absolute conveyance, with the consent and authority of the mortgagor, conveys the property to another person for a valuable consideration, the continued possession of the mortgagor takes the case out of the general rule that the possession is notice to the purchaser of the rights of the possessor. The mortgagor is in such case estopped to assert any claim to the title or right to redeem.<sup>4</sup>

**1579.** An occupant of land may be estopped by his acts from claiming that his possession imparts notice. Thus, as against an innocent mortgagee, notice from possession cannot be set up by an occupant who, for the purpose of concealing his interest from creditors, placed the title in the name of another, and, after the latter had given a mortgage upon the land, kept silent and permitted the mortgagor to borrow more money of the

*Newhall v. Pierce*, 5 Pick. 450; *Hennessey v. Andrews*, 6 Cush. 170; *Brinkman v. Jones*, 44 Wis. 498; *Patten v. Moore*, 32 N. H. 382; *Groton Savings Bank v. Batty*, 30 N. J. Eq. 126, 7 Reporter, 505; *Brophy Mining Co. v. Brophy & Dale G. & S. Min. Co.* 15 Nev. 101; *Wooldridge v. Miss. Valley Bank*, 36 Fed. Rep. 97; *Asher v. Mitchell*, 9 Bradw. 335.

<sup>1</sup> *Groton Sav. Bank v. Batty*, 30 N. J. Eq. 126; *Sawyers v. Baker*, 66 Ala. 292; *Berryhill v. Kirchner*, 96 Pa. St. 489; *Stafford Nat. Bank v. Sprague*, 17 Fed. Rep. 784; *Atkins v. Paul*, 67 Ga. 97.

<sup>2</sup> *Lincoln v. Wright*, 4 De G. & J. 16; *Campbell v. Dearborn*, 109 Mass. 130, 145, 12 Am. Rep. 671; *Lawrence v. Du Bois*, 16 W. Va. 443, 461. And see *McLean v. Clapp*, 141 U. S. 429, 12 Sup. Ct. Rep. 29.

<sup>3</sup> *M'Kechnie v. Hoskins*, 23 Me. 230; *Parsell v. Thayer*, 39 Mich. 467. See, however, *Koon v. Tramel*, 71 Iowa, 132, 32 N. W. Rep. 243.

<sup>4</sup> *Minton v. New York Elevated R. Co.* 130 N. Y. 332, 29 N. E. Rep. 319, affirming 8 N. Y. Supp. 959.

mortgagee on a second mortgage; when, if such occupant had notified the mortgagee of his claim upon his first being made aware of the existence of the earlier mortgage, the mortgagee might have collected the mortgage debt, and would not have made the second loan on the security of the land.<sup>1</sup>

## VII. *Fraud as affecting Priority.*

1580. Another instance of constructive fraud arises when a person having a mortgage upon an estate conceals its existence, or so acts in relation to it as to induce another to purchase the estate, or to loan additional money upon it, in the belief that it is free from incumbrance. What circumstances will amount to a fraudulent concealment or misrepresentation may depend in some measure upon the inquiry whether the prior mortgage is recorded or not; and, moreover, different considerations will control in cases of this sort, where a registry system is in full operation, as it is in this country, from those that prevail in England, where the possession of the title deeds for the most part stands in place of registration. But, whatever the circumstances may be, "the rule of law is clear that, where one by his words or conduct wilfully causes another to believe the existence of a certain state of things, and induces him to act on that belief so as to alter his own previous position, the former is concluded from averring against the latter a different state of things as existing at the same time."<sup>2</sup>

1581. A mortgagee allowing or inducing another to purchase the property as unincumbered, without disclosing his mortgage, may be precluded from setting it up against such purchaser; such, for instance, is the case of an attorney who acts for the mortgagor in drawing a deed for the conveyance of land from the mortgagor to a purchaser, but does not disclose a mortgage he himself holds upon the property, though he knows that the purchaser is buying it for its full value in ignorance of the mortgage.<sup>3</sup>

A mortgagee, however, whose mortgage is recorded, will not

<sup>1</sup> Groton Savings Bank v. Batty, 30 N. Foy, L. R. 4 Ch. App. 35; Berrisford v. J. Eq. 126. Milward, 2 Atk. 49.

<sup>2</sup> Per Lord Denman, C. J., in Pickard v. Sears, 6 Ad. & El. 469, 471. And see Peter v. Russell, 1 Eq. Ca. Abr. 322; Savage v. Foster, 9 Mod. 35; Sharpe v. <sup>3</sup> L'Amoureux v. Vandemburgh, 7 Paige, 316. And see Lee v. Munroe, 7 Cranch, 366, 368; Lindley v. Martindale, 78 Iowa, 379, 43 N. W. Rep. 233.



be so postponed merely because he knew that the mortgagor was making a subsequent conveyance of the premises, and did not make known his title: to have this effect, there must be actual and intentional fraud on his part;<sup>1</sup> or he must have done some act, or made some representation, to influence the conduct of another by inducing a belief of a given state of facts, when such party, having acted upon such belief, would be injured by showing a different state of facts. An *estoppel in pais* then arises against him. But he loses no right by neglecting to give a personal notice of his mortgage to one who is purchasing. The purchaser is presumed to know of the mortgage which has been duly recorded. He is bound at his peril to investigate the title.<sup>2</sup>

So, also, if a first mortgagee, having notice of a second mortgage, does anything to the prejudice of the latter, — as, for instance, if he releases any part of the mortgaged premises without receiving payment of any part of his mortgage debt, — he is, to the extent of injury done, postponed to the second mortgage.<sup>3</sup>

1582. If a mortgagee represents to another person that the debt secured by the mortgage has been paid or satisfied, and that nothing is due on it, and thereby induces him to release other security and take a mortgage of the same land, the last mortgage, as between the two mortgagees, will take priority of the first, although the first was on record when such representation was made, as the person making the representation is estopped from disputing the truth of it with respect to the other, who was thereby induced to alter his condition.<sup>4</sup> And so, if the first mortgagee in any way combines with the mortgagor to induce another to loan money upon the estate in ignorance of the first mortgage, this fraud will, without doubt, postpone his own mortgage.<sup>5</sup> And so, if a second mortgagee stands by and sees the mortgagor induce the first mortgagee to release his mortgage, and take an assignment of another mortgage which he supposes to be next in priority to his own, but which is in fact subsequent to the second mortgage, as against the second mortgagee, this subsequent mortgage

<sup>1</sup> Paine v. French, 4 Ohio, 318; Brinckerhoff v. Lansing, 4 Johns. Ch. 65, 8 Am. Dec. 538; Palmer v. Palmer, 48 Vt. 69. And see Marston v. Brackett, 9 N. H. 336. And see Story Eq. Juris. § 391.

<sup>2</sup> Rice v. Dewey, 54 Barb. 455.

<sup>3</sup> Bailey v. Gould, Walk. (Mich.) 478.

<sup>4</sup> Platt v. Squire, 12 Met. 494; Fay v. Valentine, 12 Pick. 40, 22 Am. Dec. 397; Heane v. Rogers, 9 Barn. & Cres. 577, 586; Miller v. Bingham, 29 Vt. 82; Chester v. Greer, 5 Humph. 26.

<sup>5</sup> Peter v. Russell, 1 Eq. Ca. Abr. 322.

will be preferred to his own.<sup>1</sup> When the holder of one of two mortgage deeds, executed on the same day, has represented to a person about to take an assignment of the other mortgage that the deeds were delivered at the same time, and that there was no priority in his deed, he is precluded from claiming a priority against such person.<sup>2</sup>

Where a mortgage and a deed were executed by the same grantor upon the same property to different persons without any reference in either deed to the other, and the agent of the mortgagee was guilty of negligence or bad faith in not recording the mortgage until after the deed was filed for record, the agent cannot afterwards purchase the land from the grantee of the deed and hold the title as against the mortgagee, for the priority of the deed is founded upon his own negligence, and he must hold subject to the rights of the mortgagee for whom he acted as agent.<sup>3</sup>

### VIII. *Negligence as affecting Priority.*

1583. Negligence is not fraud, though it may be evidence of it.<sup>4</sup> When a person having a mortgage upon an estate, or other interest in it, negligently puts it in the power of another to sell or mortgage the property to a third person who is ignorant of such mortgage or interest, he cannot afterwards assert his own title in priority to the title of the party whom he has suffered to be deceived.<sup>5</sup> By negligence is meant the want of that reasonable degree of diligence and care which a man of ordinary prudence and capacity would be expected to exercise in the same circumstances.

A person taking a mortgage or other conveyance of real estate is chargeable with notice of such facts as are indicated upon the

<sup>1</sup> *Stafford v. Ballou*, 17 Vt. 329.

<sup>2</sup> *Broome v. Beers*, 6 Conn. 198.

<sup>3</sup> *Mitchell v. Aten*, 37 Kans. 33, 14 Pac. Rep. 497.

<sup>4</sup> *Jones v. Smith*, 1 Hare, 43; *Worthington v. Morgan*, 16 Sim. 547.

<sup>5</sup> *Briggs v. Jones*, L. R. 10 Eq. 92, 98; *Robinson's Law of Priority*, 54; *Rice v. Rice*, 2 Drew, 73; 1 *Fisher on Mort.* 3d ed. 550. In *Briggs v. Jones*, L. R. 10 Eq. 92, 98, Lord Romilly thus stated the principle of this rule: "A person who puts it

in the power of another to deceive and raise money must take the consequences. He cannot afterwards rely on a particular or a different equity." Most of the English cases upon this point relate to the matter of the delivery of title deeds, and therefore are for the most part of use in this country only as illustrating the general principles of the law of notice. See *Thorpe v. Holdsworth*, L. R. 7 Eq. 139; *Layard v. Maud*, L. R. 4 Eq. 397.

face of the deeds, whether they indicate anything to him or not; for if he does not use the precaution, which common prudence requires, to employ a solicitor, he is in the same situation, with respect to constructive notice, as he would have been had he employed a solicitor.<sup>1</sup>

1584. It sometimes happens that a mortgagee may lose his position of priority, and, without intending to impair his own security, find himself in the place of a subsequent mortgagee, through want of care in dealing with the mortgaged property. Thus, if a mortgagee knowingly and understandingly cancels his mortgage when there is a second mortgage upon the property, and in lieu of the mortgage takes an absolute conveyance of the property, or a new mortgage, in the absence of any fraud on the part of the holder of the second mortgage, the lien of the first mortgage will not be revived, nor the second mortgagee prevented from reaping the benefit of the priority of his mortgage upon the records.<sup>2</sup> In like manner, where a senior mortgage is released without being paid, and at the same time a new mortgage is taken for the same sum, the question is whether the junior mortgage is thereby let into the position of priority. Although the transaction be a simultaneous one, and is not intended to impair the lien of the first mortgage, it is held that the release, if it be absolute in terms, will discharge the lien, and the new mortgage will be only a subordinate lien.<sup>3</sup>

But when a creditor to whom land has been conveyed in trust, to secure a debt, by a deed absolute in form reconveys it to his grantor, and simultaneously takes back a mortgage to secure the same debt, he does not lose his lien in equity as against a judgment rendered against the debtor subsequent to the original conveyance.<sup>4</sup>

<sup>1</sup> *Kennedy v. Green*, 3 Myl. & K. 699. The Master of the Rolls, referring to this case in *Greenslade v. Dare*, 20 Beav. 284, 291, said that the doctrine of this case requires to be administered with the greatest care and delicacy, and that probably each case must stand upon the peculiar facts belonging to it.

<sup>2</sup> *Frazee v. Inslee*, 2 N. J. Eq. 239. The Chancellor said that to revive the mortgage in such case would be giving encouragement to negligence, and would destroy the value of a public record. *Smith v.*

*Brackett*, 36 Barb. 571; *Banta v. Garmo*, 1 Sandf. Ch. 383; *Hutchinson v. Bramhall*, 42 N. J. Eq. 372, 7 Atl. Rep. 873; *Holt v. Baker*, 58 N. H. 276; *Keohane v. Smith*, 97 Ill. 156; *Skeele v. Stocker*, 11 Bradw. 143; *Daws v. Craig*, 62 Iowa, 515, 17 N. W. Rep. 778. See *Jones on Mortgages*, §§ 966-971.

<sup>3</sup> *Woollen v. Hillen*, 9 Gill, 185. To the same effect, see *Neidig v. Whiteford*, 29 Md. 178.

<sup>4</sup> *Christie v. Hale*, 46 Ill. 117.

§§ 1585, 1586.] NOTICE AS AFFECTING PRIORITY.

1585. Priority of lien between the holders of several notes secured by a mortgage is, by some authorities, determined according to the order of their maturity.<sup>1</sup> If judgment is obtained on one of the notes, that takes the place of the note on which it was rendered.<sup>2</sup> The holder of the note first maturing may, upon default, or at any time afterwards, foreclose and sell the premises in satisfaction of his debt.<sup>3</sup> His delay to enforce his rights does not impair his prior right.<sup>4</sup> But the mortgagee may by agreement give to particular notes a prior lien upon the security, irrespective of the time of their maturity; and therefore one who takes an assignment of a part of the notes secured by a mortgage should inquire of the maker and of the payee whether the others have been sold with a preferred lien upon the security. It is negligence on his part not to make such inquiry; and if the preferred lien has been given, it will be valid against such assignee.<sup>5</sup> One holding a mortgage securing several promissory notes may assign part of the notes, and a corresponding interest in the mortgage, giving priority to the assignee, or a *pro rata* interest in the security, according to the terms of the assignment.<sup>6</sup>

A mortgage executed by one partner in the partnership name of real estate belonging to the firm, to secure a partnership debt, conveys the legal interest of such partner and the equitable interest of the copartner; as where A executed a mortgage in the firm name of A & Bro., and himself acknowledged it. But a person taking a subsequent mortgage, properly executed by both partners, has priority as to the interest of the partner who did not execute the first mortgage.<sup>7</sup> A mortgage by one tenant in common of his interest in partnership real estate, made for a valid consideration to one who has no notice of the partnership, is not subject to any equities arising out of the partnership relation of the grantor.<sup>8</sup>

1586. As between several unrecorded mortgages or other

<sup>1</sup> See Jones on Mortgages, §§ 1699-1702, 1939; Aultman-Taylor Co. v. McGeorge, 31 Kans. 329, 2 Pac. Rep. 778; Wilson v. Eigenbrodt, 30 Minn. 4, 13 N. W. Rep. 907.

<sup>2</sup> Funk v. McReynold, 33 Ill. 481.

<sup>3</sup> Marine Bank v. International Bank, 9 Wis. 57; Wood v. Trask, 7 Wis. 566, 76 Am. Dec. 230; Lyman v. Smith, 21 Wis. 674.

<sup>4</sup> Lyman v. Smith, 21 Wis. 674.

<sup>5</sup> Walker v. Dement, 42 Ill. 272.

<sup>6</sup> Lane v. Davis, 14 Allen, 225; Howard v. Schmidt, 29 La. Ann. 129.

<sup>7</sup> Chavener v. Wood, 2 Oregon, 182; Haynes v. Seachrest, 13 Iowa, 455. And see Brazleton v. Brazleton, 16 Iowa, 417.

<sup>8</sup> See Jones on Mortgages, §§ 119, 120; McDermot v. Lawrence, 7 Serg. & R. 438, 10 Am. Dec. 468.

conveyances, that of prior execution takes precedence,<sup>1</sup> and, in determining such priority, fractions of a day will be considered.<sup>2</sup>

Of two mortgages executed at the same time, to secure debts which mature at different times, if there be no other ground of priority, according to the authorities in some States that is the prior lien which secures the payment of the note which first falls due. The rule is the same as it is when one mortgage secures debts maturing at different times; they are to be paid in the order of their maturity.<sup>3</sup> It makes no difference in the order of payment that, after the assignment of the note first maturing to one person, the note next maturing is assigned to another with the mortgage or trust deed. The holding of the mortgage security gives no preference in order of payment.<sup>4</sup>

In other States such mortgages confer equal rights, and the fact that one becomes due before the other gives no priority.<sup>5</sup>

**1587.** Where several mortgages are executed and recorded at the same time, whether the parties intended that one of them should have priority is a matter of fact for the jury to determine from the evidence of such intention.<sup>6</sup> Though the mortgagor intended that one should have priority, and first delivered that one to the recorder, yet if the recorder's certificate showed that they were filed for record simultaneously, neither is entitled to priority over the other. The fact that one instrument was handed to the recorder an instant before the other is immaterial. Neither is the intention with which the act was done important.<sup>7</sup>

**1588.** Agreement fixing the priority of mortgages.—The parties may, as between themselves, make a valid agreement, though it be verbal only, that one of two mortgages shall be prior

<sup>1</sup> *Ely v. Scofield*, 35 Barb. 330; *Berry v. Mut. Ins. Co.* 2 Johns. Ch. 603.

<sup>2</sup> *Gibson v. Keyes*, 112 Ind. 568, 14 N. E. Rep. 591.

<sup>3</sup> *Jones on Mortgages*, § 1699; *Isett v. Lucas*, 17 Iowa, 503; *Bank v. Covert*, 13 Ohio, 240; *Gardner v. Diedrichs*, 41 Ill. 158; *Murdock v. Ford*, 17 Ind. 52; *Harris v. Harlan*, 14 Ind. 439; *Marine Bank v. International Bank*, 9 Wis. 57; *Roberts v. Mansfield*, 32 Ga. 228.

According to other authorities this cir-

cumstance is no evidence to determine the fact of priority. *Gilman v. Moody*, 43 N. H. 239; *Granger v. Crouch*, 86 N. Y. 494.

<sup>4</sup> *Gwathmeys v. Ragland*, 1 Rand. 466.

<sup>5</sup> *Jones on Mortgages*, §§ 1699–1707; *Collerd v. Huson*, 34 N. J. Eq. 38; *Riddle v. George*, 58 N. H. 25; *Shaw v. Newsom*, 78 Ind. 335.

<sup>6</sup> *Gilman v. Moody*, 43 N. H. 239.

<sup>7</sup> *Koevenig v. Schmitz*, 71 Iowa, 175, 32 N. W. Rep. 320.

to the other, and the order of record is then immaterial unless they are subsequently assigned to other persons who have no notice of the agreement;<sup>1</sup> although, according to some authorities, the want of notice on the part of the assignee makes no difference, but the mortgage continues subject to the equity of this arrangement.<sup>2</sup> But such an agreement itself, when in writing, is not entitled to record, and therefore, if recorded, is not notice to subsequent purchasers;<sup>3</sup> and in that case the record of it would not be constructive notice to an assignee of the deferred mortgage. But if such assignee had knowledge of the agreement, he would take subject to the equities thereby conferred.<sup>4</sup>

1589. A mortgagee has an unquestionable right to waive his priority in favor of a subsequent mortgagee.<sup>5</sup> If a prior mortgagee releases his mortgage in order to enable the mortgagor to raise money upon the same property, with which to make improvements thereon, such mortgagee cannot afterwards be heard to object that the money was raised by the second mortgagee upon discount of other paper of the mortgagor, or that the mortgagor failed to expend the money as he had agreed.<sup>6</sup>

A mere admission by one of two mortgagees, whose mortgages were executed, delivered, and recorded on the same day, that there is no priority of one mortgage over the other, although made by a writing signed by him, does not preclude his afterwards claiming a priority in time for his own mortgage, because such admission is, like a parol declaration, subject to be explained or contradicted.<sup>7</sup> But such writing would be admissible in evidence to show that the deeds took effect simultaneously.<sup>8</sup> But an agreement as to priority may be proved by parol.<sup>9</sup>

<sup>1</sup> *Jones v. Phelps*, 2 Barb. Ch. 440; *Rhoades v. Canfield*, 8 Paige, 545; *New York Chemical Manuf. Co. v. Peck*, 6 N. J. Eq. 37; *Decker v. Boice*, 19 Hun, 152; *Freeman v. Schroeder*, 43 Barb. 618, 29 How. Pr. 263; *Beasley v. Henry*, 6 Bradw. 485; *Sparks v. State Bank*, 7 Blackf. 469; *Bank v. Campbell*, 2 Rich. Eq. 179; *Rigler v. Light*, 90 Pa. St. 235; *Poland v. Lamoille Valley R. Co.* 52 Vt. 144; *Lehman v. Godberry*, 40 La. Ann. 219, 4 So. Rep. 316.

<sup>2</sup> *Conover v. Van Mater*, 18 N. J. 481; *Freeman v. Schroeder*, 43 Barb. 618, 29 How. Pr. 263; *Cable v. Ellis*, 86 Ill. 525.

<sup>3</sup> *Gillig v. Maass*, 28 N. Y. 191.

<sup>4</sup> *Bank v. Frank*, 13 J. & S. 404.

<sup>5</sup> *Clason v. Shepherd*, 6 Wis. 369; *Taylor v. Wing*, 84 N. Y. 471, 23 Hun, 233; *Frost v. Yonkers Sav. Bk.* 70 N. Y. 553, 26 Am. Rep. 627; *Mutual Life Ins. Co. v. Sturges*, 33 N. J. Eq. 328; *Poland v. Lamoille Valley R. Co.* 52 Vt. 144; *Raleigh Nat. Bank v. Moore*, 94 N. C. 734.

<sup>6</sup> *Darst v. Bates*, 95 Ill. 493. See *Hendrickson v. Woolley*, 39 N. J. Eq. 307.

<sup>7</sup> *Beers v. Broome*, 4 Conn. 247. See *Maze v. Burke (Pa.)*, 12 Phila. 335.

<sup>8</sup> *Beers v. Hawley*, 2 Conn. 467.

<sup>9</sup> *Maze v. Burke (Pa.)*, 12 Phila. 335.

1590. Without any agreement, there may be circumstances which will entitle one of two mortgages recorded at the same time to an equitable priority over the other;<sup>1</sup> and on the other hand, although one mortgage may have been recorded before another, there may be facts which will entitle the two mortgages to stand upon an equality. An instance of the latter kind occurs when a trustee, having two funds, loans them to the same person, upon two distinct mortgages, without the intention of giving one priority to the other.<sup>2</sup> Moreover, the mortgage first recorded, and therefore *prima facie* the prior lien, may be shown to have been conditionally recorded; and a second mortgage, recorded before the condition was complied with, may be entitled to precedence.<sup>3</sup>

It is no ground for giving priority to a junior mortgage that the money received upon it was used in conserving the mortgaged property, or in improving it in any way. Although a portion of a line of railway subject to a mortgage be wholly constructed by money raised on a second mortgage, yet this fact gives the latter no priority over the former. The prior mortgage, although given before the road is built, attaches as fast as it is built, and to all property covered by the terms of the mortgage as fast as it comes into existence.<sup>4</sup>

1591. A mortgage executed before the commencement of a building erected on the land is paramount to a mechanic's lien for work and materials furnished for the building.<sup>5</sup> If a

<sup>1</sup> *Stafford v. Van Rensselaer*, 9 Cow. 316.

<sup>2</sup> *Rhoades v. Canfield*, 8 Paige, 545.

<sup>3</sup> *Freeman v. Schroeder*, 43 Barb. 618.

<sup>4</sup> *Galveston Railroad v. Cowdrey*, 11 Wall. 459. "Had the first mortgage," says Mr. Justice Bradley, "been given before a shovel had been put into the ground towards constructing the railroad, yet if it assumed to convey and mortgage the railroad, which the company was authorized by law to build, together with its superstructure, appurtenances, fixtures, and rolling-stock, these several items of property, as they came into existence, would become instantly attached to and covered by the deed, and would have fed the estoppel created thereby. No other rational or equitable rule can be adopted for such

cases. To hold otherwise would render it necessary for a railroad company to borrow in small parcels as sections of the road were completed and trust deeds could be safely given thereon. The practice of the country and its necessities are coincident with the rule." See, also, *Willink v. Morris Canal & Banking Co.* 4 N. J. Eq. 377, 402; *Jones on Corp. Bonds & Mortg.* § 584.

<sup>5</sup> *Hershee v. Hershey*, 15 Iowa, 185; *Jessup v. Stone*, 13 Wis. 466; *Jean v. Wilson*, 38 Md. 288; *Lyle v. Ducomb*, 5 Binn. 585; *Hoover v. Wheeler*, 23 Miss. 314; *Folsom v. Cragen*, 11 Colo. 205, 17 Pac. Rep. 515; *Ryder v. Cobb*, 68 Iowa, 235, 26 N. W. Rep. 91. In *Tritch v. Norton*, 10 Colo. 337, 15 Pac. Rep. 680, there was a new commencement under

mortgagee, while in possession, erects a house on the premises, a mechanic's lien for this work is subject to the mortgage.<sup>1</sup> A mortgage for the purchase-money has priority over a mechanic's lien which attached to a building on the property while it was under contract for sale to the mortgagor, and before the deed and mortgage were executed.<sup>2</sup>

Even subsequent liens may have priority. Lien laws in force at the time of the execution of a mortgage enter into and become a part of the contract; and if these laws provide that certain liens shall be paramount over all other incumbrances, whether prior or subsequent, a mortgagee takes his mortgage subject to such liens as may afterwards be acquired under the statute.<sup>3</sup>

But laws enacted after the execution of a mortgage cannot have the effect of creating a lien superior to such existing mortgage, for such laws are repugnant to the provisions of the Federal Constitution forbidding the impairment by any State of the obligations of a contract.<sup>4</sup>

Municipal assessments for improvements, which are declared by statute to be a lien, may be paramount to a mortgage of the premises, whether the mortgage be prior or subsequent to the assessment.<sup>5</sup> The lien of a drainage assessment, in Indiana, is subordinate to the lien of a preëxisting mortgage.<sup>6</sup> It is subordinate to a mortgage executed prior to the filing of a petition to enforce such lien.<sup>7</sup>

a new contract after an intervening mortgage.

See 2 Jones on Liens, §§ 1457-1492.

<sup>1</sup> Ferguson v. Miller, 6 Cal. 402.

<sup>2</sup> Rees v. Ludington, 13 Wis. 276, 80 Am. Dec. 741.

<sup>3</sup> Warren v. Sohn, 112 Ind. 213, 13 N. E. Rep. 863.

<sup>4</sup> Yeatman v. King, 2 N. D. 421, 51 N. W. Rep. 721.

<sup>5</sup> Hand v. Startup, 38 N. J. Eq. 115.

<sup>6</sup> State v. Insurance Co. 117 Ind. 251,

20 N. E. Rep. 144; Cook v. State, 101 Ind. 446; Chaney v. State, 118 Ind. 494, 21 N. E. Rep. 45; Deisner v. Simpson, 72 Ind. 435; Killian v. Andrews, 130 Ind. 579, 30 N. E. Rep. 700. The fact that the prior mortgagee had notice of the construction of the ditch and of the pendency of the drainage proceedings is of no importance.

<sup>7</sup> State v. Loveless, 133 Ind. 600, 33 N. E. Rep. 622; Pierce v. Ætna Life Ins. Co. 131 Ind. 284, 31 N. E. Rep. 68.



## BOOK III.

NATURE OF REAL ESTATE AND INCIDENTS OF  
OWNERSHIP.

**CHAPTER**

**XXXIII. REAL ESTATE IN GENERAL.**

**XXXIV. TREES, FRUIT, AND GRASS, OR FRUCTUS NATURALES.**

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## BOOK III.

### NATURE OF REAL ESTATE AND INCIDENTS OF OWNERSHIP.

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#### CHAPTER XXXIII.

##### REAL ESTATE IN GENERAL.

1592. "Land," says Lord Coke,<sup>1</sup> "*terra* in the legal signification, comprehendeth any ground, soil, or earth whatsoever; as meadows, pastures, woods, moores, waters. . . . It legally includeth also all castles, houses, and other buildings; for castles, houses, etc., consist of two things, namely, land or ground, and the foundation or structure thereupon; so, as passing the land or ground, the structure or building thereupon passeth." The title of the owner presumptively extends upward to the clouds and downward to the earth's centre, embracing everything upon the surface and everything beneath it. This general rule will be found to be subject to many qualifications when actually applied. It will be found that many things upon the surface of the land are not regarded as parcel of it, but personal property, the title to which is not in the owner of the land; and it will be found that the surface of the land may be separated in ownership from the mines or quarries beneath it, and that there may be as many different owners as there are strata of minerals.<sup>2</sup>

1593. There may be different freeholds in the same house. "The maxim, *cujus est solum ejus est usque ad cælum*, is not a presumption of law, applicable in all cases, and under all circumstances; for example, it does not apply to chambers in the inns of court."<sup>3</sup> Ashhurst, J., in an early case said: "We know that

<sup>1</sup> 1 Coke First Inst. 4 a; *Isham v. Morgan*, 9 Conn. 374, 23 Am. Dec. 361.

<sup>3</sup> Maule, J.; *Fay v. Prentice*, 1 C. B. 828, 840.

<sup>2</sup> *Lillibridge v. Lackawanna Coal Co.*  
143 Pa. St. 293, 22 Atl. Rep. 1035.

in London different persons have several freeholds over the same spot;<sup>1</sup> different parts of the same house are let out to different people. That is the case in the inns of court. Now, it would be very extraordinary to contend that, if a person purchased a set of chambers, then leased them, and afterwards purchased another set under them, the after-purchased chambers would pass under the lease." A grant of a room in a building does not carry any interest in the land, in the absence of words purporting to grant such an estate.<sup>2</sup> Such a grant is construed with reference to its subject-matter and according to the intention of the parties. Upon the destruction of the building by fire or other casualty, so that the identity and existence of the room is extinguished, and there is no stipulation as to rebuilding in such event, there is nothing remaining upon which the conveyance could operate, and the grantee's rights are at once terminated.

1594. The presumption, that the owner of the surface of the land owns everything above and beneath, is frequently rebutted as regards property in towns by reason of projections of adjoining buildings, under circumstances which give the owners of such adjoining buildings the right to maintain such projections. When such is the case the question may arise, which owner has the right to use the space above or below such projections. Thus the owner of two contiguous houses in London sold one by a deed which correctly described the ground site of the house conveyed, but conveyed it as then occupied by the owner. The purchaser pulled down the house, when it was discovered that one of the rooms of the house, retained by the owner, projected into and was supported by the house conveyed. The purchaser, in rebuilding, claimed the right of building over the projecting room, and the vendor sought to restrain him by injunction. The question was, whether the projecting room was a diminution of so much of the freehold, including the right upwards and downwards, as was defined horizontally by a section of the room, or whether such a space only was carved out of the freehold as was included between the top and bottom of the projecting room; and the court held that the vertical column of air, over so much of the room as overhung the site conveyed to the purchaser, be-

<sup>1</sup> Doe v. Burt, 1 T. R. 701, 703.

325, 59 Am. Rep. 209; Hahn v. Baker

<sup>2</sup> Stockwell v. Hunter, 11 Met. 448, 45 Am. Dec. 220; Thorn v. Wilson, 110 Ind.

Lodge, 21 Oreg. 30, 27 Pac. Rep. 166.

longed to him, and not to the owner of such room and adjoining building. The injunction was accordingly refused.<sup>1</sup>

The owner of land subject to an easement in another has all the beneficial use of his property subject to such easement. If the easement is a right of way, this is a right to use the surface of the ground for the purpose of passing and repassing; but, subject to such right, the owner may build over such passage-way, leaving a way substantially as convenient as before for the purposes for which the right of way was created.<sup>2</sup>

**1595. A conveyance of land presumptively passes the minerals below the surface.**<sup>3</sup> Mines and minerals in place are land and must be conveyed as such,<sup>4</sup> and when conveyed apart from the land, or excepted and reserved in a conveyance of the land, constitute a separate and distinct inheritance.<sup>5</sup>

**1596. As regards the separate ownership of strata of minerals beneath the surface,** Chief Justice Paxson, of Pennsylvania, in a recent case said: "In the earlier days of the common law, the attention of buyers and sellers, and therefore the attention of the courts, was fixed upon the surface. He who owned the surface owned all that grew upon it and all that was buried beneath it. His title extended upward to the clouds and downward to the earth's centre. The value of his estate lay, however, in the arable qualities of the surface, and, with rare exceptions, the income derived from it was the result of agriculture. The comparatively recent development of the sciences of geology and mineralogy, and the multiplication of mechanical devices for penetrating the earth's crust, have greatly changed the uses and the values of lands. . . . So it often happens that the owner of a farm sells the land to one man, the iron or oil or gas to another, giving to each purchaser a deed, or conveyance in fee simple, for his particular deposit or stratum, while he retains the surface for settlement and cultivation precisely as he held it before. The severance is complete for all legal and practical purposes.

<sup>1</sup> *Corbett v. Hill*, L. R. 9 Eq. Cas. 671.

<sup>2</sup> *Atkins v. Bordman*, 2 Met. 457, 37 Am. Dec. 100.

<sup>3</sup> *Egremont Burial Board v. Egremont Iron Co.* L. R. 14 Ch. Div. 158; *Adam v. Briggs Iron Co.* 7 Cush. 361.

<sup>4</sup> *Melton v. Lambard*, 51 Cal. 258.

<sup>5</sup> *Aspden v. Seddon*, L. R. 1 Ex. D.

496; *Wilkinson v. Proud*, 11 M. & W. 33; *Stoughton v. Leigh*, 1 Taunt. 402; *Snoddy v. Bolen*, 122 Mo. 479, 24 S. W. Rep. 142; *Wardell v. Watson*, 93 Mo. 107, 111, 5 S. W. Rep. 605; *Caldwell v. Fulton*, 31 Pa. St. 475, 72 Am. Dec. 760; *Marvin v. Brewster Iron Mining Co.* 55 N. Y. 538, 14 Am. Rep. 322.

Each of the separate layers or strata becomes a subject of taxation, of incumbrance, levy, and sale, precisely like the surface.”<sup>1</sup> The severance of the ownership of strata of minerals beneath the surface of the land from the ownership of the surface land gives rise to many new legal questions respecting the rights of the different owners. As against the owner of the surface, each owner of separate layers or strata of coal or other minerals beneath has the right, without any express grant for that purpose, to go upon the surface and open a shaft or sink a well to reach his underlying estate. It is a right appurtenant to such estate. On the other hand, the owner of the surface of the land, who has granted to another a strata of coal under his land, has a right, apart from any reservation in his deed, to access through the coal to strata underlying it, the ownership of which is retained by the owner of the surface.<sup>2</sup>

1597. Petroleum oil in place is a mineral and part of the realty.<sup>3</sup> In this respect it is like coal or any other natural product which, in its native bed or place, forms a part of the land. “It may become, by severance, personalty, or there may be a right to use or take it, originating in custom or prescription; as the right of a life-tenant to work open mines, or to use timber for repairing buildings or fences on a farm, or for firebote. Nevertheless, whenever conveyance is made of it, whether that conveyance be called a lease or deed, it is in effect the grant of a part of the corpus of the estate, and not of a mere incorporeal right. Not infrequently the oil forms by far the most valuable part of an estate.”<sup>4</sup>

<sup>1</sup> *Chartiers Block Coal Co. v. Mellon*, 152 Pa. St. 286, 295, 25 Atl. Rep. 597, 34 Am. St. Rep. 645, 18 L. A. R. 702, per Paxson, C. J. And see *Caldwell v. Fulton*, 31 Pa. St. 475, 72 Am. Dec. 760; *Armstrong v. Caldwell*, 53 Pa. St. 284; *Jones v. Wagner*, 66 Pa. St. 429, 5 Am. Rep. 385; *Wilms v. Jess*, 94 Ill. 464, 34 Am. Rep. 242; *Marvin v. Brewster Iron M. Co.* 55 N. Y. 538, 14 Am. Rep. 322; *Canfield v. Ford*, 28 Barb. 336; *Hartwell v. Camman*, 10 N. J. Eq. 128, 64 Am. Dec. 448; *Arnold v. Stevens*, 24 Pick. 106, 35 Am. Dec. 305; *New Jersey Zinc Co. v. New Jersey Franklinite Co.* 13 N. J. Eq. 322; *Erickson v. Michigan Land Co.* 50

*Mich.* 604, 16 N. W. Rep. 161; *Lee v. Bumgardner*, 86 Va. 315, 10 S. E. Rep. 3.

<sup>2</sup> *Chartiers Block Coal Co. v. Mellon*, 152 Pa. St. 286, 25 Atl. Rep. 597.

<sup>3</sup> *Stoughton's Appeal*, 88 Pa. St. 198, 201; *Westmoreland, &c. Gas Co. v. De Witt*, 130 Pa. St. 235, 18 Atl. Rep. 724; *Hague v. Wheeler*, 157 Pa. St. 324, 27 Atl. Rep. 714; *Funk v. Haldeman*, 53 Pa. St. 229, 249; *Kier v. Peterson*, 41 Pa. St. 357, 362; *Dark v. Johnston*, 55 Pa. St. 164, 93 Am. Dec. 732; *Williamson v. Jones*, 39 W. Va. 231, 19 S. E. Rep. 436.

<sup>4</sup> *Williamson v. Jones*, 39 W. Va. 231, 19 S. E. Rep. 436, per Holt, J.

1598. Even natural gas, so long as it is confined in the strata where it is found, belongs to the realty, and is the property of the owner of the realty where the gas is found. From its very nature the title of such owner is gone when the gas escapes into the land of another.<sup>1</sup> It is only in a very general sense, therefore, that the possession or ownership of the land is the possession or ownership of the gas beneath the surface. It is only when the owner has drilled a gas-well, and controls the gas produced thereby, that he is in fact in possession of the gas within the land. The peculiar nature of property in gas is well stated by Mr. Justice Mitchell, of the Supreme Court of Pennsylvania, in a recent case, where he says:<sup>2</sup> "Gas, it is true, is a mineral; but it is a mineral with peculiar attributes, which require the application of precedents arising out of ordinary mineral rights with much more careful consideration of the principles involved than of the mere decisions. Water also is a mineral; but the decisions in ordinary cases of mining rights, etc., have never been held as unqualified precedents in regard to flowing, or even to percolating, waters. Water and oil, and still more strongly gas, may be classed by themselves, if the analogy be not too fanciful, as minerals *feræ naturæ*. In common with animals, and unlike other minerals, they have the power and the tendency to escape without the volition of the owner. Their 'fugitive and wandering existence within the limits of a particular tract is uncertain,' as said Chief Justice Agnew.<sup>3</sup> They belong to the owner of the land and are part of it, so long as they are on or in it, and are subject to his control; but when they escape and go into other land, or come under another's control, the title of the former owner is gone. Possession of the land, therefore, is not necessarily possession of the gas. If an adjoining or even a distant owner drills his own land and taps your gas, so that it comes into his well and under his control, it is no longer yours, but his."

So long as the gas remains in the strata where found, it is the property of the owner of the surface of the land, though the gas may be separated from the general ownership of the land by

<sup>1</sup> People's Gas Co. v. Tyner, 131 Ind. 277, 31 N. E. Rep. 59, 31 Am. St. Rep. 433, 16 L. R. A. 443; Tyner v. People's Gas Co. 131 Ind. 408, 31 N. E. Rep. 61.

<sup>2</sup> Westmoreland N. Gas Co. v. De Witt, 130 Pa. St. 235, 249, 5 L. R. A. 731.

<sup>3</sup> Brown v. Vandergrift, 80 Pa. St. 142, 148.

grant, lease, or exception. The owner may also lose his property in the gas by its escaping out of his possession by its being drawn off by a well in the land of another. So, also, the owner may lose his property in the gas when its escape is the inevitable result of the sinking of wells for mining and removing carbon oil under a lease. Thus a lease of the carbon oil in certain land was made at a fixed royalty, and in mining the oil the natural gas escaped through the wells and thus ceased to be a part of the realty, and this was shown to be a natural and inevitable incident to the sinking of all oil wells in that region, as verified by an experience of many years; and, while the grant was for the specific purpose of mining and removing carbon oil, still the lease necessarily included the gas which came up with the oil as an inevitable concomitant. It was essential that the well should be kept open in order to pump the oil, and the gas necessarily, from its nature and by its own force, issued from it. The court held, under the circumstances of that case, that the lessee could, in any proper manner that he might choose, appropriate and use this escaped, wild gas without accounting therefor.<sup>1</sup>

1599. Both air and water are the subjects of qualified property by occupancy. "Every owner of land has the control of the use and appropriation of the air and water on his land, but this control can be asserted only by denying access to the land, and not by demanding compensation from those who are in the rightful occupancy of the land. And, having the right to exclude others from his land, the owner may by contract provide that those who desire the air, or mineral, or other waters on his land shall pay him a stipulated price for the use of the same, and such a contract would be enforceable in law. But in such case the contract must be express, because the ownership is qualified, and the law will not raise an implication for the payment for the use of such property. These being incapable of absolute ownership, they cannot be the subject of compensation for waste or appropriation where the access is rightful, and where it is wrongful the measure of damages will be limited to the injury done to the land."<sup>2</sup>

<sup>1</sup> Wood County Petroleum Co. v. West Virginia Transp. Co. 28 W. Va. 210, 218, 57 Am. Rep. 659, per Snyder, J. In People's Gas Co. v. Tyner, 131 Ind. 277, 280, 31 N. E. Rep. 59, Coffey, J., said: "Wa-

<sup>2</sup> Wood County Petroleum Co. v. West



ter, petroleum, oil, and gas are generally classed by themselves as minerals possessing, in some degree, a kindred nature. As to whether the owner of the soil may dig down and divert a well-defined subterranean stream of water, there is much diversity of opinion and conflict in the adjudicated cases; but the authorities agree that the owner of a particular tract of land may sink a well, and appropriate to his own use all the percolating water

found therein, though it may entirely destroy the well on his neighbor's land." Citing *Hanson v. McCue*, 42 Cal. 303, 10 Am. Rep. 299; *Wheatley v. Baugh*, 25 Pa. St. 528, 64 Am. Dec. 721; *Frazier v. Brown*, 12 Ohio St. 294; *Acton v. Blundell*, 12 M. & W. 324; *Delhi v. Youmans*, 50 Barb. 316; *Mosier v. Caldwell*, 7 Nev. 363; *New Albany, &c. R. Co. v. Peterson*, 14 Ind. 112, 77 Am. Dec. 60; *Greencastle v. Hazelett*, 23 Ind. 186.

## CHAPTER XXXIV.

### TREES, FRUIT, AND GRASS, OR FRUCTUS NATURALES.

I. Trees, 1600-1615.  
II. Fruit, 1616, 1617.

III. Grass, 1618.

#### I. *Trees.*

1600. Growing trees are presumptively a part of the realty, and are the property of the owner of the land; yet by grant or exception the ownership of the land may be in one person and the ownership of the trees in another, although they in fact remain annexed to the land. A grant or exception of standing trees is *prima facie* a grant or exception of an interest in the land within the meaning of the statute of frauds, and cannot be made by parol; it must be by an instrument in writing.<sup>1</sup>

1601. Growing trees are parcel of the realty and pass with it by deed or mortgage. They remain a part of the realty until

<sup>1</sup> Scorell v. Boxall, 1 Young & J. 396; Jones v. Flint, 10 Ad. & El. 753; Teal v. Auty, 2 Brod. & B. 99; Macdonell v. McKay, 15 Grant. (Ont.) 391. **Alabama**: Heflin v. Bingham, 56 Ala. 566, 28 Am. Rep. 776. **Indiana**: Terrell v. Frazier, 79 Ind. 473; Owens v. Lewis, 46 Ind. 488, 15 Am. Rep. 295; Armstrong v. Lawson, 73 Ind. 498. **Michigan**: Williams v. Hyde, 98 Mich. 152; Williams v. Flood, 63 Mich. 487, 30 N. W. Rep. 93; Spalding v. Archibald, 52 Mich. 365, 17 N. W. Rep. 940; Wetmore v. Neuberger, 44 Mich. 362, 6 N. W. Rep. 837; Jackson v. Evans, 44 Mich. 510, 7 N. W. Rep. 79; Russell v. Myers, 32 Mich. 522; Fletcher v. Alcona Turnpike, 72 Mich. 18, 40 N. W. Rep. 36. **Mississippi**: Harrell v. Miller, 35 Miss. 700, 72 Am. Dec. 154. **New Hampshire**: Kingsley v. Holbrook, 45 N. H. 313, 86 Am. Dec. 173. **New Jersey**: Slocum v. Seymour, 36 N. J. L. 138. **New York**: Vorebeck v. Roe, 50 Barb. 302; Bank v. Crary, 1 Barb. 542; Green v. Armstrong, 1 Denio, 550; Pierrepont v. Barnard, 5 Barb. 364; McGregor v. Brown, 10 N. Y. 114; Warren v. Leland, 2 Barb. 613; Lawrence v. Smith, 27 How. Pr. 327. **Ohio**: Hirth v. Graham, 50 Ohio St. 57. **Pennsylvania**: Pattison's App. 61 Pa. St. 294, 100 Am. Dec. 637; Bowers v. Bowers, 95 Pa. St. 477; Huff v. McCauley, 53 Pa. St. 206, 91 Am. Dec. 203. **Tennessee**: Knox v. Haralson, 2 Tenn. Ch. 232. **Vermont**: Buck v. Pickwell, 27 Vt. 157. **Wisconsin**: Daniels v. Bailey, 43 Wis. 566; Young v. Lego, 36 Wis. 394; Strasson v. Montgomery, 32 Wis. 52; Lillie v. Dunbar, 62 Wis. 198, 22 N. E. Rep. 467.

they are actually, or in contemplation of law, severed from the soil;<sup>1</sup> but when so severed they become personal property.<sup>2</sup>

A mortgage of standing timber, to be removed within a definite or indefinite time, is a mortgage of an interest in the realty, and should be recorded as a mortgage of real estate. The filing of it as a chattel mortgage is notice to no one.<sup>3</sup>

But one who has a contract for the purchase of growing wood and timber to be cut and removed by him, the contract not involving any interest in the realty, may mortgage the same as personal property, and the mortgage is properly recorded as a chattel mortgage. Such a mortgage takes effect upon the wood and timber when it is severed from the freehold.<sup>4</sup> The recording of such a mortgage in the registry of deeds as a conveyance of an interest in the land is ineffectual.<sup>5</sup>

1602. But although growing trees are parcel of the realty they may be sold by a writing not under seal, because the interest in the realty is less than a freehold. The conveyance need not be recorded.<sup>6</sup> The title given by a written contract of sale is not affected by a subsequent deed conveying the timber to another.<sup>7</sup>

By a valid sale of growing trees, they are, in contemplation of law, severed from the land and made personal chattels.<sup>8</sup> But such sale to be valid must be by a written contract, for a parol contract of sale is revocable at any time before it has been acted upon by the purchaser by actually severing the trees from the land.<sup>9</sup>

1603. A sale of growing wood and timber, to be removed within either a fixed or indefinite time, is a sale of a present

<sup>1</sup> *Jones v. Flint*, 10 Ad. & El. 753; *Hutchins v. King*, 1 Wall. 53; *White v. Foster*, 102 Mass. 375; *Wright v. Barrett*, 13 Pick. 41; *Brackett v. Goddard*, 54 Me. 309; *Green v. Armstrong*, 1 Den. 550; *Slocum v. Seymour*, 36 N. J. L. 138, 13 Am. Rep. 432; *Baker v. Lewis*, 33 Pa. St. 301, 75 Am. Dec. 598; *Mee v. Benedict*, 98 Mich. 260, 57 N. W. Rep. 175; *Johnson v. Moore*, 28 Mich. 3; *Wait v. Baldwin*, 60 Mich. 622, 27 N. W. Rep. 697; *Williams v. Flood*, 63 Mich. 487, 30 N. W. Rep. 93; *Monroe v. Bowen*, 26 Mich. 523.

<sup>2</sup> *Smith v. Surman*, 9 Barn. & C. 561.

<sup>3</sup> *Williams v. Hyde*, 98 Mich. 152; *Booth v. Oliver*, 67 Mich. 664, 35 N. W. Rep. 793.

<sup>4</sup> *Claffin v. Carpenter*, 4 Met. 580, 38 Am. Dec. 381; *Boykin v. Rosenfield*, 69 Tex. 115, 9 S. W. Rep. 318.

<sup>5</sup> *Douglas v. Shumway*, 13 Gray, 498.

<sup>6</sup> *Sterling v. Baldwin*, 42 Vt. 306; *Warren v. Leland*, 2 Barb. 613.

<sup>7</sup> *Sterling v. Baldwin*, 42 Vt. 306.

<sup>8</sup> *Evans v. Roberts*, 5 Barn. & C. 829; *Warren v. Leland*, 2 Barb. 613.

<sup>9</sup> *Owens v. Lewis*, 46 Ind. 488, 15 Am. Rep. 295; *McGregor v. Brown*, 10 N. Y. 114.

interest in the land.<sup>1</sup> It gives not merely a right to enter upon the land and remove the trees within the time named, but also a right or easement in the land, so far as necessary for the support and growth of the trees, defeasible by failure to cut and remove the trees within the time limited. A parol contract for the sale of the trees within such limited time would only amount to a license to cut and remove the trees, and would not confer any interest in the land.

When a present interest in standing trees is granted with the understanding that they may remain on the land and grow for a definite or unlimited time, the grant of the trees necessarily is a grant of an interest in the land. "By the rule that the grant of a thing carries with it, as incident, all that is necessary to its beneficial enjoyment, there passed by the same deed a right to the soil upon which they grew. This last-named right, for the reasons above suggested, was not a mere license to enter upon the land and remove the trees within a limited time, revocable except so far as already acted upon, but rather a peculiar incorporeal right or easement in the grantor's land, so far as necessary for the support and growth of the trees, with right of entry and of way during the time named, and not revocable by the grantor."<sup>2</sup>

1604. Upon a sale of growing trees without fixing any time for their removal, the purchaser has a reasonable time within which to cut and remove them, and he has in the mean time an interest in the land.<sup>3</sup> A parol license to enter upon land "at any and all times," and cut and carry away growing wood, must be acted upon within a reasonable time and, if not acted upon within a period of more than three years, may be revoked.<sup>4</sup>

<sup>1</sup> *Scorell v. Boxall*, 1 *Younge & J.* 396; *Teal v. Auty*, 2 *Brod. & B.* 99; *Summers v. Cook*, 28 *Grant (Ont.)*, 179; *Hutchins v. King*, 1 *Wall.* 53; *White v. Foster*, 102 *Mass.* 375; *Cook v. Stearns*, 11 *Mass.* 533; *Clap v. Draper*, 4 *Mass.* 266, 3 *Am. Dec.* 215; *Olmstead v. Niles*, 7 *N. H.* 522; *Putney v. Day*, 6 *N. H.* 430, 25 *Am. Dec.* 470; *Howe v. Batchelder*, 49 *N. H.* 204; *Kingsley v. Holbrook*, 45 *N. H.* 313, 86 *Am. Dec.* 173; *Green v. Armstrong*, 1 *Denio*, 550; *Warren v. Leland*, 2 *Barb.* 613; *Dubois v. Kelly*, 10 *Barb.* 496; *Slocum v. Seymour*, 36 *N. J. L.* 138, 13 *Am. Rep.* 432; *Bowers v. Bowers*, 95 *Pa. St.*

477; *Pattison's App.* 61 *Pa. St.* 294, 100 *Am. Dec.* 637; *Huff v. McCauley*, 53 *Pa. St.* 206, 91 *Am. Dec.* 203; *Yeakle v. Jacob*, 33 *Pa. St.* 376; *Buck v. Pickwell*, 27 *Vt.* 157.

<sup>2</sup> *White v. Foster*, 102 *Mass.* 375, 379, per *Colt, J.*

<sup>3</sup> *Howe v. Batchelder*, 49 *N. H.* 204; *Hoit v. Stratton Mills*, 54 *N. H.* 109; *Boults v. Mitchell*, 15 *Pa. St.* 371; *Heflin v. Bingham*, 56 *Ala.* 566, 28 *Am. Rep.* 776.

<sup>4</sup> *Hill v. Cutting*, 113 *Mass.* 103; *Gilmore v. Wilbur*, 12 *Pick.* 120, 22 *Am. Dec.* 410.

Where a sale of standing timber has been made by written contract which gives the purchaser the right to remove the timber within a limited time, this time may be extended by a parol agreement. Such agreement of extension is more than a revocable license, and prevents a forfeiture within the time of extension.<sup>1</sup>

1605. A sale of growing timber is not within the statute of frauds when the sale is so made that no title passes till the timber is severed, as where it is to be delivered by the seller, or is sold by measurement, or is sold to be presently cut and removed by the purchaser;<sup>2</sup> for even in the latter case the contract is construed as passing an interest in the trees when they are severed from the freehold, and not an interest in the land.<sup>3</sup>

Such a contract, says Mr. Justice Knowlton, of Massachusetts, "does not immediately pass a title to property, and is not a sale or a contract for a sale of an interest in land, but an executory agreement for the sale of chattels, to take effect when the wood and timber are severed from the land, with a license to enter and cut the trees and remove them. Such a contract, if oral, is not within the statute of frauds, and its construction is the same as if it were in writing."<sup>4</sup>

1606. A sale of standing wood and timber is by many authorities regarded as a sale of chattels, and not within the statute of frauds, the ownership changing only so fast as the trees are severed from the land, though the contract purports to

<sup>1</sup> *Williams v. Flood*, 63 Mich. 487, 30 N. W. Rep. 93.

<sup>2</sup> *Marshall v. Green*, L. R. 1 C. P. D. 35; *New Brunswick & N. S. Land Co. v. Kirk*, 1 Allen, N. B. 443; *Murray v. Gilbert*, 1 Hannay, N. B. 545; *Smith v. Surman*, 9 B. & C. 561, Bayley, J., said: "This contract was not for the growing trees, but for the timber at so much a foot; that is, the produce of the trees when they should be cut down and severed from the freehold." *Littledale, J.*, said: "The object of a party who sells timber is, not to give the vendee any interest in his land, but to pass to him an interest in the trees when they become goods and chattels. Here the vendor was to cut the trees himself. His intention clearly was, not to give the vendee any property in the trees until they were cut and ceased to

be part of the freehold." See, however, *Lavery v. Purcell*, 57 L. J. C. 570.

<sup>3</sup> *Smith v. Surman*, 9 Barn. & C. 561; *Douglas v. Shumway*, 13 Gray, 498, 502; *Bostwick v. Leach*, 3 Day, 476; *Delaney v. Root*, 99 Mass. 546, 548, 97 Am. Dec. 32; *Parsons v. Smith*, 5 Allen, 578, 580; *Nettleton v. Sikes*, 8 Met. 34; *Claffin v. Carpenter*, 4 Met. 580, 38 Am. Dec. 381; *Whitmarsh v. Walker*, 1 Met. 313; *Johnson v. Wilkinson*, 139 Mass. 3, 20 N. E. Rep. 62, per Morton, J.; *Erskine v. Plummer*, 7 Me. 447, 22 Am. Dec. 216; *Boyce v. Washburn*, 4 Hun, 792; *Boykin v. Rosenfield*, 69 Tex. 115, 9 S. W. Rep. 318.

<sup>4</sup> *Fletcher v. Livingston*, 153 Mass. 388, 26 N. E. Rep. 1001.

To the contrary, see *Ellison v. Brigham*, 38 Vt. 64.

be a present sale.<sup>1</sup> Such parol sale amounts to a license to the purchaser to enter upon the vendor's land and cut the trees, the title to which thereupon vests in him. No absolute title in

<sup>1</sup> *Taylor v. Waters*, 7 Taunt. 374. **Alabama**: *Heflin v. Bingham*, 56 Ala. 566, 28 Am. Rep. 776. **Indiana**: *Cool v. Peters*, Box & L. Co. 87 Ind. 531; *Owens v. Lewis*, 46 Ind. 488, 15 Am. Rep. 295. **Kentucky**: *Byassee v. Reese*, 4 Metc. 372, 83 Am. Dec. 481, holding that a parol sale of standing trees, in contemplation of their immediate separation from the soil, by either the vendor or vendee, is a constructive severance of them, and they pass as chattels. **Maine**: *Erschine v. Plummer*, 7 Me. 447, 22 Am. Dec. 216; *Banton v. Shorey*, 77 Me. 48. **Maryland**: *Smith v. Bryan*, 5 Md. 141, 59 Am. Dec. 104. **Massachusetts**: *United Society v. Brooks*, 145 Mass. 410, 14 N. E. Rep. 622; *Whitmarsh v. Walker*, 1 Met. 313; *Clafin v. Carpenter*, 4 Met. 580, 583, 38 Am. Dec. 381; *Hill v. Cutting*, 107 Mass. 596, 597; *Drake v. Wells*, 11 Allen, 141; *Giles v. Simonds*, 15 Gray, 441, 77 Am. Dec. 373. **Michigan**: *White v. King*, 87 Mich. 107, 49 N. W. Rep. 518; *Spalding v. Archibald*, 52 Mich. 365, 17 N. W. Rep. 940; *Wetmore v. Neuberger*, 44 Mich. 362, 6 N. W. Rep. 837; *Haskell v. Ayres*, 35 Mich. 89; *Greeley v. Stilson*, 27 Mich. 153; *Ward v. Rapp*, 79 Mich. 469, 44 N. W. Rep. 934. **New York**: *Mumford v. Whitney*, 15 Wend. 380, 30 Am. Dec. 60; *Pierrepont v. Barnard*, 6 N. Y. 279; *Killmore v. Howlett*, 48 N. Y. 569. In this case the owner of woodland contracted to cut standing trees into wood, and to deliver it at a certain price per cord. It was held that the contract, though oral, was valid.

In *Smith v. Surnam*, 9 B. & C. 561, *Littledale, J.*, said that the fourth section of the statute of frauds related to contracts "which give the vendee a right to the use of the land for a specific period. If in the case the contract had been for the sale of the trees, with a specific liberty to the vendee to enter upon the land to cut them, I think it would not have given

him an interest in the land within the meaning of the statute. The object of a party who sells timber is, not to give the vendee any interest in his land, but to pass to him an interest in the trees when they become goods and chattels." In *White v. Foster*, 102 Mass. 375, *Colt, J.*, referring to some of the cases cited in this note, said: "When cases have arisen under parol or simple contracts for the sale of growing timber, to be cut and severed from the freehold by the vendee, such agreements, with reference to the statute of frauds, and in order to give effect to them, have been construed as not intended by the parties to convey any interest in the land, and therefore not within the statute. Such contracts are held to be at least executory contracts for the sale of chattels, as they shall be thereafter severed from the real estate, with a license to enter on the land for the purpose of removal."

In *Whitmarsh v. Walker*, 1 Met. 313, the defendant agreed verbally to sell to the plaintiff, at a stipulated price, two thousand mulberry-trees, then growing upon his land. The plaintiff paid a small sum at the time, and agreed to pay the remainder on the delivery of the trees, which was to be on demand. The defendant refused to carry out the agreement, insisting that it was not binding, being for the sale of an interest in land. *Wilde, J.*, delivering the opinion of the court, remarked that the contract of sale was not to be considered as consummated at the time of the agreement, and that no property then vested in the plaintiff. He adds: "It is immaterial whether the severance was to be made by the plaintiff or by the defendant. For a license for the plaintiff to enter and remove the trees would pass no interest in the land, and would without writing be valid notwithstanding the statute of frauds."

the trees vests until they are severed from the land. After severance the license is coupled with an interest and is irrevocable, and the purchaser has a right to enter and remove the trees he has cut. Before the trees are severed the vendor may revoke such license, and then no title passes to the purchaser, and no right vests in him by virtue of such contract.

1607. A sale of standing trees is thus regarded as executory, passing no title until they are severed from the land. The owner of land with growing trees upon it agreed to sell all the hemlock bark, and all the hemlock and spruce timber standing on the land, to one who agreed to purchase, cut, and remove the timber and bark within four years, and to cut and remove a certain amount each year, and to pay certain prices per cord for the bark and per thousand feet for the timber. It was held that the contract was an executory agreement for the sale of timber and bark, and that the property in the trees did not pass until they were cut. "The instrument," say the court, "in all its parts seemed to look to future action and future results rather than to a present change of title. The property to be transferred had no existence in the form in which it was referred to in the contract. It was called bark, lumber, and timber, and was to be first put into that form, and then measured and paid for, at certain prices by the cord and by the thousand."<sup>1</sup>

1608. According to some authorities, if an immediate severance of trees from the land is contemplated by the parties, a sale or reservation of them may be by parol, for the property is regarded as personalty; but if an immediate severance is not in contemplation, the sale or reservation must be by written contract, for the property is an interest in the realty.<sup>2</sup>

1609. An oral license to cut and remove trees within a certain time is revoked by giving an absolute conveyance of

<sup>1</sup> United Society v. Brooks, 145 Mass. 410, 14 N. E. Rep. 632.

<sup>2</sup> Byassee v. Reese, 4 Met. (Ky.) 372, 83 Am. Dec. 481; Cain v. McGuire, 13 B. Mon. 340; McClintock's App. 71 Pa. St. 365, 367. In this case a grantor reserved the timber on the land, to be taken off upon thirty days' notice from the grantee. Williams, J., for the court, said: "In the case in hand, it is manifest that the parties intended by their contract to

divide the pine and hemlock timber from the freehold, and to give it the quality of a chattel. It was not to be taken off at discretion as to time. By the express terms of the deed, the vendee of the land had the right to require the removal on giving, and the vendor was bound to take it off on receiving, thirty days' notice. The timber must, therefore, be regarded as a chattel which passed to the administrator."

the land to another, although the grantee has knowledge of such license.<sup>1</sup> Such a license, when acted upon by the purchaser of the trees by severing them from the land, is not revocable.<sup>2</sup> If such purchaser has cut a part of the trees before the revocation of the license, the revocation does not affect his right to remove the trees already cut, but it terminates the license as to the trees then left standing.<sup>3</sup> But if the contract has not been executed in any part by a severance of the trees from the soil, it is wholly revocable. "So long as the timber or other product of the soil continues in its natural condition, and no act is done by the vendee towards its separation from the soil, no property or title passes to the vendee. The whole rests in contract. A revocation of the license to enter on the land does not defeat any valid title; it does not deprive an owner of chattels of his property in or possession of them. The contract being still executory, no title has passed to the vendee, and the refusal of the vendor to permit the vendee to enter on the land, for the purpose of disconnecting from the freehold the property agreed to be sold, is only a breach of contract, the remedy for which is an action for damages, as in the common case of a failure or refusal to deliver ordinary chattels in pursuance of a contract of sale."<sup>4</sup>

1610. A bill of sale of growing timber is no more than a license to enter, cut, and remove it, and it does not operate as a revocation of a prior parol license to cut and remove the timber until the first licensee has notice of such revocation. If the first licensee has cut the timber, and thereby converted it into personalty under his license, he is entitled to the timber, and

<sup>1</sup> *Drake v. Wells*, 11 Allen, 141; *Ward v. Rapp*, 79 Mich. 469, 44 N. W. Rep. 934.

<sup>2</sup> *Fletcher v. Livingston*, 153 Mass. 388, 26 N. E. Rep. 1001; *Nettleton v. Sikes*, 8 Met. 34; *Nelson v. Nelson*, 6 Gray, 385; *Douglas v. Shumway*, 13 Gray, 498; *Whitmarsh v. Walker*, 1 Met. 313; *White v. King*, 87 Mich. 107, 49 N. W. Rep. 518; *Cool v. Peters Box & L. Co.* 87 Ind. 531; *Owens v. Lewis*, 46 Ind. 488, 15 Am. Rep. 285; *Armstrong v. Lawson*, 73 Ind. 498.

<sup>3</sup> *Giles v. Simonds*, 15 Gray, 441, 77

Am. Dec. 373; *Burton v. Scherpf*, 1 Allen, 135, 79 Am. Dec. 717.

<sup>4</sup> *Drake v. Wells*, 11 Allen, 141, 143, per Bigelow, J. And see *Fletcher v. Livingston*, 153 Mass. 388, 26 N. E. Rep. 1001; *Hill v. Cutting*, 113 Mass. 107; *Delaney v. Root*, 99 Mass. 546, 548, 97 Am. Dec. 52; *Armstrong v. Lawson*, 73 Ind. 498; *Owens v. Lewis*, 46 Ind. 488, 15 Am. Rep. 295; *Cool v. Peters Box & L. Co.* 87 Ind. 531; *Ward v. Rapp*, 79 Mich. 469, 44 N. W. Rep. 934; *Pierrepont v. Barnard*, 6 N. Y. 279.



may recover the value of it from the licensee under the bill of sale who has taken possession of it.<sup>1</sup>

But a contract in writing, whereby the owner of land agrees to rent it for a certain period to another for a sum named, and to permit him to cut and remove all the growing timber therefrom, is a contract of lease, and not a mere license for the right of possession passed by it.<sup>2</sup>

**1611. A parol exception of growing trees in a conveyance of the land, though assented to by the grantee, constitutes a mere license to enter upon the land and cut the trees, may be revoked at any time before the trees are cut, and no action lies for such revocation.<sup>3</sup>**

An exception of standing timber made in a conveyance of the land is an exception of an interest in the land. The title to the timber in such case remains in the grantor, who has an implied power to enter, cut, and remove the timber at his pleasure. This right does not rest upon the notion of a license from the grantee, as in the case of a parol exception, but is an incident to the title retained by the grantor. If there are no words limiting the time within which the grantor may exercise this right, it cannot be terminated at the will of the grantee or owner of the land, nor by notice to remove the timber within a reasonable time.<sup>4</sup>

**1612. Timber trees cut down, and lying upon the ground where they grew, pass by a deed of the land.<sup>5</sup> But trees that have been cut into logs or hewed into timber do not pass with the land.<sup>6</sup>**

**1613. Trees and shrubs planted in a nursery garden, for the temporary purpose of cultivation and growth until they are fit for market, and then to be taken up and sold, pass by a deed or mortgage of the land, so that neither the grantor, his assignee, nor his creditors can remove them as personal property.<sup>7</sup> One**

<sup>1</sup> *White v. King*, 87 Mich. 107, 49 N. W. Rep. 518.

<sup>2</sup> *Crane v. Patton*, 57 Ark. 340.

<sup>3</sup> *Armstrong v. Lawson*, 73 Ind. 498; *Owens v. Lewis*, 46 Ind. 488, 15 Am. Rep. 295; *Jones v. Timmons*, 21 Ohio St. 596.

<sup>4</sup> *Wait v. Baldwin*, 60 Mich. 622, 27 N. W. Rep. 697; *Knotts v. Hydrick*, 12 Rich. 314.

<sup>5</sup> *Brackett v. Goddard*, 54 Me. 309; *Kittredge v. Woods*, 3 N. H. 503, 14 Am. Dec. 393, per Richardson, C. J.; *Cockrill v. Downey*, 4 Kans. 426, so holding as to down trees whose roots are still attached to the earth.

<sup>6</sup> *Cook v. Whiting*, 16 Ill. 480.

<sup>7</sup> *Maples v. Millon*, 31 Conn. 598; *Adams v. Beadle*, 47 Iowa, 439, 29 Am. Rep. 487; *Smith v. Price*, 39 Ill. 28, 89 Am.

claiming that trees and shrubs, whether growing naturally or planted and cultivated for any purpose, are not part of the realty, must show special circumstances which take the particular case out of the general rule; he must show that the parties intended that they should be regarded as personal chattels. The mere fact that the trees and shrubs were the stock in trade of the mortgagor in his business as a nursery gardener is insufficient for this purpose. They are *prima facie* parcel of the land itself, and would pass to a vendee upon a sale of the land unless specially excepted, and in the same way, unless excepted, pass to a mortgagee.<sup>1</sup> Although planted by the mortgagor after the execution of the mortgage, they become a part of the realty and part of the mortgage security.<sup>2</sup>

Trees in a nursery are sometimes and for some purposes regarded as chattels; while the same trees, immediately upon being transplanted, become real estate.<sup>3</sup>

1614. **Overhanging trees.** — There is an exception to the maxim of law, *Cujus est solum ejus est usque ad cælum*, in the case of overhanging trees; for the rule is that the owner of the land upon which the trunk of the tree wholly stands is entitled to the fruit, though its branches overhang the lands of an adjoining owner and the roots of the tree penetrate the soil of such land.<sup>4</sup> If the latter converts the overhanging branches, or the fruit from such branches, to his own use, he is liable therefor to the owner of the tree.<sup>5</sup> He may cut off the branches of the tree to the extent that they overhang his land and are a nuisance. He may also cut the roots of the tree to the extent that they penetrate his land and are a damage to it.<sup>6</sup>

Dec. 284. And see *Bank v. Crary*, 1 Barb. 542; *King v. Wilcomb*, 7 Barb. 263; *Lee v. Risdon*, 7 Taunt. 188, per Gibbs, C. J.

<sup>1</sup> Per Hinman, C. J., in *Maples v. Milon*, 31 Conn. 598.

<sup>2</sup> *Price v. Brayton*, 19 Iowa, 309.

<sup>3</sup> *Winslow v. Bromich*, 54 Kans. 300, 38 Pac. Rep. 275. Horton, C. J., says that this distinction well illustrates the rule that the simple fact of annexation to the realty is not the sole and controlling test whether an article is a fixture or not.

<sup>4</sup> *Masters v. Pollie*, 2 Rolle Rep. 141; *Waterman v. Soper*, 1 Ld. Ray. 737; *Holder v. Coates*, 1 Moody & M. 112; *Hutchins v. King*, 1 Wall. 53, 59; *Hoffman v. Armstrong*, 48 N. Y. 201, 8 Am. Rep. 537; *Dubois v. Beaver*, 25 N. Y. 123, 82 Am. Dec. 326; *Lyman v. Hale*, 11 Conn. 177, 27 Am. Dec. 728; *Skinner v. Wilder*, 38 Vt. 115, 88 Am. Dec. 645.

<sup>5</sup> *Lyman v. Hale*, 11 Conn. 177, 27 Am. Dec. 728; *Skinner v. Wilder*, 38 Vt. 115, 88 Am. Dec. 645.

<sup>6</sup> *Grandona v. Lovdal*, 70 Cal. 161, 11 Pac. Rep. 623.

A tree growing upon the boundary line between adjoining owners presumptively belongs to them as tenants in common.<sup>1</sup>

1615. The owner of land is not divested of his title to timber cut from his land by a trespasser, but may follow it and recover it though it has been sold to a *bona fide* purchaser.<sup>2</sup>

## II. *Fruit.*

1616. A sale of fruit growing upon trees is a sale of an interest in land and must be in writing, although no time is limited for taking the fruit.<sup>3</sup> Growing fruits, such as apples, pears, and peaches, go to the heir, and not to the executor. They cannot be seized and sold upon execution as chattels.<sup>4</sup>

A sale, by parol contract, of the peaches growing in a peach orchard, to be gathered and removed as they mature is valid. No interest in the land is involved in such sale though the fruit is immature.<sup>5</sup>

1617. Blackberries while growing on the bushes are *fructus naturales* and part of the realty. They are not subject to levy on execution as personal property. Mr. Justice Mitchell, of the Supreme Court of Minnesota, said:<sup>6</sup> "It is sometimes stated that the test whether the unsevered product of the soil is an emblement, and, as such, personal property, is whether it is produced chiefly by the manurance and industry of the owner. But, while this test is correct as far it goes, it is incomplete. Under modern improved methods, all fruits are cultivated, the quality and quantity of the yield depending more or less upon the annual expenditure of labor upon the trees, bushes, or vines; but it has never been held that fruit growing upon cultivated trees was subject to

<sup>1</sup> *Dubois v. Beaver*, 25 N. Y. 123, 82 Am. Dec. 326; *Griffin v. Bixby*, 12 N. H. 454, 37 Am. Dec. 225; *Musch v. Burkhardt*, 83 Iowa, 301, 48 N. W. Rep. 1025.

<sup>2</sup> *Strubbee v. Trustees Cincinnati Ry. Co.* 78 Ky. 481, 39 Am. Rep. 251; *Isle Royale Min. Co. v. Hertin*, 37 Mich. 332, 26 Am. Rep. 520; *Murphy v. S. C. & Pac. R. Co.* 55 Iowa, 473, 39 Am. Rep. 175; *Lindsay v. Winona & St. P. R. Co.* 29 Minn. 411, 43 Am. Rep. 228, relating to grass.

<sup>3</sup> *Rodwell v. Phillips*, 9 M. & W. 501. This was a sale of pears growing upon

the trees. Lord Abinger said: "Growing fruit would not pass to an executor, but to the heir; it could not be taken by a tenant for life, or levied in execution under a writ of *fieri facias* by the sheriff; therefore it is distinct from all those cases where the interest would pass, not to the heir at law, but to some other person."

<sup>4</sup> *Roe v. Gemmill*, 1 Houst. 9.

<sup>5</sup> *Turner v. Piercy*, 40 Md. 212, 17 Am. Rep. 591.

<sup>6</sup> *Sparrow v. Pond*, 49 Minn. 412, 418, 52 N. W. Rep. 36.

levy as personal property. No doubt all emblements are produced by the manurance and labor of the owner, and are called *fructus industriales* for that reason; but the manner, as well as purpose, of planting is an essential element to be taken into consideration. If the purpose of planting is not the permanent enhancement of the land itself, but merely to secure a single crop, which is to be the sole return for the labor expended, the product would naturally fall under the head of 'emblements.' On the other hand, if the tree, bush, or vine is one which requires to be planted but once, and will then bear successive crops for years, the planting would be naturally calculated to permanently enhance the value of the land itself, and the product of any one year could not be said to essentially owe its existence to labor expended during that year; and hence it would be classed among *fructus naturales*, and the right of emblements would not attach.

"This classification is, of course, more or less arbitrary, but it is the one uniformly adopted by the courts (unless hops be an exception), and it is the only one which will furnish a definite and exact rule. Blackberry bushes are perennial, and, when planted once, yield successive crops. They grow wild, but, like every other kind of fruit or berry, are improved by cultivation. The quantity and quality of the yield is largely dependent upon the amount of annual care expended upon them, but the difference in that respect between them and other fruits is only one of degree."

### III. Grass.

1618. Grass is considered a natural product of the land, renewed from year to year without cultivation. It is, in contemplation of law, part of the soil of which it is the natural growth. Growing grass is not a chattel which can be seized as such upon execution; it goes to the heir and not to the executor.<sup>1</sup>

A sale of grass to be cut or fed by the buyer is a contract concerning an interest in the land, within the statute of frauds, and must be in writing.<sup>2</sup>

<sup>1</sup> *Evans v. Roberts*, 5 B. & C. 829, 832, per Bayley, J.; *Chamberlain*, Matter of, 140 N. Y. 390, 35 N. E. Rep. 602, 37 Am. Rep. 614.

<sup>2</sup> *Leake on Land Laws*, pt. iii. p. 50; *St. Rep.* 568; *Kain v. Fisher*, 6 N. Y. 597; *Bank v. Crary*, 1 Barb. 542, 545; *Kimball v. Sattley*, 55 Vt. 285, 45 Am. Rep. 614; *Crosby v. Wadsworth*, 6 East, 602; *Carrington v. Roots*, 2 M. & W. 248.

But when a sale of grass is made after it has matured, and is ready to cut, the sale may be regarded as a sale of a chattel interest only, and the same rule is applicable that governs a sale of timber to be cut and removed immediately:<sup>1</sup> the sale may be made by parol contract, and there is no objection to it arising from the statute of frauds.<sup>2</sup>

<sup>1</sup> § 1606.

<sup>2</sup> *Cutler v. Pope*, 13 Me. 377.

## CHAPTER XXXV.

### GROWING CROPS, OR FRUCTUS INDUSTRIALES.

1619. Growing crops produced by annual planting and labor are so far a part of the land that they *prima facie* pass by a conveyance of the title to the land when there is no express reservation or exception of the crops.<sup>1</sup> But it is only in a limited sense that growing crops are a part of the real estate. While they pass by a deed or mortgage of the land, they possess the characteristics of personal property in most other respects. They may be sold and transferred as personal property by the owner,

<sup>1</sup> *Sainsbury v. Matthews*, 4 M. & W. 343; *Evans v. Roberts*, 5 B. & C. 829. **Alabama**: *Thweat v. Stamps*, 67 Ala. 96. **Arkansas**: *Gibbons v. Dillingham*, 10 Ark. 9, 50 Am. Dec. 233; *Floyd v. Ricks*, 14 Ark. 286, 58 Am. Dec. 374. **Connecticut**: *Kinsman v. Kinsman*, 1 Root, 180, 1 Am. Dec. 37. **Georgia**: *Pitts v. Hendrix*, 6 Ga. 452. **Illinois**: *Bull v. Griswold*, 19 Ill. 631, 633; *Carson v. Clark*, 2 Ill. 113, 115, 25 Am. Dec. 79. **Indiana**: *Heavilon v. Heavilon*, 29 Ind. 509; *Turner v. Cool*, 23 Ind. 56, 85 Am. Dec. 449; *Chapman v. Long*, 10 Ind. 465; *Kluse v. Sparks* (Ind.), 36 N. E. Rep. 914. **Kansas**: *Polley v. Johnson*, 52 Kans. 478, 482, 35 Pac. Rep. 8; *First Nat. Bank v. Beegle*, 52 Kans. 709, 35 Pac. Rep. 814, 39 Am. St. Rep. 365; *Missouri Valley Land Co. v. Barwick*, 50 Kans. 57, 31 Pac. Rep. 685; *Goodwin v. Smith*, 49 Kans. 351, 31 Pac. Rep. 153; *Caldwell v. Alsop*, 48 Kans. 571, 29 Pac. Rep. 1150; *Beckman v. Sikes*, 35 Kans. 120, 10 Pac. Rep. 592; *Garanflo v. Cooley*, 33 Kans. 137, 5 Pac. Rep. 766; *Smith v. Leighton*, 38 Kans. 544, 17 Pac. Rep. 52; *Chapman v. Veach*, 32 Kans. 167, 4 Pac. Rep. 100; *Smith v. Hague*, 25 Kans. 246. **Kentucky**: *Foster v. Fletcher*, 7 T. B. Mon. 534, 18 Am. Dec. 208. **Louisiana**: *Porche v. Bodin*, 28 La. Ann. 761. **Maryland**: *Coombs v. Jordan*, 3 Bland. Ch. 284, 22 Am. Dec. 236. **Michigan**: *Tripp v. Hasceig*, 20 Mich. 254; *Coman v. Thompson*, 47 Mich. 22, 41 Am. Rep. 706. **Missouri**: *McIlvaine v. Harris*, 20 Mo. 457, 64 Am. Dec. 196; *Steele v. Farber*, 37 Mo. 71, 80; *Pratte v. Coffman*, 27 Mo. 424; *Boyer v. Williams*, 5 Mo. 335, 32 Am. Dec. 324. **New Jersey**: *Bloom v. Welsh*, 27 N. J. L. 177, 183. **New York**: *Sexton v. Breese*, 135 N. Y. 387, 32 N. E. Rep. 133; *Stall v. Wilbur*, 77 N. Y. 158; *Foot v. Colvin*, 3 Johns. 216, 222, 3 Am. Dec. 478; *Wintermute v. Light*, 46 Barb. 278, 283; *Pattison v. Hull*, 9 Cow. 754. **Pennsylvania**: *Backenstoss v. Stahler*, 33 Pa. St. 251, 75 Am. Dec. 592; *Bittinger v. Baker*, 29 Pa. St. 66, 70 Am. Dec. 154; *Bear v. Bitzer*, 16 Pa. St. 175, 55 Am. Dec. 490; *Lauchner v. Rex*, 20 Pa. St. 464; *Wilkins v. Vashbinder*, 7 Watts, 378; *Bank v. Wise*, 3 Watts, 394; *Sallade v. James*, 6 Pa. St. 144. **Texas**: *Willis v. Moore*, 59 Tex. 628, 46 Am. Rep. 284. **Virginia**: *Crews v. Pendleton*, 1 Leigh, 297, 19 Am. Dec. 750.

and as such they may be attached and taken upon execution by his creditors.

Growing crops are so far personal property that upon the decease of the owner they go to his personal representatives as against his heirs.<sup>1</sup> But they go to the devisee of the land and not to the executor. This is the settled rule of the common law, and remains the law in this country,<sup>2</sup> so far as it has not been changed by statute.<sup>3</sup> This distinction has been called "capricious" and "unphilosophical;" but Mr. Justice Walton declares that "it is nevertheless founded in practical wisdom," because the devisee is the selected object of a specific donation. If the gift is unconditional, "we think it may fairly be presumed that it was the intention of the donor that his donee should take the land, as a grantee would take it, with the right to immediate possession, and the full enjoyment of all that is growing upon it, as well the unsevered annual crops as the more permanent growth."<sup>4</sup>

Of course the presumed intention of the testator, that the devisee should take the crops upon the land, may be controlled by the expression of a different purpose in the will, and a slight intimation is sufficient.<sup>5</sup>

**1620. Crops, whether mature or not, may be sold by parol contract.** A sale of growing crops is not a sale of an interest in land within the meaning of the statute of frauds.<sup>6</sup> "If a growing crop of corn does not in any of these cases (stated by Lord Coke) constitute any part of the land, I think," says Little-

<sup>1</sup> 2 Bl. Com. 404; *Kluse v. Sparks* (Ind.), 36 N. E. Rep. 914; *Wright v. Watson*, 96 Ala. 536, 11 So. Rep. 634; *Sherman v. Willett*, 42 N. Y. 146.

<sup>2</sup> *West v. Moore*, 8 East, 339; *Cox v. Godsalve*, 6 East, 604; *Dennett v. Hopkinson*, 63 Me. 350, 18 Am. Rep. 227.

<sup>3</sup> *Dennett v. Hopkinson*, 63 Me. 350, 18 Am. Rep. 227; *Pratte v. Coffman*, 27 Mo. 424.

<sup>4</sup> *Dennett v. Hopkinson*, 63 Me. 350, 18 Am. Rep. 227.

<sup>5</sup> *Bradner v. Faulkner*, 34 N. Y. 347.

<sup>6</sup> *Evans v. Roberts*, 5 B. & C. 829; *Jones v. Flint*, 10 Ad. & El. 753; *Parker v. Staniland*, 11 East, 362; *Warwick v. Bruce*, 2 Maule & S. 205; *Davis v. McFarlane*, 37 Cal. 634, 99 Am. Dec. 340; *Marshall v. Ferguson*, 23 Cal. 65; *Harris*

*Frink*, 49 N. Y. 24, 10 Am. Rep. 318; *Austin v. Sawyer*, 9 Cow. 39, 42; *Purner v. Piercy*, 40 Md. 212, 17 Am. Rep. 591; *Bryant v. Crosby*, 40 Me. 9, 23; *Delaney v. Root*, 99 Mass. 546, 548, 97 Am. Dec. 52; *Ross v. Welch*, 11 Gray, 235; *Bull v. Griswold*, 19 Ill. 631; *Ticknor v. McClelland*, 84 Ill. 471; *Thompson v. Wilhite*, 81 Ill. 356; *Graff v. Fitch*, 58 Ill. 373, 11 Am. Rep. 85; *Kluse v. Sparks* (Ind.), 36 N. E. Rep. 914; *Sherry v. Picken*, 10 Ind. 375; *Craddock v. Riddlesbarger*, 2 Dana, 205; *Moreland v. Myall*, 14 Bush, 474; *Bloom v. Welsh*, 27 N. J. L. 177; *Westbrook v. Eager*, 16 N. J. L. 81; *Bellows v. Wells*, 36 Vt. 599.

*Contra*, see *Kerr v. Hill*, 27 W. Va. 576, 605.

dale, J., in a leading case, "that a sale of any growing produce of the earth, raised by labor and expense, in actual existence at the time of the contract, whether it be in a state of maturity or not, is not to be considered a sale of an interest in or concerning land, within the meaning of the fourth section of the statute of frauds, but a contract for the sale of goods, wares, and merchandise within the seventeenth section of that statute. Such an interest goes to the executor and not to the heir, and anything which goes to the executor and not to the heir may be taken in execution. . . . Now, a growing crop of corn or potatoes, or of any vegetable which is produced, not spontaneously by the earth but by the labor and expense of the occupier, goes to the executor, and not to the heir of tenant in fee simple. It would seem, therefore, that such a growing crop may be seised under a *fieri facias*, issued against the owner of the inheritance as his goods and chattels, even while they are annexed to the freehold. I cannot, therefore, consider the annual produce of land which is proceeding to a state of maturity, and which, when taken at maturity, will be severed from the ground and become movable goods and chattels, as an interest in or concerning land within the meaning of the fourth section of the statute of frauds, which seems to me to mean land taken as mere land, and not its annual growing productions."<sup>1</sup>

1621. Whether crops that are matured, ready for harvest, pass by a conveyance of the land, is a question upon which the decisions are not agreed, though the better opinion seems to be that so long as the crops are not severed from the land, either in fact or in law, they pass by such conveyance.<sup>2</sup>

<sup>1</sup> *Evans v. Roberts*, 5 Barn. & C. 829, 840. This was a sale of growing potatoes. Holroyd, J., said: "Although the vendee might have an incidental right, by virtue of his contract, to some benefit from the land while the potatoes were arriving at maturity, yet I think he had not an interest in the land within the meaning of this statute."

<sup>2</sup> *Kittredge v. Woods*, 3 N. H. 503, 507, 14 Am. Dec. 393, per Richardson, C. J.; *Tripp v. Hasceig*, 20 Mich. 254, 262, 4 Am. Rep. 388; *Heavilon v. Heavilon*, 29 Ind. 509.

In *Tripp v. Hasceig*, 20 Mich. 254, 262,

4 Am. Rep. 388, Graves, J., said: "If the crops are to be considered as land or personal chattels, as they continue or do not continue to draw nourishment from the soil, the instances will be numerous in which very difficult inquiries will be requisite to settle the point."

*Contra*, *Everingham v. Braden*, 58 Iowa, 133, 12 N. W. Rep. 142; *First Nat. Bank v. Beegle*, 52 Kans. 709, 35 Pac. Rep. 8; *Goodwin v. Smith*, 49 Kans. 351, 31 Pac. Rep. 153; *Missouri Val. Land Co. v. Barwick*, 50 Kans. 57, 31 Pac. Rep. 685; *Powell v. Rich*, 41 Ill. 466, a dictum.



**1622.** A chattel mortgage of the crops, made by the owner in possession, operates in law as a severance of them, so that they will not pass under a mortgage of the land upon the subsequent entry of the mortgagee and sale of the realty under the mortgage.<sup>1</sup> A bill of sale or chattel mortgage of such crops, made by the grantor after delivery of a conveyance of the land, passes no title to them as against the grantee in such conveyance, though the crops still remain in the grantor's possession.<sup>2</sup> If the grantor, before his conveyance, has agreed to sell the crop to another who has not paid the purchase-price at the time of the conveyance, the grantee is entitled to collect the price.<sup>3</sup>

**1623.** A sale of the growing crop upon execution may be regarded as a severance of it, so that a subsequent purchaser of the land will acquire no interest in it;<sup>4</sup> and an assignment for the benefit of creditors has the same effect.<sup>5</sup>

**1624.** A reservation of growing crops may be made by parol where there is no express exception in the deed. The crops are but a temporary interest in the land. They are really personal chattels only.<sup>6</sup> The rule is different, however, in regard to the natural products of the earth, such as trees, a reservation of which must be by writing.<sup>7</sup>

**1625.** The owner of the soil is entitled to crops raised upon it, by a stranger to the title, without license or authority of the

<sup>1</sup> *White v. Pulley*, 27 Fed. Rep. 436; *Willis v. Moore*, 59 Tex. 628, 46 Am. Rep. 284.

<sup>2</sup> *Coman v. Thompson*, 47 Mich. 22, 10 N. W. Rep. 62, 41 Am. Rep. 706; *Gibbons v. Dillingham*, 10 Ark. 9, 50 Am. Dec. 233; *First Nat. Bank v. Beegle*, 52 Kans. 709, 35 Pac. Rep. 8; *Caldwell v. Alsop*, 48 Kans. 571, 29 Pac. Rep. 1150; *Willis v. Moore*, 59 Tex. 628, 46 Am. Rep. 284.

<sup>3</sup> *Smith v. Leighton*, 38 Kans. 544, 17 Pac. Rep. 52.

<sup>4</sup> *Hershey v. Metzgar*, 90 Pa. St. 217; *Stambaugh v. Yeates*, 2 Rawle, 161; *Austin v. Sawyer*, 9 Cow. 39.

<sup>5</sup> *Myers v. White*, 1 Rawle, 353.

<sup>6</sup> *Sherman v. Willett*, 42 N. Y. 146. *Backenstoss v. Stahler*, 33 Pa. St. 251, 75 Am. Dec. 592; *Lauchner v. Rex*, 20 Pa. St. 464; *McIlvaine v. Harris*, 20 Mo. 457, 64 Am. Dec. 196; *Kluse v.*

*Sparks (Ind.)*, 37 N. E. Rep. 1047, affirming *Ind. App.* 36 N. E. Rep. 914, overruling, so far as in conflict, *Turner v. Cool*, 23 Ind. 56, 85 Am. Dec. 449; *Chapman v. Long*, 10 Ind. 465; *Heavilon v. Heavilon*, 29 Ind. 509; *Armstrong v. Lawson*, 73 Ind. 498; *Hays v. Peck*, 107 Ind. 389, 8 N. E. Rep. 274; *Bailey v. Briant*, 117 Ind. 362, 20 N. E. Rep. 278; *Baker v. Jordan*, 3 Ohio St. 438; *Youmans v. Caldwell*, 4 Ohio St. 71, approved in *Jones v. Timmons*, 21 Ohio St. 596.

*Contra*, *Brown v. Thurston*, 56 Me. 126, 96 Am. Dec. 438; *Gibbons v. Dillingham*, 10 Ark. 9, 50 Am. Dec. 233; *McIlvaine v. Harris*, 20 Mo. 457, 64 Am. Dec. 196; *Howell v. Schenck*, 24 N. J. L. 89; *Austin v. Sawyer*, 9 Cow. 39; *Wintermute v. Light*, 46 Barb. 278, relating to wine plants.

<sup>7</sup> *Green v. Armstrong*, 1 Denio, 550.

owner.<sup>1</sup> But crops raised by one holding actual and exclusive possession of land under claim of title belong to him.<sup>2</sup> Thus a vendee in possession, holding an agreement or bond for title, is entitled to the crops raised by him, though his agreement or bond is invalid. As between the parties the crops are chattels and not part of the realty.<sup>3</sup>

1626. Crops on leased land belong to the lessee, and a conveyance of the land does not pass any title to the crops. They are personal property and may be sold by the lessee.<sup>4</sup>

The lessee of a farm is entitled to a crop growing upon it at the time of the execution of the lease, which matures during his term, if there is no reservation of the crop.<sup>5</sup>

1627. Growing crops, as between the owner of the soil and his creditors, are personal property, and as such subject to attachment and sale for his debts, although they are at the time immature and dependent upon the soil for nourishment.<sup>6</sup> A levy

<sup>1</sup> *Thomas v. Moody*, 11 Me. 139; *Freeman v. McLennan*, 26 Kans. 151; *Simpkins v. Rogers*, 15 Ill. 397; *Crotty v. Collins*, 13 Ill. 567.

<sup>2</sup> *Martin v. Thompson*, 62 Cal. 618, 45 Am. Rep. 663.

<sup>3</sup> *Harris v. Frink*, 49 N. Y. 24, 10 Am. Rep. 318.

<sup>4</sup> *Mabry v. Harp*, 53 Kans. 398, 36 Pac. Rep. 743; *Pickens v. Webster*, 31 La. Ann. 870; *Porche v. Bodin*, 28 La. Ann. 761; *Dayton v. Vandoozer*, 39 Mich. 749; *Bittinger v. Baker*, 29 Pa. St. 66, 70 Am. Dec. 154; *Edwards v. Perkins*, 7 Oreg. 149; *Bellows v. Wells*, 36 Vt. 599.

<sup>5</sup> *Emery v. Fugina*, 68 Wis. 505, 32 N. W. Rep. 236.

<sup>6</sup> *Jones v. Flint*, 10 Ad. & El. 753; *Peacock v. Pulvis*, 2 Brod. & B. 362; *Evans v. Roberts*, 5 B. & C. 829, 835. **Alabama**: *McKenzie v. Lampley*, 31 Ala. 526. **Georgia**: *Crine v. Tifts*, 65 Ga. 644. **Illinois**: *Bull v. Griswold*, 19 Ill. 631, 633. **Indiana**: *Favorite v. Deardorff*, 84 Ind. 555; *Lindley v. Kelley*, 42 Ind. 294. **Kansas**: *Coughlin v. Coughlin*, 26 Kans. 116; *Polley v. Johnson*, 52 Kans. 478, 23 L. R. A. 258. **Kentucky**: *Thompson v. Craigmyle*, 4 B. Mon. 391, 41 Am. Dec. 240; *Moreland v. Myall*, 14 Bush, 474;

*Parham v. Thompson*, 2 J. J. Marsh. 159; *Craddock v. Riddlesbarger*, 2 Dana, 205. **Louisiana**: *Porche v. Bodin*, 28 La. Ann. 761; *Pickens v. Webster*, 31 La. Ann. 870. **Massachusetts**: *Penhallow v. Dwight*, 7 Mass. 34, 5 Am. Dec. 21; *Heard v. Fairbanks*, 5 Met. 111, 38 Am. Dec. 394; *Mulligan v. Newton*, 16 Gray, 211. In this State the crops must be fit for harvest, as a valid attachment can be made only by severing them from the freehold, and keeping them in the officer's custody. **Michigan**: *Preston v. Ryan*, 45 Mich. 174, 7 N. W. Rep. 819. **Mississippi**: *Cayce v. Stovall*, 50 Miss. 396. **New Hampshire**: *Kingsley v. Holbrook*, 45 N. H. 313, 86 Am. Dec. 173; *Howe v. Batchelder*, 49 N. H. 204. **New Jersey**: *Westbrook v. Eager*, 16 N. J. L. 81; *Bloom v. Welsh*, 27 N. J. L. 177. **New York**: *Green v. Armstrong*, 1 Den. 550; *Shepard v. Philbrick*, 2 Den. 174; *Hartwell v. Bissell*, 17 Johns. 128; *Whipple v. Foot*, 2 Johns. 418, 3 Am. Dec. 442; *Harder v. Plass*, 57 Hun, 540; *Bank v. Crary*, 1 Barb. 542; *Harris v. Frink*, 49 N. Y. 24, 10 Am. Rep. 318; *Newcomb v. Raynor*, 15 Wend. 108, 34 Am. Dec. 219; *Mumford v. Whitney*, 15 Wend. 380, 30 Am. Dec. 60; *Austin v. Sawyer*, 9 Cow. 39. **North Carolina**:

and sale of crops in that condition usually afford but a slight return to the creditor, while they may inflict a serious loss upon the debtor.<sup>1</sup>

A purchaser of land at an execution or judicial sale is entitled to the crops growing thereon at the time, though not to crops that have been severed before the sale.<sup>2</sup>

**1628.** The purchaser at a foreclosure sale is entitled to the crops growing at the time of the conveyance, in preference to the mortgagor, or any one claiming under him whose claim originated subsequently to the mortgage;<sup>3</sup> and he is entitled in prefer-

*Flynt v. Conrad*, Phillips L. 190, 93 Am. Dec. 588; *Smith v. Tritt*, 1 Dev. & Bat. 241, 28 Am. Dec. 565; *Brittain v. McKay*, 1 Ired. 265, 35 Am. Dec. 738; *Bond v. Coke*, 71 N. C. 97, 100. **Pennsylvania**: *Stambaugh v. Yeates*, 2 Rawle, 161; *Pattison's Appeal*, 61 Pa. 294, 100 Am. Dec. 637; *Hershey v. Metzgar*, 90 Pa. 217; *Long v. Seavers*, 103 Pa. 517. **South Carolina**: *Devore v. Kemp*, 3 Hill, 259. **Tennessee**: *Edwards v. Thompson*, 85 Tenn. 720, 4 S. W. Rep. 913. **Texas**: *Cook v. Steel*, 42 Tex. 53; *Silberberg v. Trilling*, 82 Tex. 523, 18 S. W. Rep. 591; *Willis v. Moore*, 59 Tex. 628, 46 Am. Rep. 284. **Vermont**: *Hamblet v. Bliss*, 55 Vt. 535.

<sup>1</sup> *Sexton v. Breese*, 135 N. Y. 387, 391, 32 N. E. Rep. 133; *Stall v. Wilbur*, 77 N. Y. 158; *Whipple v. Foot*, 2 Johns. 418, 422, 3 Am. Dec. 442.

<sup>2</sup> *Hershey v. Metzgar*, 90 Pa. St. 217.

<sup>3</sup> **California**: *Montgomery v. Merrill*, 65 Cal. 432, 4 Pac. Rep. 414. **Illinois**: *Anderson v. Strauss*, 98 Ill. 485; *Rankin v. Kinsey*, 7 Ill. App. 215; *Sugden v. Beasley*, 9 Ill. App. 71, quoting text. **Indiana**: *Jones v. Thomas*, 8 Blackf. 428. **Iowa**: *Downard v. Groff*, 40 Iowa, 597. **Kansas**: *Beckman v. Sikes*, 35 Kans. 120, 10 Pac. Rep. 592; *Missouri Val. Land Co. v. Barwick*, 50 Kans. 57, 31 Pac. Rep. 685; *Smith v. Hague*, 25 Kans. 246; *Chapman v. Veach*, 32 Kans. 167, 4 Pac. Rep. 100; *Garanflo v. Cooley*, 33 Kans. 137, 5 Pac. Rep. 766; *Goodwin v. Smith*, 49 Kans. 351, 31 Pac. Rep. 153, 33 Am. St. Rep. 373, 17 L. R. A. 284. **Maine**:

*Perley v. Chase*, 79 Me. 519, 11 Atl. Rep. 418. **Michigan**: *Scriven v. Moote*, 36 Mich. 64; *Ruggles v. First Nat. Bank*, 43 Mich. 192, 5 N. W. Rep. 257; *Ledyard v. Phillips*, 32 Mich. 13, 47 Mich. 305, 11 N. W. Rep. 170. **Missouri**: *Hayden v. Burkemper*, 101 Mo. 644, 14 S. W. Rep. 767. **New Jersey**: *Calvin v. Shimer* (N. J.), 15 Atl. Rep. 255; *Howell v. Schenck*, 24 N. J. L. 89. **New York**: *Sherman v. Willett*, 42 N. Y. 146; *Sexton v. Breese*, 135 N. Y. 387, 391, 32 N. E. Rep. 133; *Batterman v. Albright*, 122 N. Y. 484, 25 N. E. Rep. 856; *Shepard v. Philbrick*, 2 Den. 174; *Lane v. King*, 8 Wend. 584, 24 Am. Dec. 105.

In *Batterman v. Albright*, 122 N. Y. 484, 25 N. E. Rep. 856, Judge Bradley, delivering the judgment, said: "The doctrine peculiar to growing crops, originating in considerations deemed beneficial to the interests of agriculture, has remained substantially unchanged, and the rule, as stated in *Lane v. King*, 8 Wend. 584, 24 Am. Dec. 105, was not only followed in some of the cases before cited, but that case and its doctrine have more recently been judicially cited and referred to with approval in this State." Citing *Harris v. Frink*, 49 N. Y. 24, 31; *Samson v. Rose*, 65 N. Y. 411.

**Ohio**: *Parker v. Storts*, 15 Ohio St. 351. **Vermont**: *Hamblet v. Bliss*, 55 Vt. 535. **Virginia**: *Crews v. Pendleton*, 1 Leigh, 297, 19 Am. Dec. 750. **West Virginia**: *Kerr v. Hill*, 27 W. Va. 576.

In *Cassilly v. Rhodes*, 12 Ohio, 88, it was held that a tenant of the mortgagor was

ence to one who bids off the property at a sale subsequently made by the assignee in bankruptcy of the mortgagor.<sup>1</sup> It is immaterial whether the crops were planted before or after the execution of the mortgage. After the sale, while awaiting confirmation thereof, and a delivery of the deed and possession, the purchaser may, it seems, upon application to the court, have an injunction restraining the mortgagor and others claiming under him from meddling with the crops.<sup>2</sup> Before confirmation the purchaser's title is not sufficient to enable him to maintain replevin for crops that have been severed by the person in possession.<sup>3</sup> The confirmation of the sale relates back to the sale, and entitles the purchaser to the crops from that time, if no equities prevent and due notice has been given to interested parties.<sup>4</sup> If, however, the growing crop be expressly reserved at the sale, it having been previously sold by the mortgagee as administrator of the mortgagor, the purchaser acquires no title to it.<sup>5</sup> But the sheriff or other officer in selling has no authority to reserve the way-going crops.<sup>6</sup>

1629. This rule uniformly prevails where the common law on the subject of mortgages remains in force. Even in some States in which a mortgage is regarded as a security merely, the title remaining in the mortgagor, the rule is the same. In a recent important case on this subject in New York the court say: "Our attention is called to no reason why the considerations upon which the doctrine relating to emblements was founded, and has since been observed, are now any less entitled to satisfaction than formerly. The fact that the right to ejectment is taken away from the mortgagee by the statute, and the mortgage reduced to

entitled to the annual crops. The case was decided on the ground that in Ohio the statute requires a valuation of lands for judicial sales, and the value of growing crops is not included in the estimate. This decision was reaffirmed in *Houts v. Showalter*, 10 Ohio St. 124, and in *Albin v. Riegel*, 40 Ohio St. 339. On a statute almost identical with that of Ohio a contrary conclusion was reached in *Jones v. Thomas*, 8 Blackf. 428.

<sup>1</sup> *Gillett v. Balcom*, 6 Barb. 370.

<sup>2</sup> *Ruggles v. First Nat. Bank*, 43 Mich. 192, 5 N. W. Rep. 257; *Mut. Life Ins. Co. v. Bigler*, 79 N. Y. 568; *Missouri*

*Land Co. v. Barwick*, 50 Kans. 57, 31 Pac. Rep. 685; *Galbreath v. Drought*, 29 Kans. 711; *Farlin v. Sook*, 30 Kans. 401, 1 Pac. Rep. 123; *Emerson v. Sansome*, 41 Cal. 552; *Frink v. Roe*, 70 Cal. 296, 11 Pac. Rep. 820; *Walker v. Hill*, 22 N. J. Eq. 513; *Morse v. Hackensack Bank*, 47 N. J. Eq. 279, 20 Atl. Rep. 961.

<sup>3</sup> *Woehler v. Endter*, 46 Wis. 301, 50 N. W. Rep. 1099.

<sup>4</sup> *Ruggles v. First Nat. Bank*, 43 Mich. 192, 5 N. W. Rep. 257.

<sup>5</sup> *Sherman v. Willett*, 42 N. Y. 146.

<sup>6</sup> *Howell v. Schenck*, 24 N. J. L. 89.

a mere chose in action, secured by lien upon the land while the defeasance remains effectual, does not seem to have any essential bearing upon the question, inasmuch as the perfecting of title under it has relation to the time it became a lien.”<sup>1</sup>

1630. This rule in regard to crops applies as well to trees and shrubs growing in a nursery. “The rule, as between mortgagor and mortgagee, as to crops growing on mortgaged premises, is no less favorable to the claim of the plaintiff than that relating to nursery trees, which partake of the same character, and the principle applicable to both in such case may be treated as the same.”<sup>2</sup>

1631. But in some States, where a mortgage creates no estate, but only a lien, the mortgagor or his tenant may claim the crops which have matured at the time of the foreclosure.<sup>3</sup> In such States the mortgagor is entitled to the possession and use of the land, and to the crops grown thereon, until his right is divested by appropriate judicial proceedings. The title to the land remains in the mortgagor, and his right to control and dispose of the annual crops remains in him, at least until a receiver is appointed and obtains possession. The fact that the mortgage debt is due, and that the mortgagor is in default, does not of itself divest him of the right to control and dispose of the crops. The crop is chattel property, which the mortgagor has a right to

<sup>1</sup> *Batterman v. Albright*, 122 N. Y. 484, 25 N. E. Rep. 856.

<sup>2</sup> *Batterman v. Albright*, 122 N. Y. 484, 25 N. E. Rep. 856. Bradley, J., said: “It may be observed that the doctrine applicable to growing crops is distinguishable from that relating to other personal property on land, as between grantor and grantee and mortgagor and mortgagee. The theory on which it rests is that they in some sense appertain to the realty; and the general rule, as declared from an early day by text and judicial writers, is that a party entering into possession by title paramount to the right of the tenant takes them. . . . And while the plaintiff (a purchaser upon execution against the mortgagor, prior to the foreclosure sale), as against the mortgagor, and without

liability to the mortgagee, may have taken the nursery trees from the premises prior to the time of the foreclosure of the mortgage, he had no such right as against the purchaser or his grantee, who had entered under the title perfected by the sale on foreclosure, and the conveyance made pursuant to it.” Citing *Lane v. King*, 8 Wend. 584, 24 Am. Dec. 105; *Shepard v. Philbrick*, 2 Denio, 174; *Gillett v. Balcom*, 6 Barb. 370; *Jewett v. Keenholts*, 16 Barb. 193; *Sherman v. Willett*, 42 N. Y. 146; *Aldrich v. Reynolds*, 1 Barb. Ch. 613; *Adams v. Beadle*, 47 Iowa, 439, 29 Am. Rep. 487.

<sup>3</sup> *Richards v. Knight*, 78 Iowa, 69, 42 N. W. Rep. 584; *Hecht v. Dettman*, 56 Iowa, 679, 7 N. W. Rep. 495, 10 N. W. Rep. 241, 41 Am. Rep. 131.

sell, and, if he sells the same prior to the appointment of a receiver, the purchaser obtains a good title.<sup>1</sup>

1632. The purchaser at a foreclosure sale is even entitled to the growing crops as against a lessee who took his lease after the execution of the mortgage, for the record of the mortgage is notice to the lessee of the prior lien of the mortgage, not only upon the land but upon the crops raised thereon.<sup>2</sup>

1633. A mortgagee of the land upon taking possession is entitled to the growing crops, and may restrain the mortgagor or his assignee in insolvency from cutting the crops.<sup>3</sup> A prior mortgagee may enter and take possession of the crops as against a judgment debtor who has already seized them under an execution against the mortgagor.<sup>4</sup>

Where the owner of the equity of redemption is entitled to redeem, during a limited period, after a foreclosure sale, he is entitled to the crops that mature while he is in possession, although these are covered by the mortgage.<sup>5</sup>

1634. If the mortgagor severs the crops before entry by the mortgagee, or before sale under foreclosure proceedings, they cease to be a part of the realty and are not covered by the mortgage.<sup>6</sup> Thus, where a crop of corn was planted on the mortgaged land by the mortgagor, and, four days before a sale of the land under a judgment of foreclosure, the mortgagor sold the crop, which was then mature, but there had been no physical severance of it at the time of the foreclosure sale, the purchaser from the mortgagor was adjudged to be entitled to the crop. The sale of it by the mortgagor was a constructive severance of it from the land.<sup>7</sup> But where a mortgagor planted a crop of corn

<sup>1</sup> § 1522; *Caldwell v. Alsop*, 48 Kans. 571, 29 Pac. Rep. 1150, per Johnson, J.; *Hecht v. Dettman*, 56 Iowa, 679, 7 N. W. Rep. 495, 10 N. W. Rep. 241, 41 Am. Rep. 131. But a mortgage sale does not affect the right of a tenant of the mortgagor to crops growing on the mortgaged land, where such tenant was not made a party to the foreclosure proceedings. *St. John v. Swain*, 14 N. Y. Supp. 743.

<sup>2</sup> *Lane v. King*, 8 Wend. 584, 24 Am. Dec. 105; *Sallade v. James*, 6 Pa. St. 144; *Stanbrough v. Cook*, 83 Iowa, 705, 49 N. W. Rep. 1010.

<sup>3</sup> *Bagnall v. Villar*, L. R. 12 Ch. D. 812; *Jones on Mortgages*, § 1658; *White v. Pulley*, 27 Fed. Rep. 436.

<sup>4</sup> *Steele v. Farber*, 37 Mo. 71.

<sup>5</sup> *Second National Bank v. Swan*, 2 N. D. 225, 50 N. W. Rep. 357; *Pioneer Sav. & Loan Co. v. Farnham*, 50 Minn. 315, 52 N. W. Rep. 897.

<sup>6</sup> *Hinton v. Walston*, 115 N. C. 7, 20 S. E. Rep. 164.

<sup>7</sup> *First Nat. Bank v. Beegle*, 52 Kans. 709, 35 Pac. Rep. 814, 23 L. R. A. 258.

on mortgaged land, and the land was sold under foreclosure on the first day of August, when the crop was still growing and immature, it was held that the crop passed by the sale to the purchaser at such sale, in preference to one who purchased the crop of the mortgagor the day before the foreclosure sale. "The mortgagor planted the crop knowing that it was subject to the mortgage, and liable to be divested by the foreclosure and sale of the premises. Any one who purchased such crop from him took it subject to the same contingency, as the recorded mortgage and the decree of foreclosure were notice to him of the existence of the lien. If the land is not sold until the crop has ripened and been severed, the vendee of the mortgagor would ordinarily get a good title; but if the land was sold and conveyed while the crop was still growing, and there was no reservation or waiver of the right to the crop at such sale, the title to the same would pass with the land."<sup>1</sup>

The owner of a farm subject to a mortgage sold a crop of wheat growing thereon, giving a bill of sale and the right to harvest the crop, and subsequently surrendered possession to the mortgagee. The latter prevented the purchaser of the crop from cutting the wheat, but after it was harvested such purchaser entered and carried it away. In an action of replevin by the mortgagee it was held that the action was not maintainable, as the purchaser of the crop had the right to take the wheat. The mortgagor's legal title to the land had not ceased, and the mere fact of the change of possession of the land was not sufficient to annul the mortgagor's sale of the crop with license to enter and carry away the crop when it should reach maturity.<sup>2</sup>

<sup>1</sup> Beckman v. Sikes, 35 Kans. 120, 122,  
10 Pac. Rep. 592.

<sup>2</sup> Sexton v. Breese, 135 N. Y. 387, 32  
N. E. Rep. 133.

## CHAPTER XXXVI.

### INCIDENTS TO REALTY WHICH PASS AS APPURTENANCES.

I. Appurtenances in general, 1635-1646. II. Land appurtenant to land, 1647-1651. III. Appurtenances to mills, 1652-1656.	IV. Rights of way appurtenant, 1657-1659. V. Water rights appurtenant, 1660-1662. VI. Drains and sewers appurtenant, 1663, 1664.
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#### *I. Appurtenances in General.*

1635. An appurtenance is that which belongs to another thing, but which has not belonged to it immemorially. A thing appendant is that which, beyond memory, has belonged to another thing more worthy.<sup>1</sup> The thing appurtenant need not be one of necessity; it may be one of convenience only; but it must be connected in use with the principal.<sup>2</sup> Appendants are "ever by prescription." He further says "that nothing can be properly appendant or appurtenant to anything unless the principal or superior thing be of perpetual subsistence and continuance."

1636. The thing which is appurtenant and that to which it is appurtenant must agree in nature and aptitude. Thus, in an old case, one sold a mill with its appurtenances, and the jury found that a kiln was occupied with the mill for many years. "*Sed per Curiam*, that kiln shall not pass by those words, for it might be a lime-kiln, and have no relation to the mill."<sup>3</sup> Mr. Justice Field, of the Supreme Court of the United States, in a recent case defined an appurtenance, saying, "A thing is appurtenant to something else only when it stands in the relation of an

<sup>1</sup> Co. Litt. 121 b, 122 a; New Ipswich Factory v. Batchelder, 3 N. H. 190, 14 Am. Dec. 346.

<sup>2</sup> Humphreys v. McKissock, 140 U. S. 304, 11 Sup. Ct. Rep. 779; Meek v. Breck-

enridge, 29 Ohio St. 642; Woodhull v. Rosenthal, 61 N. Y. 382; Wilson v. Beckwith, 117 Mo. 61, 22 S. W. Rep. 639.

<sup>3</sup> Appertaining, 3 Salk. 40.



incident to a principal, and is necessarily connected with the use and enjoyment of the latter.”<sup>1</sup>

1637. It is a general rule that the word “appurtenances,” when used in a deed, passes only incorporeal easements and privileges,<sup>2</sup> and, of these, only such as are necessary to the proper enjoyment of the estate granted, or are usually enjoyed with it. In a recent case before the Queen’s Bench Division, Lord Justice Fay said: “No doubt the word ‘appurtenances’ is not apt for the creation of a new right, and the word ‘appurtenant’ is not apt to describe a right which had never previously existed; and therefore the mere grant of all appurtenances, or of all ways appurtenant to the principal subject of the grant, has been held in many cases not to create a new right of way where the right was not preëxisting at the date of the grant. But, from as long ago as the fourth year of Philip and Mary,<sup>3</sup> the word ‘appurtenances’ has easily admitted of a secondary meaning, and as equivalent in that case to ‘usually occupied.’”<sup>4</sup>

1638. There are authorities, however, which hold that the word “appurtenances” has no inflexible meaning, and must be construed with reference to the nature of the principal thing granted.<sup>5</sup> The word is frequently used to signify something more than the purely incorporeal hereditaments usually annexed to lands, and when it can be gathered from all the circumstances that it was so used, effect should be given to the understanding of the parties.<sup>6</sup>

<sup>1</sup> *Humphreys v. McKissock*, 140 U. S. 304, 313, 11 Sup. Ct. Rep. 779, citing *Harris v. Elliott*, 10 Pet. 25, 54; *Jackson v. Hathaway*, 15 Johns. 447, 455; *Linthicum v. Ray*, 9 Wall. 241.

<sup>2</sup> *Buszard v. Capel*, 8 B. & C. 141, 6 Bing. 150; *Lister v. Pickford*, 34 Beav. 576; *Harris v. Elliott*, 10 Pet. 25, 54; *Griffiths v. Morrison*, 106 N. Y. 165, 12 N. E. Rep. 580; *Armstrong v. Du Bois*, 90 N. Y. 95; *Ogden v. Jennings*, 62 N. Y. 526, 531, per Allen, J.; *Woodhull v. Rosenthal*, 61 N. Y. 382; *New York Cent. R. Co. v. Buffalo & N. Y. & Erie R. Co.* 49 Barb. 501, 505; *Jackson v. Hathaway*, 15 Johns. 447, 8 Am. Dec. 263; *Jackson v. Striker*, 1 Johns. Cas. 284; *St. Louis Bridge Co. v. Curtis*, 103 Ill. 410; *Perry v. Pennsyl-*

*vania R. Co.* (N. J.) 26 Atl. Rep. 829; *Tyler v. Hammond*, 11 Pick. 194; *Otis v. Smith*, 9 Pick. 293; *Gayetty v. Bethune*, 14 Mass. 49, 7 Am. Dec. 188; *Leonard v. White*, 7 Mass. 6, 8, 5 Am. Dec. 19; *Frey v. Drahos*, 6 Neb. 1, 39 Am. Rep. 353; *Helme v. Guy*, 2 Murph. (N. C.) 341; *Tucker v. Jones*, 8 Mont. 225, 19 Pac. Rep. 571; *Ottumwa Woollen Mill Co. v. Hawley*, 44 Iowa, 57, 24 Am. Rep. 719.

<sup>3</sup> *Hill v. Grange*, Plowd. 164, 170.

<sup>4</sup> *Thomas v. Owen*, 20 Q. B. D. 225, 231.

<sup>5</sup> *Missouri Pac. Ry. Co. v. Maffitt*, 94 Mo. 56, 6 S. W. Rep. 600.

<sup>6</sup> *Frey v. Drahos*, 6 Neb. 1, 39 Am. Rep. 353, per Lake, C. J.

1639. Only such easements as are directly necessary to the proper enjoyment of the land granted pass as appurtenant thereto. The necessity measures both the extent and duration of the right. The necessity must be actual. When the necessity ceases, the right resulting from it ceases.<sup>1</sup>

1640. But easements already created and belonging to the grantor, and in actual use at the time of the conveyance, will often pass, although not absolutely necessary, but only convenient. Clearly, in case the grantor adds words conveying the privileges and appurtenances "as now or heretofore used by me," the inquiry is not as to what is necessary, but what was in use at the time; and in that case it is to the use, and not to the necessity, that the evidence should be directed.<sup>2</sup>

If the owner of a house, the eaves of which project over the land of an adjoining owner, has acquired from him the right to maintain such projection, such right will pass by deed to a purchaser of the house as an appurtenance to it. But if the grantor had not acquired such an easement, and he does not expressly convey any such right to his grantee, the right does not pass.<sup>3</sup>

When one owning the right of fastening a boom to the shore, by purchase from an adjoining owner, conveys his land with the boom and piers, and privileges thereto appertaining, as before used by him, the grantee acquires the right of fastening the boom in the manner this right was enjoyed by his grantor.<sup>4</sup>

1641. The right to take ice from a pond, granted to one who purchased land adjoining on which to build an ice-house, is a natural, appropriate, and necessary adjunct of the land conveyed, and is an appurtenance to such land in the nature of an easement; and, upon a subsequent sale by the original purchaser of the land with the appurtenances, the right passes to his grantee.<sup>5</sup>

<sup>1</sup> *Humphreys v. McKissock*, 140 U. S. 304, 11 Sup. Ct. Rep. 779; *Woodhull v. Rosenthal*, 61 N. Y. 382; *Ogden v. Jennings*, 62 N. Y. 526; *Comstock v. Johnson*, 46 N. Y. 615; *Burr v. Mills*, 21 Wend. 290; *Holmes v. Seely*, 19 Wend. 507; *Oakley v. Stanley*, 5 Wend. 523; *Le Roy v. Platt*, 4 Paige, 77; *Tabor v. Bradley*, 18 N. Y. 109, 72 Am. Dec. 498; *Voorhees v. Burchard*, 55 N. Y. 98; *Griffiths v. Morrison*, 36 Hun, 337; *New Ipswich*

*Factory v. Batchelder*, 3 N. H. 190, 14 Am. Dec. 346; *Howell v. M'Coy*, 3 Rawle, 256.

<sup>2</sup> *Hoskins v. Brawn*, 76 Me. 68; *Baker v. Bessey*, 73 Me. 472, 40 Am. Rep. 377.

<sup>3</sup> *Meek v. Breckenridge*, 29 Ohio St. 642.

<sup>4</sup> *Hoskins v. Brawn*, 76 Me. 68.

<sup>5</sup> *Huntington v. Asher*, 96 N. Y. 604, 48 Am. Rep. 652, reversing 26 Hun, 496.

1642. The word "appurtenances" in a deed conveys only what is legally appurtenant to the land described. It does not, without particular mention, convey any rights which do not naturally and necessarily belong to the thing granted in the hands of the grantor. It will not be construed to convey an easement in the land of another which, by reason of not having ripened into a legal right, had not become legally attached to the land conveyed, unless the easement is particularly described, and there is a manifest intention on the part of the grantor to include it in the conveyance.<sup>1</sup> Mr. Justice Kellogg, speaking for the Supreme Court of Vermont, said: "We have not been able to find any case in which the word 'appurtenances,' where none were specified, has been held to pass any rights or privileges *in alieno solo*, or in lands outside of the limits of the subject-matter of the grant, as necessarily incident to the thing granted, unless they legally existed in the grantor at the time of his conveyance."<sup>2</sup>

1643. The word "appurtenance" is not necessary to the passing of anything that is merely incident to the land granted. The incident follows the principal thing without words. Everything reasonably necessary to the enjoyment of the land tacitly goes with the grant of the land.<sup>3</sup> Thus, where the use of a ditch and water exists in favor of land, they pass by a deed of the land without express mention, or even the use of the word "appurtenances."<sup>4</sup>

The Civil Code of California declares the general principle in the provision that a transfer of real property passes all easements attached thereto, and creates in favor thereof an easement to use other real property of the person whose estate is transferred, in the same manner and to the same extent as such property was obviously and permanently used by the person whose

<sup>1</sup> Swazey v. Brooks, 34 Vt. 451, criticizing a dictum to the contrary in Vermont Cent. R. Co. v. Hills, 23 Vt. 681; Spaulding v. Abbot, 55 N. H. 423; Seavey v. Jones, 43 N. H. 441; Dunklee v. Wilton R. Co. 24 N. H. 489; Manning v. Smith, 6 Conn. 289, 292; Green v. Collins, 86 N. Y. 246, 40 Am. Rep. 531, reversing 20 Hun, 474; Tabor v. Bradley, 18 N. Y. 109, 72 Am. Dec. 498.

<sup>2</sup> Swazey v. Brooks, 34 Vt. 451, 455.

<sup>3</sup> Sheets v. Selden, 2 Wall. 177, 187,

per Field, J.; Cave v. Crofts, 53 Cal. 135; Green v. Collins, 86 N. Y. 246, 40 Am. Rep. 531; Huttemeier v. Albro, 18 N. Y. 48; Tucker v. Jones, 8 Mont. 225, 19 Pac. Rep. 571; Donnell v. Humphreys, 1 Mont. 518, 530; Simmons v. Winters, 21 Oreg. 35, 27 Pac. Rep. 7; Jackson v. Trullinger, 9 Oreg. 393.

<sup>4</sup> Simmons v. Winters, 21 Oreg. 35, 27 Pac. Rep. 7; Tucker v. Jones, 8 Mont. 225, 19 Pac. Rep. 571.

estate is transferred, for the benefit thereof, at the time when the transfer was agreed upon or completed.<sup>1</sup>

In Kentucky it is provided by statute that every deed shall, unless an exception be made therein, be construed to include all buildings, privileges, and appurtenances of every kind attached to the lands therein conveyed.<sup>2</sup>

1644. An easement appurtenant during a severance of ownership of adjoining estates is extinguished by a unity of ownership. If a house be so built that a portion of it overhangs an adjoining house, and afterwards both houses come under the ownership of one person, who sells them to different purchasers, the purchaser of the overhanging house acquires a right to maintain his house without condition, or to pull it down and build another of the same description. If, however, the owner of both houses had removed the overhanging portion, and then sold to different persons, the overhanging could not be renewed, because the houses, as the court say, "must be taken as they were at the time of the conveyance."<sup>3</sup> The rule of the common law on this subject is well stated by Mr. Justice Selden in a case before the Court of Appeals of New York: "The principle is, that where the owner of two tenements sells one of them, or the owner of an entire estate sells a portion, the purchaser takes the tenement, or portion sold, with all the benefits and burdens which appear, at the time of the sale, to belong to it, as between it and the property which the vendor retains. This is one of the recognized modes by which an easement or servitude is created. No easement exists so long as there is a unity of ownership, because the owner of the whole may at any time rearrange the qualities of the several parts. But the moment a severance occurs, by the sale of a part, the right of the owner to redistribute the properties of the respective portions ceases, and easements or servitudes are created corresponding to the benefits and burdens mutually existing at the time of the sale. This is not a rule for the benefit of purchasers only, but is entirely reciprocal. . . . The parties are presumed to contract in reference to the condition of the property at the time of the sale, and neither has a right, by altering arrangements then openly existing, to change materially the relative value of the respective parts."<sup>4</sup>

<sup>1</sup> Civ. Code, § 1104.

<sup>3</sup> *Robbins v. Barnes*, Hob. 131.

<sup>2</sup> G. S. 1894, § 2357.

<sup>4</sup> *Lampman v. Milks*, 21 N. Y. 505, 507.

1645. A deed of a city lot, with its appurtenances, conveys the title to a shade-tree planted by the grantor in the margin of the sidewalk in front of the lot, and it is immaterial whether the grantor owns the title in fee to the centre of the street. The tree should be regarded as an appurtenance to the lot, in precisely the same legal sense that a hitching-post of stone, iron, or wood, if located in the very place where the tree stood, would have been regarded as an appurtenance to the lot.<sup>1</sup>

1646. All rents and income accumulated in respect to the land conveyed pass with it, unless they have been so disconnected with it as to become personal property. A conveyance of a share in a wharf passes a dividend declared a month afterwards for the year previous to the time it was declared. Of course, rents or income of the property in arrear, and disconnected with the estate as debts due, would not pass by the conveyance.<sup>2</sup>

## II. *Land Appurtenant to Land.*

1647. By deed, land does not pass as appurtenant to other land.<sup>3</sup> By a will it may do so, in order to give effect to the testator's intention.<sup>4</sup> But, even in case of a devise, lands usually occupied with a house will not pass as appurtenances unless it clearly appears that the testator meant to extend the word "appurtenances" beyond its technical sense.<sup>5</sup>

When land is conveyed by definite boundaries, other land beyond those boundaries will not pass as appurtenant.<sup>6</sup> Mines and minerals belonging to the grantor in adjoining land, as for instance in adjoining streets, which the grantor has conveyed excepting the valuable minerals, do not pass as appurtenant to the land conveyed. It would be folly to say that the grantor "actually intended, when conveying a lot abutting on the street, to convey also a property so carefully reserved and separated from such lot,

<sup>1</sup> *Gorham v. Eastchester Electric Co.* 31 Abb. N. C. 198, 29 N. Y. Supp. 1094.

<sup>2</sup> *Winslow v. Rand*, 29 Me. 362.

<sup>3</sup> *Ammidown v. Granite Bank*, 8 Allen, 285, 292; *Miller v. Mann*, 55 Vt. 475; *Buck v. Squiers*, 22 Vt. 484; *St. Louis Bridge Co. v. Curtis*, 103 Ill. 410; *Wilson v. Beckwith*, 117 Mo. 61, 22 S. W. Rep. 639.

<sup>4</sup> *Doe v. Collins*, 2 T. R. 498; *Blackborn v. Edgley*, 1 P. Wms. 600, 603; *Otis v. Smith*, 9 Pick. 293.

<sup>5</sup> *Buck v. Nurton*, 1 B. & P. 53.

<sup>6</sup> *Smith v. Ridgway*, L. R. 1 Ex. 331; *Harris v. Elliott*, 10 Pet. 25, 54; *Jackson v. Hathaway*, 15 Johns. 447, 8 Am. Dec. 263; *Buck v. Squiers*, 22 Vt. 484; *Snoddy v. Bolen*, 122 Mo. 479, 24 S. W. Rep. 142.

or that the grantee of the lot could have supposed that was his intention by the terms of the grant, with this distinct and notable separation staring him in the face upon the public records of the title he was about to purchase.”<sup>1</sup>

1648. A railroad does not pass as an “appurtenance” to another railroad, any more than one tract of land will pass as appurtenant to another.<sup>2</sup> Neither does stock in another corporation owned by a railroad company pass by a deed or mortgage under the general description as an appurtenance to the road. This was the decision in a case where several railroad companies combined to construct an elevator to be used by the several roads, each contributing towards its cost, and each receiving certificates of stock in a corporation organized to take the tolls to the elevator and to construct it. A railroad company having such an interest in another corporation could not mortgage such interest as an appurtenance to its road or otherwise. Mr. Justice Field, delivering the judgment of the court, said:<sup>3</sup> “Were we to consider the company as possessing a separate legal interest in the elevator, it would not be appurtenant to its railroad. That building is situated at some distance from the railroad,—more than half a mile,—and is erected on land not belonging to that company, but leased from another company, and can only be reached by crossing the tracks of another railroad. Had the elevator been constructed upon property covered by the mortgage, it might have been contended that it fell, to the extent of the one sixth interest, under the mortgage, as one of the depots of the company.”

1649. Every grant of land includes that without which the grant would be of no avail, and includes that which is reasonably necessary to the enjoyment of the thing granted.<sup>4</sup> Mr. Justice Story said: “The good sense of the doctrine on this subject is that under the grant of a thing, whatever is parcel of it, or of the essence of it, or necessary to its beneficial use and

<sup>1</sup> *Snoddy v. Bolen*, 122 Mo. 479, 24 S. W. Rep. 142.

<sup>2</sup> *Philadelphia v. Philadelphia & Reading R. Co.* 58 Pa. St. 253.

<sup>3</sup> *Humphreys v. McKissock*, 140 U. S. 304, 313, 11 Sup. Ct. Rep. 779.

<sup>4</sup> *Co. Litt.* 152; *United States v. Appleton*, 1 Sumn. 492; *Bank v. Miller*, 7

*Sawyer*, 163, 169; *Sparks v. Hess*, 15 Cal. 186; *Voorhees v. Burchard*, 55 N. Y. 98, 102; *Farrar v. Stackpole*, 6 Me. 154, 19 Am. Dec. 201; *Baker v. Bessey*, 73 Me. 472, 40 Am. Rep. 377; *Wise v. Wheeler*, 6 Ired. 196; *Simmons v. Winters*, 21 Oreg. 35, 27 Pac. Rep. 7; *Riddle v. Littlefield*, 53 N. H. 503, 16 Am. Rep. 388.

enjoyment, or in common intendment is included in it, passes to the grantee." <sup>1</sup>

Notwithstanding the maxim, there are numerous instances in which land passes as appurtenant to land ; thus flats may pass as appurtenant to a wharf, in case they are necessary for the use of the wharf and are usually occupied with it. <sup>2</sup>

1650. Land as well as various privileges and easements often passes as appurtenant to land described by a comprehensive word, such as messuage, farm, mill, or the like. The question in such cases is, what is comprised within the meaning of the word or descriptive phrase used, covering the whole subject of the grant. Land and privileges in use, as a part of the thing included in the general designation of the whole, pass by virtue of the description. <sup>3</sup>

1651. It is a familiar rule, that by the grant of a house or messuage the curtilage and garden belonging to it passes with it as part of it. But only the garden, curtilage, and close adjoining to the house, and on which the house is built, passes under the general description. Other lands, although occupied with the house, will not pass unless they are particularly described. <sup>4</sup>

A deed of a well of water passes the fee in the land occupied by the well. <sup>5</sup> By a grant of a pool, the land passes with the water. <sup>6</sup> By a grant of a town pound, the land on which it stands is conveyed, not as an appurtenance, but as parcel. <sup>7</sup>

A barn conveyed or reserved *eo nomine* may include a shed connected with it, and other privileges. <sup>8</sup>

A conveyance of lands by metes and bounds with a sawmill and appurtenances, described as the mill property, includes as incident an easement in a piece of land belonging to the grantor,

<sup>1</sup> Whitney v. Olney, 3 Mason, 280, 284.

<sup>2</sup> Doane v. Broad Street Asso. 6 Mass. 332. See, however, Buszard v. Capel, 8 Barn. & C. 141.

<sup>3</sup> Lampman v. Milks, 21 N. Y. 505, 510, per Selden, J.

<sup>4</sup> Shep. Touch. 94 ; Smith v. Martin, 2 Saund. 400 and n. 2 ; Carden v. Tuck, Cro. Eliz. 89 ; Bettisworth's Case, 2 Coke, 516 ; Blackburn v. Edgley, 1 P. Wms. 600, 603 ; Ogden v. Jennings, 62 N. Y. 526, 530, per Allen, J. ; Johnson v. Ray-

nor, 6 Gray, 107 ; Stockwell v. Hunter, 11 Met. 448, 45 Am. Dec. 220 ; Ammidown v. Ball, 8 Allen, 293 ; Sparks v. Hess, 15 Cal. 186 ; Crawfordville v. Boots, 76 Ind. 32 ; Wilson v. Hunter, 14 Wis. 683, 80 Am. Dec. 795.

<sup>5</sup> Johnson v. Rayner, 6 Gray, 107 ; Mixer v. Reed, 25 Vt. 254 ; Brackett v. Goddard, 54 Me. 309, 313, per Appleton, C. J.

<sup>6</sup> Co. Litt. 5.

<sup>7</sup> Wooley v. Groton, 2 Cush. 305.

<sup>8</sup> Cunningham v. Webb, 69 Me. 92.

which had for many years been used as a mill-yard, and which was still necessary to the mill for that purpose, and as an approach or way to the mill.<sup>1</sup>

### III. *Appurtenances to Mills.*

1652. A deed of a mill passes not merely the building but the land under it and about it necessary to its use and commonly used with it, and the water privilege essential to its use;<sup>2</sup> such as the dam, the water-power, the privilege of flowing, the flow of water in the mill-stream, and the right to discharge water from the mill over other land of the grantor. Chief Justice Shaw defines the principle, saying: "The grant of a mill carries with it, by necessary implication, the right to the use of the water-course coming to the mill and furnishing power for working it, and also to the canal or raceway which carries the water from the mill, to the full extent of the grantor's right and power so to grant them."<sup>3</sup>

A conveyance of a branch canal and water-power passes the land belonging to the grantor which was necessary to the use of the canal and water-power.<sup>4</sup>

A conveyance of certain land specifically described, with a water privilege, recited that the land was to be for a site for the erection of a new mill to be run by water coming through a mill-race on the land; that the grantee was to have the privilege of widening said race, if necessary, but not to make unnecessary

<sup>1</sup> Voorhees v. Burchard, 55 N. Y. 98.

<sup>2</sup> Whitney v. Olney, 3 Mason, 280; United States v. Appleton, 1 Sumn. 492; Bank v. Miller, 7 Sawyer, 163; Dunklee v. Wilton R. Co. 24 N. H. 489; Gibson v. Brockway, 8 N. H. 465; New Ipswich Factory v. Batchelder, 3 N. H. 190; Blake v. Clark, 6 Me. 436; Baker v. Bessey, 73 Me. 472, 40 Am. Rep. 377; Allen v. Scott, 21 Pick. 25, 32 Am. Dec. 238; Pettee v. Hawes, 13 Pick. 323; Bacon v. Bowdoin, 22 Pick. 401; Forbush v. Lombard, 13 Met. 109; Wise v. Wheeler, 6 Ired. 196; Blaine v. Chambers, 1 S. & R. 169; Pickering v. Stapler, 5 S. & R. 107, 9 Am. Dec. 336; Strickler v. Todd, 10 S. & R. 63, 13 Am. Dec. 649; Tabor v. Bradley, 18 N. Y. 109, 113, 72 Am. Dec. 498;

Voorhees v. Burchard, 55 N. Y. 98, 106; Oakley v. Stanley, 5 Wend. 523; Le Roy v. Platt, 4 Paige, 77; French v. Carhart, 1 N. Y. 96; Taylor v. Hampton, 4 McCord, 96, 17 Am. Dec. 710; Curtis v. Norton, 58 Mich. 411, 25 N. W. Rep. 327; Bliss v. Kennedy, 43 Ill. 67, 71.

<sup>3</sup> Richardson v. Bigelow, 15 Gray, 154. And see Pickering v. Staples, 5 S. & R. 107, 9 Am. Dec. 336; Strickler v. Todd, 10 S. & R. 63, 13 Am. Dec. 49; Tabor v. Bradley, 18 N. Y. 113, 72 Am. Dec. 498; Voorhees v. Burchard, 55 N. Y. 106; Coolidge v. Hager, 43 Vt. 1, 5 Am. Dec. 256; Smith v. Moodus Water Power Co. 35 Conn. 392.

<sup>4</sup> Sheets v. Selden, 2 Wall. 177.



waste of the land along said race, and to have the privilege of clearing and keeping in repair said race; that the grantor was to have the privilege of passing and repassing over said race at any and all times, and of putting his fences on the race-bank, if necessary. It was held that the deed conveyed the fee simple title to the land covered by the mill-race, and not a mere privilege to convey water through it.<sup>1</sup>

1653. The cases relating to mills follow the general rule of law that all the incidents of the property conveyed which rightfully belong to it at the time of the conveyance, or are usually enjoyed with it, according to the nature of the property, its use and situation, pass with it. "It will be sufficient for our present purpose," said Mr. Justice Bell in a New Hampshire case, "to cite some cases which relate to mills and streams, the immediate subject of inquiry in this case. They support the principle that a conveyance of a mill, or of land on which a mill is situate, carries with it, as incidents of the mill, the right to raise the mill-pond, and to flow the lands above as high as the dam has been usually kept up, and to maintain the dam and flume which are necessary to support the water at that height, and to support and use the penstocks, aqueducts, and channels which are necessary to convey the water to the mill, and the channels and raceways which are necessary to conduct the water from the mill to the stream below, in the manner in which they have been kept and used immediately previous to the conveyance, so far at least as the grantor has a right to convey such privileges."<sup>2</sup>

The right to overflow adjoining lands is an easement, and will

<sup>1</sup> *Branson v. Studebaker*, 133 Ind. 147, 166, 33 N. E. Rep. 98. Elliott, J., said: "The clause, 'all that certain parcel or tract of land and water privileges,' taken in connection with the other language of the deed, clearly means that the grantor conveys land for a mill-site and mill-race, together with the privilege of using water. Under the authorities to which we have referred, the clause quoted, standing alone, would carry the land covered by the mill-race, for it is manifest that whatever was conveyed besides mere water privileges was land. The mill-site, and land necessary to the existence and operation of a mill, was designated as 'land' and as

'land conveyed;' but the language in other parts of the deed makes the meaning entirely free from doubt. If the land covered by the race was not conveyed, there is no meaning in the provisions reserving to the grantor the right 'of passing and repassing over said race,' and 'to have the privilege of putting his fences on the race-bank, if necessary.' If the fee remained in Miller, he would have possessed these rights, without any mention or reservation in the deed."

<sup>2</sup> *Dunklee v. Wilton R. Co.* 24 N. H. 489, 495. And see *Jackson v. Trullinger*, 9 Oreg. 393; *Taylor v. Hampton*, 4 McCord, 96, 17 Am. Dec. 710.

pass as an appurtenant when agreeing in nature and quality with the principal thing granted. Thus by the grant of a mill the dam and the rights of flowing essential to the enjoyment of the mill pass with it.<sup>1</sup>

One having made a conveyance of a mill, which as an incident passed with it the water-power necessary for its use as previously enjoyed by the grantor, he cannot, by a subsequent conveyance to another of a parcel of land through which the mill-stream flows, impair the right of the grantee of the mill to use the water.<sup>2</sup>

A deed by an officer selling under execution a mill property described as "the mill and dam, with the appurtenances," carries an easement in a dam and reservoir belonging to the judgment debtor above the mill and dam specifically mentioned. The grantee in such deed has the right to use the upper dam and reservoir to maintain a head of water, in the same manner that the former owner used it.<sup>3</sup>

**1654. Incidents which pass as appurtenances must be open and visible,** and consequently within the knowledge of the grantor. It is not essential that such apparent incidents should have been in the actual use of the vendor before his conveyance. Thus, if the owner of land on a stream sells a mill-site situated between a mill belonging to him and a reservoir above used for the benefit of the mill, the purchaser takes the portion conveyed with all the incidents and appurtenances which appear at the time of the sale to belong to it, as between it and the portion retained by the vendor. It was urged in such case that something more than the mere unity of the legal title with the visible incident of a water supply from the reservoir was necessary to cause the use of the reservoir to pass by the deed; that there must have been at the date of the conveyance not only ownership in the grantor both of the lot of land and reservoir, but also occupation of the lot and use of it in connection with the water power, in order that the right should attach to the lot in the hands of the purchaser.<sup>4</sup> But the court held that the use of the reservoir was

<sup>1</sup> *Wilcoxon v. McGhee*, 12 Ill. 381, 386, 54 Am. Dec. 409; *Jackson v. Trullinger*, 9 Oreg. 393.

<sup>2</sup> *Swartz v. Swartz*, 4 Pa. St. 354, 45 Am. Dec. 697.

<sup>3</sup> *Baker v. Bessey*, 73 Me. 472, 40 Am. Rep. 377.

<sup>4</sup> This argument was founded upon *Nicholas v. Chamberlain*, Cro. Jac. 121, which does not go to this extent, but merely requires knowledge by the vendor of the existing incidents.

an open and visible incident of the mill-site conveyed, and that because this incident was open and visible the grantor had knowledge of its existence. Such knowledge may be shown otherwise than by the grantor's actual use of the reservoir in connection with the land conveyed. His actual use of this incident or appurtenance was not essential to its passing by deed to his grantee.<sup>1</sup>

1655. The owner of land conveying a portion of it often creates and conveys to his grantee an easement in the portion of land retained by him, without expressly defining or mentioning the easement, if this is openly and visibly attached to the land conveyed at the time of the sale. Thus, where the owner of land through which a stream flowed diverted the stream to a new and artificial channel, so as to relieve a portion of the land formerly overflowed, which he then conveyed, neither he nor his grantees of the remaining land can return the stream to its ancient bed to the damage of the purchaser of the land benefited by diverting the stream.<sup>2</sup>

1656. But an easement in a water privilege is not appurtenant to a grant of land unless it is directly connected with the land, and is necessary to its enjoyment. Therefore where land on a stream is conveyed by metes and bounds with the right to build a mill, no right in a reservoir situated above this land is implied, though the reservoir is owned by the grantor, and the stream is small and the use of it is necessary for the beneficial use of a mill on the granted land. As there is nothing in the deed to indicate an intention to include any privileges connected with the subject of the grant, the grantee's rights are measured by the terms of the deed, and not by his subsequent convenience or necessity.<sup>3</sup> And so, where a conveyance was made by metes and bounds of certain land upon which the purchaser had built a mill and dam, it was held that no right to flow over other land of the grantor passed as an incident or appurtenance, because no intention to grant such a privilege was suggested by the terms of the deed, and there was no evidence that the grantor had notice of the existence of the mill or dam when the deed was executed.<sup>4</sup>

<sup>1</sup> *Simmons v. Cloonan*, 81 N. Y. 557.  
See, also, *Curtiss v. Ayrault*, 47 N. Y. 73.

<sup>2</sup> *Lampman v. Milks*, 21 N. Y. 505.  
And see *Cave v. Crafts*, 53 Cal. 135.

<sup>3</sup> *Brace v. Yale*, 4 Allen, 393. See § 1654.

<sup>4</sup> *Tabor v. Bradley*, 18 N. Y. 109, 72 Am. Dec. 498.

#### IV. *Rights of Way Appurtenant.*

1657. If a deed describes the land conveyed as bounded on a passageway, the grantee by implication takes a right of way over it as appurtenant to his land.<sup>1</sup>

A conveyance of land bounded on a highway which had been closed by statute does not convey an easement in the highway, or pass as appurtenant a right to claim damages subsequently awarded to the owners of lands injured by such closing. The damages belong to the owners at the time of the closing.<sup>2</sup>

1658. A way of necessity is founded on an implied grant. Thus if one grants a parcel of land surrounded by other land of his own, he impliedly grants a right of way over his land to the parcel conveyed. But no right of way is implied when a way over the grantor's land would be simply more convenient, or some other way would be exceedingly difficult to pass.<sup>3</sup> A right of way of necessity ceases when the necessity ceases.<sup>4</sup>

A conveyance of a parcel of land carved out of a larger piece owned by the grantor, and described by metes and bounds, does not carry a right of way through other land of the grantor not annexed to the land granted by any natural or legal necessity.<sup>5</sup> Though such way had been in actual use up to the time of severance, it will not pass as an easement over the land retained by the grantor, unless the language of the conveyance shows that he intended to create the easement anew.<sup>6</sup> "In order to pass a way existing in point of user, but extinguished or suspended in point of law, the grantor must either employ words of express grant, or must describe the way in question as one used and enjoyed with the land."<sup>7</sup>

1659. A right of way not necessary for the complete en-

<sup>1</sup> *Franklin Ins. Co. v. Cousens*, 127 Mass. 258; *Huttemeier v. Albro*, 18 N. Y. 48. 55 Cal. 350; *Parsons v. Johnson*, 68 N. Y. 62, 23 Am. Rep. 149.

<sup>2</sup> *King v. Mayor*, 102 N. Y. 171, 6 N. E. Rep. 395. <sup>4</sup> *Collins v. Prentice*, 15 Conn. 39, 38 Am. Dec. 61.

<sup>3</sup> *Nichols v. Luce*, 24 Pick. 102, 35 Am. Dec. 302; *Regan v. Boston Gas Light Co.* 137 Mass. 37; *Gayetty v. Bethune*, 14 Mass. 49, 7 Am. Dec. 188; *Collins v. Prentice*, 15 Conn. 39, 38 Am. Dec. 61; *Carey v. Rae*, 58 Cal. 159; *Taylor v. Warnaky*, 55 Cal. 350; *Parsons v. Johnson*, 68 N. Y. 62, 23 Am. Rep. 149.

<sup>5</sup> *Grant v. Chase*, 17 Mass. 443, 9 Am. Dec. 161; *Barker v. Clark*, 4 N. H. 380, 17 Am. Dec. 428.

<sup>6</sup> *Worthington v. Gimson*, 2 Ellis & E. 618; *Parsons v. Johnson*, 68 N. Y. 62, 67, 23 Am. Rep. 149.

<sup>7</sup> *James v. Plant*, 4 Adol. & E. 749, 761.

joyment of the land conveyed does not pass as appurtenant thereto.<sup>1</sup> "To raise the implication, the easement must be *de facto* annexed to the estate conveyed at the time of the grant, and must be necessary to its enjoyment in the condition in which it then is."<sup>2</sup>

### V. *Water Rights Appurtenant.*

1660. A water right belonging to the owner of land, and used for its benefit or convenience, is appurtenant to the land and passes by a conveyance. In an early case reported by Coke he says: "It was held by all the court, upon demurrer, that if one erect a house, and build a conduit thereto in another part of his land, and convey water by pipes to the house, and afterward sell the house with the appurtenances, excepting the land, or sell the land to another, reserving to himself the house, the conduit and the pipes pass with the house, because they are necessary and appurtenant thereto."<sup>3</sup>

A conveyance of a house and land, which are supplied with water by an aqueduct from a spring on other land belonging to the grantor, passes a right to use the spring and aqueduct as an appurtenance, if the use of them is essential to the proper enjoyment of the premises conveyed.<sup>4</sup>

Water rights acquired by the owner of land from a water company for domestic purposes and for irrigation, and used by him for several years, constitute an appurtenance to the land, which passes to a mortgagee of the land and to a purchaser under a foreclosure sale.<sup>5</sup>

1661. An easement will not pass by implication unless it actually belongs to the grantor and is annexed to the land conveyed.<sup>6</sup> Such an easement will only pass by express description and grant. Thus, where at the time of the conveyance of a

<sup>1</sup> Parker v. Bennett, 11 Allen, 388; Laukin v. Terwilliger (Oreg.), 29 Pac. Rep. 268.

<sup>2</sup> Parker v. Bennett, 11 Allen, 388, 392, per Hoar, J. And see Pope v. O'Hara, 48 N. Y. 446, 455.

<sup>3</sup> Nicholas v. Chamberlain, Cro. James, 121. To like effect, see Brown v. Nichols, Moore, 682; Parker v. Bennett, 11 Allen, 388, 392, per Hoar, J.; Coolidge v. Hager, 43 Vt. 9, 5 Am. Rep. 256.

<sup>4</sup> Coolidge v. Hager, 43 Vt. 9, 5 Am. Dec. 256; Hollenbeck v. McDonald, 112 Mass. 247. See, however, Manning v. Smith, 6 Conn. 289, 292; Williams v. Wadsworth, 51 Conn. 277.

<sup>5</sup> Clyne v. Benicia Water Co. 100 Cal. 310, 34 Pac. Rep. 714; Farmer v. Ukiah Water Works, 56 Cal. 11, 14.

<sup>6</sup> Philbrick v. Ewing, 97 Mass. 133; Bliss v. Kennedy, 43 Ill. 67, 71; Bank v. Miller, 7 Sawyer, 163.

house and land the only supply of water was from an aqueduct company through a pipe laid across the land of a third person under an oral license from him, and no mention was made of this right in the conveyance, no right of drawing water through the pipe passed by the deed. The grantor did not own the water, and he did not own the land through which the water-pipe was laid; and consequently no right to the water or to the use of the water-pipe passed by his conveyance.<sup>1</sup> But in such case the pipe itself was a fixture appurtenant to the house, and passed by the conveyance of the house without express mention, and consequently the grantor had no right to dig it up and carry it off.<sup>2</sup> "We suppose it is a common thing in cities for the owner of a house to connect it by a pipe with the pipe in the street belonging to a water company, and that such a pipe would pass by the sale of the house, although the owner of the house did not own the soil of the street. So, in case of a drain-pipe connecting with a common sewer, on a sale of the house the vendor cannot take it away. That the owner of the house had no right to the water except by contract, or to use the common sewer except upon terms to be agreed on, would not affect this right of property."

1662. An easement will not pass by a conveyance unless it is legally appurtenant to the land conveyed. A conveyance of land and buildings with appurtenances does not pass any easement in an aqueduct which had been used to supply the premises with water from a spring on the land of another, if the easement has not ripened into a legal right and become legally attached to the land conveyed.<sup>3</sup>

Even an easement which is not necessary to the enjoyment of the estate conveyed will pass with it, whether mentioned in the deed or not, if it is legally attached to the estate, as where the easement has been acquired by express or implied grant, or by prescription for the use of that estate.<sup>4</sup>

<sup>1</sup> Philbrick v. Ewing, 97 Mass. 133.

<sup>4</sup> Spaulding v. Abbot, 55 N. H. 423;

<sup>2</sup> Philbrick v. Ewing, 97 Mass. 133, 136, per Hoar, J.

Seavey v. Jones, 43 N. H. 441; Barker v. Clark, 4 N. H. 380, 382, 17 Am.

<sup>3</sup> Spaulding v. Abbot, 55 N. H. 423; Swazey v. Brooks, 34 Vt. 451.

Dec. 428; Underwood v. Carney, 1 Cush. 285.

VI. *Drains and Sewers Appurtenant.*

1663. There is a class of easements that will pass when property is severed, as being apparent and continuous, and necessary to the enjoyment of the severed part. Of this class there are instances of easements in drains and sewers.<sup>1</sup>

A conveyance of a house and lot of land, with the appurtenances thereto belonging, passes a right to use a drain from the house across another piece of land belonging to the grantor, if the drain was necessary to the beneficial use of the house.<sup>2</sup>

If a ditch be cut through a tract of land and the owner afterwards sells the upper portion, the purchaser acquires an easement in the lower portion for the flow of water through the ditch, and the owner cannot put an obstruction in the part retained.<sup>3</sup>

1664. The question in such a case is, whether the drain through other land is necessary to the beneficial enjoyment of the land conveyed. If the grantee can conveniently construct a drain without going through the land of his grantor, it cannot be necessary to the enjoyment of the land he has purchased that he should have a drain through his grantor's land.<sup>4</sup>

Where one owning two lots of land, with houses on each, one of which he occupied and the other leased to tenants, constructed a drain from the latter through the land which he occupied to a common sewer, and permitted his tenants to use it for many years and then sold both lots on the same day to different purchasers, without mentioning the drain, the purchaser of the lot for the use of which the drain was constructed acquired no right to use the drain through the other lot if by reasonable labor and expense he could make a drain without going through that land. If it had been intended that such purchaser should have a perpetual right of drainage through the other lot, when it was not necessary to the enjoyment of the property granted, it seems reasonable to suppose that it would have been expressed in the deed.<sup>5</sup>

<sup>1</sup> *Worthington v. Gimson*, 2 Ellis & E. 618, 626, per Crompton, J.; *Pyer v. Carter*, 1 H. & N. 916. The latter case is criticised by Baron Martin in *Dodd v. Birchall*, 8 Jur. N. S. 1180, and by the Lord Chancellor in *Suffield v. Brown*, 9 L. T. Rep. 627.

<sup>2</sup> *Thayer v. Payne*, 2 Cush. 327.

<sup>3</sup> *Shaw v. Etheridge*, 3 Jones, 300.

<sup>4</sup> *Thayer v. Payne*, 2 Cush. 327.

<sup>5</sup> *Johnson v. Jordan*, 2 Met. 234, 37 Am. Dec. 85; and to same effect *Dolliff v. Boston & Maine R. Co.* 68 Me. 173.

## CHAPTER XXXVII.

### FIXTURES TO THE REALTY.

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| <p>I. General principles determining what are fixtures, 1665-1690.</p> <p>II. Buildings as fixtures, 1691-1701.</p> <p>III. Domestic fixtures, 1702-1707.</p> <p>IV. Agricultural fixtures, 1708-1711.</p> <p>V. Machinery in mills, 1712-1728.</p> | <p>VI. Rolling-stock of railroads, 1729, 1730.</p> <p>VII. Rights of mortgagees as to fixtures, 1731-1758.</p> <p>VIII. Mortgagees' remedies for removal of fixtures, 1759-1764.</p> <p>IX. Tenant's fixtures, 1765-1769.</p> |
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#### *I. General Principles determining what are Fixtures.*

**1665. Defined.**— Things of a personal nature which have been so fixed to land, or to buildings or other structures upon the land, as to become a part thereof, are termed “fixtures.” They pass with the land in any transfer of ownership, whether this be by absolute deed or by mortgage, without any express mention of them.<sup>1</sup>

A thing may be a fixture to a building which is personal property, just as if it were real property; and in such case a bill of sale or chattel mortgage of the building will cover the thing annexed to it, or used with it as a fixture.<sup>2</sup>

**1666. The application of the doctrine of fixtures depends largely upon the relations of the parties in interest.** Lord Ellenborough in a leading case divides the parties into three classes.<sup>3</sup> The first comprises vendor and vendee, mortgagor and mortgagee, and executor and heir. As between these, the common-law rule, that whatever is affixed to the freehold becomes a part of it and passes with it, is in general strictly enforced.<sup>4</sup> In the second class are included the executor of a tenant for life or in tail and the remainder-man, between whom the rule as to fix-

<sup>1</sup> *Teaff v. Hewett*, 1 Ohio St. 511, 59 Am. Dec. 634; *Ritchie v. McAllister*, 14 Pa. Co. Ct. Rep. 267; *Hutchins v. Master-son*, 46 Tex. 551, 26 Am. Rep. 286.

<sup>2</sup> *McGorrick v. Dwyer*, 78 Iowa, 279, 43 N. W. Rep. 215, 16 Am. St. Rep. 440.

<sup>3</sup> *Elwes v. Maw*, 3 East, 38, 2 Smith Lead. Cas. 228.

<sup>4</sup> *Foote v. Gooch*, 96 N. C. 265, 1 S. E. Rep. 525, 60 Am. Rep. 411; *Overman v. Sasser*, 107 N. C. 432, 12 S. E. Rep. 64, per Clark, J.



tures is less strict, the right of the executor to remove fixtures being regarded with favor. In the third class are landlord and tenant, between whom, in order to favor trade and encourage industry, the greatest latitude is allowed the tenant in removing fixtures which he has annexed. The subject of fixtures will be considered chiefly in its application between the parties embraced in the first-named class, and only incidentally as between the parties in the other classes; for the subjects of life estates, and estates for years, and lesser interests, form no part of the plan of the present treatise.

The reason for the distinction between these classes, in the application of the doctrine of fixtures, has often been pointed out. In a recent case before the Supreme Court of North Carolina, Mr. Justice Clark says: "When additions are made to the land by the owner, whether vendor, mortgagor, or ancestor, the purpose is to enhance the value and to be permanent. With the tenant, the additions are made for a temporary purpose, and not with a view of making them part of the land; hence, for the encouragement of trade, manufacturing, etc., the tenant is allowed to remove what had apparently become affixed to the freehold, if affixed for purposes of trade, and not merely for better enjoyment of the premises."

The case before the court was one between the executor of a tenant for life and the remainder-man, and was the first instance in which the rule as to fixtures between such parties had come before the courts of that State. The adjudications in that class of cases are few. The rule in this class, says the learned justice, "assimilates to that between landlord and tenant, the principal difference perhaps being that the executor can remove such fixtures within a reasonable time after the death of the life tenant, whereas, between landlord and tenant the tenant cannot go on the premises to remove the fixtures, after the termination of his lease, without being a trespasser, except in those cases where the duration of his term is not fixed but uncertain, or where there is an agreement that he may remove after the expiration of the lease."<sup>1</sup>

<sup>1</sup> *Overman v. Sasser*, 107 N. C. 432, 12 S. E. Rep. 64, citing *Lord Hardwicke in Lawton v. Lawton*, 3 Atk. 13, and in *Dudley v. Warde*, 1 Amb. 113; and *Lord Mansfield in Lawton v. Salmon*, 1 H. Bl. 260. See, also, *Cannon v. Hare*, 1 Tenn. Ch. 22, per Cooper, Ch.; *Demby v. Parse*, 53 Ark. 526, 14 S. W. Rep. 899. See, also, on this subject, *Jones on Chat-tel Mortgages*, §§ 123-137; *Jones on Liens*, §§ 1384-1388; and *Jones on Corporate Bonds and Mortgages*, §§ 70-79, 136-144.

1667. A deed or mortgage of real property, as a general rule, carries as part of the security all fixtures belonging to the realty, without any special mention of them being made in the conveyance.<sup>1</sup> In determining what chattels when annexed to the land become fixtures, and therefore bound by a mortgage, very much the same rules apply as between a grantor and his grantee in case of an absolute conveyance;<sup>2</sup> but although in the case of a deed the construction is generally favorable to holding that things attached to the land are part and parcel of the realty rather than personalty, yet in the construction of a mortgage even greater favor in the same way seems to be shown the mortgagee. The reason seems not to be far away. When the question arises under a mortgage, the mortgagor always has the right to redeem, and in this way to gain the benefit of any addition made to the realty; and any one claiming under him has only his rights, and acquires these with full knowledge of the incumbrance and of the condition of the property.

All buildings and other fixtures annexed to the freehold become part of it, and inure to the benefit of those who are entitled to it; both to the mortgagee as an increased security for his debt, and to the mortgagor to the same extent as enhancing the value of his equity of redemption. The latter can obtain the full benefit of all improvements he has made by paying his debt and regaining his estate by redemption. This rule, and the exceptions to it as well, are applicable to deeds of trust equally with mortgages.<sup>3</sup>

A building erected upon the mortgaged land without the consent of the mortgagee may be sold by him as a part of the mortgaged property, and his right is not affected by the fact that the building was erected under an agreement with the mortgagor that it should be and remain the personal property of the party erecting it.<sup>4</sup>

<sup>1</sup> *Colegrave v. Dias Santos*, 2 B. & C. 76.

<sup>2</sup> *Longstaff v. Meagoe*, 2 Adol. & El. 167; *Butler v. Page*, 7 Met. 40, 39 Am. Dec. 757; *Winslow v. Merchants' Ins. Co.* 4 Met. 306, 38 Am. Dec. 368; *Thomas v. Davis*, 76 Mo. 72; 43 Am. Rep. 756; *Wadleigh v. Janvrin*, 41 N. H. 503, 77 Am. Dec. 780; *Burnside v. Twitchell*, 43 N. H. 390; *Main v. Schwarzwaelder*, 4 E. D. Smith, 273; *Robinson v. Preswick*, 3

Edw. 246; *Snedeker v. Warring*, 12 N. Y. 170; *Bank v. Finch*, 3 Barb. Ch. 293; *Gardner v. Finley*, 19 Barb. 317; *Laffin v. Griffiths*, 35 Barb. 58; *McFadden v. Allen*, 134 N. Y. 489, 32 N. E. Rep. 21; *Foote v. Gooch*, 96 N. C. 265, 60 Am. Rep. 411; *Kloess v. Katt*, 40 Ill. App. 99.

<sup>3</sup> *Græme v. Cullen*, 23 Gratt. 266; *Moore v. Vallentine*, 77 N. C. 188.

<sup>4</sup> *Meagher v. Hayes*, 152 Mass. 228, 25 N. E. Rep. 105, 23 Am. St. Rep. 819;

1668. The intention with which an article of personal property is attached to the realty, whether for temporary use or for permanent improvement, has within certain limits quite as much to do with the determination of the question, whether it has thereby become a permanent fixture, as has the way and manner in which it is attached.<sup>1</sup> In the modern cases the intention with

*Butler v. Page*, 7 Metc. 40, 39 Am. Dec. 757; *Cole v. Stewart*, 11 Cush. 181; *Guernsey v. Wilson*, 134 Mass. 482; *McFadden v. Allen*, 134 N. Y. 489, 32 N. E. Rep. 21; *Lafin v. Griffiths*, 35 Barb. 58; *Snedeker v. Warring*, 12 N. Y. 170.

<sup>1</sup> **Alabama**: *Rogers v. Prattville Manuf. Co.* 81 Ala. 483, 1 So. Rep. 643, 60 Am. Rep. 171; *Tillman v. De Lacy*, 80 Ala. 103. **California**: *Lavenson v. Standard Soap Co.* 80 Cal. 245, 22 Pac. Rep. 184; *Fratt v. Whittier*, 58 Cal. 126. **Connecticut**: *Tolles v. Winton*, 63 Conn. 440, 28 Atl. Rep. 542; *Capen v. Peckham*, 35 Conn. 88, 92; *Alvord Carriage Manuf. Co. v. Gleason*, 36 Conn. 86; *Stockwell v. Campbell*, 39 Conn. 362, 12 Am. Rep. 393. **Illinois**: *Kelly v. Austin*, 46 Ill. 156, 92 Am. Dec. 243; *Jones v. Ramsey*, 3 Bradw. 303; *Arnold v. Crowder*, 81 Ill. 56, 25 Am. Rep. 260; *Fifield v. Farmers' Nat. Bank*, 148 Ill. 163, 35 N. E. Rep. 802, affirming 47 Ill. App. 118. **Indiana**: *Binkley v. Forkner*, 117 Ind. 176, 19 N. E. Rep. 753. **Iowa**: *Ottumwa Woolen Mill Co. v. Hawley*, 44 Iowa, 57, 24 Am. Rep. 719; *Johnson v. Mosher*, 82 Iowa, 29, 47 N. W. Rep. 996; *Fletcher v. Kelly*, 88 Iowa, 475, 486, 55 N. W. Rep. 474, 21 L. R. A. 347. **Kansas**: *Atchison, &c. R. Co. v. Morgan*, 42 Kans. 23, 21 Pac. Rep. 809; *Docking v. Frazell*, 38 Kans. 420, 423, 17 Pac. Rep. 160; *Eaves v. Estes*, 10 Kans. 314, 15 Am. Rep. 345. **Maine**: *Hinkley & E. Iron Co. v. Black*, 70 Me. 473. **Maryland**: *Schaper v. Bibb*, 71 Md. 145, 149, 17 Atl. Rep. 935. **Massachusetts**: *Holly Manuf. Co. v. New Chester Water Co.* 48 Fed. Rep. 879; *Smith Paper Co. v. Servin*, 130 Mass. 511. **Michigan**: *Manwaring v. Jenison*, 61 Mich. 117, 27 N. W. Rep. 899; *Stevens v. Rose*, 69 Mich. 259, 37 N. W. Rep. 205; *Smith v. Blake*, 96 Mich. 542, 55 N. W.

Rep. 978; *Aldine Manuf. Co. v. Barnard*, 84 Mich. 632, 48 N. W. Rep. 280; *Crippen v. Morrison*, 13 Mich. 23; *Morrison v. Berry*, 42 Mich. 389, 4 N. W. Rep. 731; *Robertson v. Corsett*, 39 Mich. 777; *Wheeler v. Bedell*, 40 Mich. 693; *Ferris v. Quimby*, 41 Mich. 202, 2 N. W. Rep. 9. **Missouri**: *Elliott v. Wright*, 30 Mo. App. 217. **New Hampshire**: *Langdon v. Buchanan*, 62 N. H. 657; *Cavis v. Beckford*, 62 N. H. 229; *Despatch Line v. Bellamy Manuf. Co.* 12 N. H. 205, 37 Am. Dec. 203. **New Jersey**: *Quinby v. Manhattan Cloth & Paper Co.* 24 N. J. Eq. 260. **New York**: *Bishop v. Bishop*, 11 N. Y. 123, 62 Am. Dec. 68, as to hop-poles; *Voorhees v. McGinnis*, 48 N. Y. 278; *Potter v. Cromwell*, 40 N. Y. 287, 100 Am. Dec. 485; *McRea v. Central Nat. Bank*, 66 N. Y. 489; *Sullivan v. Toole*, 26 Hun, 203; *Hart v. Sheldon*, 34 Hun, 38. **North Carolina**: *Foote v. Gooch*, 96 N. C. 265, 60 Am. Rep. 411. **Pennsylvania**: *Morris's Appeal*, 88 Pa. St. 368; *Harmony Build. Asso. v. Berger*, 99 Pa. St. 320; *Kisterbock v. Lanning*, 19 W. N. C. 54, 7 Atl. Rep. 596; *Voorhis v. Freeman*, 2 W. & S. 116; *Pyle v. Pennock*, 2 W. & S. 390; *Christian v. Dripps*, 28 Pa. St. 271; *Hill v. Sewald*, 53 Pa. St. 271; *Meigs's Appeal*, 62 Pa. St. 28; *Patterson v. Delaware Co.* 70 Pa. St. 381; *Seeger v. Pettit*, 77 Pa. St. 437; *Benedict v. Marsh*, 127 Pa. St. 309, 18 Atl. Rep. 26; *McLean v. Palmer*, 2 Kulp, 349; *Ege v. Kille*, 84 Pa. St. 333; *Harrisburg Electric Light Co. v. Goodman*, 129 Pa. St. 206, 19 Atl. Rep. 844; *Vail v. Weaver*, 132 Pa. St. 363, 19 Atl. Rep. 138; *New Chester Water Co. v. Holly Manuf. Co.* 3 U. S. App. 264, 3 C. C. A. 399, 53 Fed. Rep. 19, a Pennsylvania case. **South Carolina**: *Padgett v. Cleveland*, 33 S. C. 339, 11 S. E. Rep.

which a chattel is attached to the realty has become more and more the decisive test whether or not the chattel has become a part of the realty.<sup>1</sup> The mode of annexation is of consequence chiefly as bearing upon the intention.

1669. The intention which controls is, "not the secret design which may dwell in a party's mind, and as to whose existence he alone can speak, but that 'intention' which was either expressly declared by the parties competent to make it the governing rule, or which flows, patent to all, from the nature and character of the act, the clear purpose to be served, the manifest relation which the articles bear to the realty, and the visible consequences of their severance upon the proper and obvious use of it."<sup>2</sup>

When there is conflicting evidence as to the movable character of the articles in question, such as a steam engine and sawmill put up by one on his timber-land, and there is doubt whether

1069. **South Dakota**: *Peet v. Dakota F. & M. Ins. Co.* 1 S. D. 462, 47 N. W. Rep. 532. **Texas**: *Copp v. Swift* (Tex. Civ. App.), 26 S. W. Rep. 438; *Harkey v. Cain*, 69 Tex. 146, 6 S. W. Rep. 637; *Moody v. Aiken*, 50 Tex. 65; *Hutchins v. Masterson*, 46 Tex. 551, 26 Am. Rep. 286; *Jones v. Bull*, 85 Tex. 136, 19 S. W. Rep. 1031; *Willis v. Morris*, 66 Tex. 628, 1 S. W. Rep. 799; *Grabfelder v. Gazetti* (Tex. Civ. App.), 26 S. W. Rep. 436. **Vermont**: *Hill v. Wentworth*, 28 Vt. 428, per Bennett, J. **Washington**: *Cherry v. Arthur*, 5 Wash. St. 787, 32 Pac. Rep. 744. **Wisconsin**: *Taylor v. Collins*, 51 Wis. 123, 8 N. W. Rep. 22; *Walker v. Flouring Mill Co.* 70 Wis. 92, 96, 35 N. W. Rep. 332.

<sup>1</sup> *Choate v. Kimball* (Ark.), 19 S. W. Rep. 108; *Southbridge Sav. Bank v. Exeter Machine Works*, 127 Mass. 542; *Turner v. Wentworth*, 119 Mass. 459; *Allen v. Mooney*, 130 Mass. 155; *Smith Paper Co. v. Servin*, 130 Mass. 511; *Hubbell v. E. Cambridge Five Cents Sav. Bank*, 132 Mass. 447; *Maguire v. Park*, 140 Mass. 21, 1 N. E. Rep. 750; *McRea v. Central Nat. Bank*, 66 N. Y. 489; *Hill v. National Bank*, 97 U. S. 450; *Ottumwa Woollen Mill Co. v. Hawley*, 44 Iowa, 57; *Cooper v. Harvey*, 16 N. Y. Supp. 660; *Hopewell*

*Mills v. Taunton Sav. Bank*, 150 Mass. 519, 23 N. E. Rep. 327. Knowlton, J., referring to some of these cases, says: "These cases seem to recognize the true principle on which the decisions should rest, only it should be noted that the intention to be sought is not the undisclosed purpose of the actor, but the intention implied and manifested by his act. It is an intention which settles, not merely his own rights, but the rights of others who have or who may acquire interests in the property. They cannot know his secret purpose; and their rights depend, not upon that, but upon the inferences to be drawn from what is external and visible. In cases of this kind, every fact and circumstance should be considered which tends to show what intention, in reference to the relation of the machine to the real estate, is properly imputable to him who put it in position."

<sup>2</sup> *National Bank v. North*, 160 Pa. St. 303, 28 Atl. Rep. 694; *Kloess v. Katt*, 40 Ill. App. 99. This meaning of the word is particularly emphasized in *Harmony Building Asso. v. Berger*, 99 Pa. St. 320, 324, and by Knowlton, J., in *Hopewell Mills v. Taunton Sav. Bank*, 150 Mass. 519, 23 N. E. Rep. 327.

they were intended to be moved from one tract to another, it is proper to admit evidence of conversations with the owner showing his intention to put in a portable mill.<sup>1</sup>

1670. If the article is something necessary for the proper enjoyment of the estate, it may be presumed that it was annexed for its permanent improvement, and therefore that it goes with the land to a purchaser or mortgagee. "If it is placed on the realty to improve it and make it more valuable, it is some evidence that it is a fixture; but if it is placed there for a use that does not enhance the value of the realty, this is some evidence that it is personal property."<sup>2</sup>

The fixtures may be so adapted to the building in which they are placed, and to the purposes for which the building is to be used, as to show clearly that they were designed to be permanent.<sup>3</sup> "It is a well-recognized rule that when articles of personal property which are especially adapted and designed to be used in connection with the realty, and essential to the convenient and profitable enjoyment of the estate, are affixed to it, with an intention to make them a permanent accession to the land, they become a part of the realty, though not so fastened as to be incapable of removal without serious injury to themselves or the freehold."<sup>4</sup>

Such, for instance, are the fixtures in a manufactory necessary for furnishing the motive power, or for the proper carrying on of the business.<sup>5</sup> A mortgage of a machine-shop includes a lathe and other fixtures necessary for the prosecution of the business of the shop.<sup>6</sup> A mortgage of a building erected for a steam sawmill, and which would be of little use for any other purpose, embraces also the boilers, engines, saws, gearing, and machinery

<sup>1</sup> *Benedict v. Marsh*, 127 Pa. St. 309, 18 Atl. Rep. 26. And see *National Bank v. North*, 160 Pa. St. 303, 28 Atl. Rep. 694, citing and commenting upon the preceding case.

<sup>2</sup> *Atchison, T. & S. F. R. Co. v. Morgan*, 42 Kans. 23, 21 Pac. Rep. 809, 22 Pac. Rep. 995; *Morris's App.* 88 Pa. St. 368; *Southbridge Sav. Bank v. Mason*, 147 Mass. 500, 18 N. E. Rep. 406.

<sup>3</sup> *Equitable Trust Co. v. Christ*, 2 Flipp. 599; *Tolles v. Winton*, 63 Conn. 440, 28 Atl. Rep. 542; *Capen v. Peckham*, 35

Conn. 88, 92; *Chapman v. Union Mut. L. Ins. Co.* 4 Ill. App. 29.

<sup>4</sup> *Hawkins v. Hersey*, 86 Me. 394, 30 Atl. Rep. 14, per Whitehouse, J. See, also, *Pope v. Jackson*, 65 Me. 162; *Strickland v. Parker*, 54 Me. 263.

<sup>5</sup> *Millikin v. Armstrong*, 17 Ind. 456; *Crane v. Brigham*, 11 N. J. Eq. 29; *Keve v. Paxton*, 26 N. J. Eq. 107; *Tillman v. De Lacy*, 80 Ala. 103; *Roseville Alta Min. Co. v. Iowa Gulch Min. Co.* 15 Colo. 29, 24 Pac. Rep. 920.

<sup>6</sup> *Hoskin v. Woodward*, 45 Pa. St. 42.

necessary for the working of the mill, and without which it would be incomplete.<sup>1</sup> Boilers, engines, shafting, and steam-pipes for heating a large building, are covered by a mortgage of the realty.<sup>2</sup>

1671. The principles by which to determine whether a personal article after being attached to the realty still remains a chattel are two: first, the mode and degree of the annexation; and, second, the purpose of it.<sup>3</sup> The first cannot of course be defined with any exactness. The modes of annexation may be almost as numerous as the instances that occur. The degrees of physical force with which the chattels are annexed may be as many as the modes of annexation. The degree may be very slight, and yet be sufficient to make the article a fixture and part of the realty. As the result of the numerous cases, it is safe to say that this is the less important part of the criterion. If the intent is manifest that the chattel is attached to the estate for its permanent improvement, the mode and degree in which it is attached are of little importance.<sup>4</sup> In a case before the English Court of Queen's Bench,<sup>5</sup> in regard to a hydraulic press placed in a factory, but not essential to its work, Mr. Justice Mellor said: "If we could see, as in the gas-works case,<sup>6</sup> an intention that the chattel should remain fixed to the factory so long as the factory remained a factory, then we might think the press to be sufficiently fixed to become a part of the freehold; but we see no such intention."

1672. The criterion adopted by several courts for determining whether property ordinarily regarded as personal becomes a part of the realty is the united application of the following requisites: 1st. Actual annexation to the realty, or something appur-

<sup>1</sup> *Brennan v. Whitaker*, 15 Ohio St. 446; *Quinby v. Manhattan Cloth & Paper Co.* 24 N. J. Eq. 260.

<sup>2</sup> *Ex parte Montgomery, &c.* 4 Irish Ch. 520. In this case the Lord Chancellor said: "I find that all the cases come round to the same question, namely, what are fixtures? Now, it appears to me that this does not at all depend upon the power of removal: the owner in fee has the right to remove all fixtures; the tenant has a right to remove fixtures erected for trade purposes; but until they are severed they are still fixtures, and as between mortgagor and mortgagee they are not

removable though the mortgagor remain in possession. I therefore think that the possibility of removal is not so much the test as the nature of the article."

<sup>3</sup> *Hellawell v. Eastwood*, 6 Exch. 295; *Clark v. Crownshaw*, 3 B. & Ad. 804; *Holland v. Hodgson*, L. R. 7 C. P. 328, 334.

<sup>4</sup> *Capen v. Peckham*, 35 Conn. 88, 92; *Alvord Carriage Manuf. Co. v. Gleason*, 36 Conn. 86; *Tolles v. Winton*, 63 Conn. 440, 28 Atl. Rep. 542.

<sup>5</sup> *Parsons v. Hind*, 14 W. R. 860.

<sup>6</sup> *Regina v. Lee*, L. R. 1 Q. B. 241, 14 W. R. 311.

tenant thereto; 2d. Appropriation to the use or purpose of that part of the realty with which it is connected; 3d. The intention of the party making the annexation to make the article a permanent accession to the freehold,—this intention being inferred from the nature of the article affixed, the relation and situation of the party making the annexation, the structure and mode of annexation, and the purpose or use for which the annexation has been made.<sup>1</sup>

**1673.** It is in the application of the criterion that the courts chiefly differ. While some look to physical attachment to the realty as the chief requisite of a fixture, others regard chiefly the intention of the party making the annexation, and hence arises an irreconcilable conflict of authorities. The mode and degree of annexation may determine the intention. Especially is this the case when an article is attached so as to be an inseparable and permanent part of the realty. When the annexation is less complete, it may still afford convincing evidence of the intention; as, for instance, where the building is constructed expressly to receive the machine or other article, and this could not be removed without material injury to the building, or where the article would be of no value for use in that particular building, or could not be removed without being destroyed or greatly damaged.<sup>2</sup> The

<sup>1</sup> So stated in *Teaff v. Hewitt*, 1 Ohio St. 511, 530, 59 Am. Dec. 634, and expressly adopted in *Potter v. Cromwell*, 40 N. Y. 287, 100 Am. Dec. 485; *McRea v. Central Nat. Bank*, 66 N. Y. 489, 496; *McFadden v. Allen*, 134 N. Y. 489, 32 N. E. Rep. 21; *Scobell v. Block*, 82 Hun, 223, 31 N. Y. Supp. 975; *Quinby v. Manhattan Cloth & Paper Co.* 24 N. J. Eq. 260; *Blancke v. Rogers*, 26 N. J. Eq. 563; *Williamson v. N. J. Southern R. Co.* 29 N. J. Eq. 311, 329; *Speiden v. Parker*, 46 N. J. Eq. 292, 19 Atl. Rep. 21; *Doughty v. Owen* (N. J.), 19 Atl. Rep. 540; *McMillan v. N. Y. Water-Proof Paper Co.* 29 N. J. Eq. 610; *State Savings Bank v. Kircheval*, 65 Mo. 682, 27 Am. Dec. 310; *Dudley v. Hurst*, 67 Md. 44, 8 Atl. Rep. 901; *Tillman v. De Lacy*, 80 Ala. 103; *Rogers v. Prattville Manuf. Co.* 81 Ala. 483, 1 So. Rep. 643, 60 Am. Rep. 171; *Capen v. Peckham*, 35 Conn. 88; *Brennan v. Whitaker*, 15 Ohio St. 446; *Thomas*

*v. Davis*, 76 Mo. 72, 43 Am. Rep. 756; *Sword v. Low*, 122 Ill. 487, 13 N. E. Rep. 826; *Choate v. Kimball* (Ark.), 19 S. W. Rep. 108; *Cooper v. Harvey*, 16 N. Y. Supp. 660; *Winslow v. Bromich*, 54 Kans. 300, 38 Pac. Rep. 275; *Choate v. Kimball*, 56 Ark. 55, 19 S. W. Rep. 108; *Henkle v. Dillon*, 15 Oreg. 610, 17 Pac. Rep. 148; *Honeyman v. Thomas*, 25 Oreg. 539, 36 Pac. Rep. 636; *Helm v. Gilroy*, 20 Oreg. 517, 26 Pac. Rep. 851; *Fifield v. Farmers' Nat. Bank*, 148 Ill. 163, 35 N. E. Rep. 802, 47 Ill. App. 118, 39 Am. St. Rep. 166; *Hutchins v. Masterson*, 46 Tex. 551; *Jones v. Bull*, 85 Tex. 136, 19 S. W. Rep. 1031; *Keating Implement & M. Co. v. Marshall Electric Light Co.* 74 Tex. 605, 12 S. W. Rep. 489; *Taylor v. Collins*, 51 Wis. 123, 8 N. W. Rep. 22; *Walker v. Grand Rapids Flouring Mill Co.* 70 Wis. 92, 96, 35 N. W. Rep. 332.

<sup>2</sup> *McRea v. Central Nat. Bank*, 66 N. Y.

question thus becomes usually a question of mixed law and fact.<sup>1</sup> It is therefore a question for the jury, under the direction of the court as to the law.<sup>2</sup> The object, the effect, and the mode of annexation are all to be considered in determining whether any specific articles are movable fixtures.<sup>3</sup> All these and any other circumstances which may be presumed to manifest the intention of the parties in the annexation are for the consideration of the jury in determining what was in fact their intention.<sup>4</sup> If the description of the property expressly includes buildings and engines, boilers, and fixed machinery appurtenant to the same, effect must be given to such description of the fixtures, and it is obvious that by the use property was intended and included which was no part of the realty, and which would not pass by a conveyance of it alone.<sup>5</sup>

1674. In Vermont the rule as to fixtures seems to be exceptionally strict in requiring that they shall in all cases be substantially attached to the freehold, and in holding that it is not sufficient, to make personal chattels a part of the freehold, that they are attached to the building in which they are used in a manner adapted to keep them steady, or that they are essential to the occupation of the building for the business carried on in it. "The rule requiring actual annexation," says Mr. Justice Bennett,<sup>6</sup> "is not affected by those cases where a constructive annexation has been held sufficient. These cases may be regarded as

489; *Tillman v. De Lacy*, 80 Ala. 103; *Equitable Trust Co. v. Christ*, 2 Flipp. 599.

<sup>1</sup> *Hopewell Mills v. Taunton Sav. Bank*, 150 Mass. 519, 23 N. E. Rep. 327, 15 Am. St. Rep. 235; *Allen v. Mooney*, 130 Mass. 155; *Turner v. Wentworth*, 119 Mass. 459; *Maguire v. Park*, 140 Mass. 21, 1 N. E. Rep. 750; *Carpenter v. Walker*, 140 Mass. 416, 5 N. E. Rep. 160; *Southbridge Savings Bank v. Mason*, 147 Mass. 500, 18 N. E. Rep. 406.

<sup>2</sup> *National Bank v. North*, 160 Pa. St. 303, 28 Atl. Rep. 694; *Campbell v. O'Neill*, 64 Pa. St. 290; *Harmony Building Asso. v. Berger*, 99 Pa. St. 320; *Seeger v. Pettit*, 77 Pa. St. 437, 18 Am. Rep. 452; *Harrisburg Electric Light Co. v. Goodman*, 129 Pa. St. 206, 19 Atl. Rep.

844; *McLean v. Palmer*, 2 Kulp, 349; *Hopewell Mills v. Taunton Sav. Bank*, 150 Mass. 519, 23 N. E. Rep. 327, 15 Am. St. Rep. 235; *Dunman v. Gulf, &c. Ry. Co.* (Tex. Civ. App.) 26 S. W. Rep. 304, 24 S. W. Rep. 701; *Copp v. Swift* (Tex. Civ. App.), 26 S. W. Rep. 438.

<sup>3</sup> *Leonard v. Stickney*, 131 Mass. 541. And see *Honeyman v. Thomas*, 25 Oreg. 539, 36 Pac. Rep. 636; *Cooke v. McNeil*, 49 Mo. App. 81.

<sup>4</sup> *Copp v. Swift* (Tex. Civ. App.), 26 S. W. Rep. 438; *Hutchins v. Master-son*, 46 Tex. 551, 26 Am. Rep. 286; *Jones v. Bull*, 85 Tex. 136, 19 S. W. Rep. 1031.

<sup>5</sup> *Beaupre v. Dwyer*, 43 Minn. 485, 45 N. W. Rep. 1094.

<sup>6</sup> *Hill v. Wentworth*, 28 Vt. 428.



exceptions to the general rule, or else as cases where the things were mere incidents to the freehold, and became a part of it and passed with it, upon a principle different from that of its being a fixture." It was, moreover, said that reference must be had not only to the annexation, but also to the object and purpose of it; and that to change the nature and legal qualities of a chattel into a fixture requires not only a positive act on the part of the person making the annexation, but also that his intention to make this change should particularly appear; and that, if this intention be left in doubt, the article should still be regarded as personal property. It was accordingly held in this case that, in a mortgage of a mill for manufacturing paper, the iron shafting used to communicate the motive power to the machinery, and fastened to the building by means of bolts, should be regarded as a constituent part of the mill, and therefore as included in a mortgage of that; but that a large iron boiler supported by brick-work, laid on a stone foundation placed on the ground near the centre of the building, and also the machines for grinding rags into pulp, the paper-presses, and other machinery, were no part of the real estate, as between the mortgagor and mortgagee.

This decision was followed by another to like effect in the same court, holding that, while the steam-engine and boilers used in a marble mill were fixtures as between mortgagor and mortgagee, yet the saw-frames, though fastened to the building by bolts, were not such fixtures. The manner in which they were attached to the building was not considered to be such as to operate to change their character as chattels.<sup>1</sup>

**1675. Statutory provisions.**—In Vermont it is provided by statute that machinery attached to or used in any shop, mill, printing-office, or factory may be mortgaged by deed, executed, acknowledged, and recorded as deeds of real estate. Such mortgages may be assigned, discharged, or foreclosed like mortgages of real estate.<sup>2</sup> The statute does not apply to a case where machinery was set up subsequent to and not mentioned in a mortgage of the realty whereto it is attached, but the rights of the

<sup>1</sup> *Sweetzer v. Jones*, 35 Vt. 317, 82 Am. Dec. 639. And see *Fullam v. Stearns*, 30 Vt. 443; *Bartlett v. Wood*, 32 Vt. 372; *Tobias v. Francis*, 3 Vt. 425, 431, 23 Am. Rep. 217; *Sturgis v. Warren*, 11 Vt. 433; *Harris v. Haynes*, 34 Vt. 220; *Davenport v. Shants*, 43 Vt. 546; *Newhall v. Kinney*, 56 Vt. 591; *Hackett v. Amsden*, 57 Vt. 432.

<sup>2</sup> R. S. 1880, § 1980.

parties are to be determined by the law established by the decisions of the court prior to the statute.<sup>1</sup>

In Connecticut it is provided that the fixtures of a manufacturing or mechanical establishment, or of a printing or publishing house, the furniture of a dwelling-house, and the hay in a barn, may be mortgaged with the realty when the mortgage contains a particular description of the machinery, furniture, or other property, to the same effect as if the same were a part of the real estate. The same may be mortgaged separate from the realty, if particularly described, and the deed be executed, acknowledged, and recorded in all respects as a mortgage of land.<sup>2</sup>

In Rhode Island it is provided that the water-wheels, steam-engines, boilers, main belts which first give motion to the shafting, all shafting, whether upright or horizontal, and hangers for the same, except such as are used to drive a special machine, all drums, pulleys, wheels, gearing, steam-pipes, gas-pipes and gas-fixtures, water-pipes and fixtures, kettles and vats set and used in any mechanical or manufacturing establishment, shall be regarded as real estate, whenever the same belong to the owner of the real estate to which they are attached. All other machinery, tools, and apparatus of every description, used and employed in any manufacturing establishment, are declared to be personal estate.<sup>3</sup>

1676. A custom which is general in the place where the land lies, to treat certain articles as removable chattels when they are attached to land merely for temporary use, may serve to determine the intention of the parties in any particular case, for the reason that it must be presumed that they contracted with reference to such custom. Thus, where, after the execution of a mortgage, the mortgagor placed on the premises a boiler, saw-rig, shingle-mill, and planer, which could be removed without injury to the freehold, though he did not disclose to the mortgagee his intention that they should not become a permanent accession to the freehold, yet it was held, as it was shown to be customary to put such articles on land and remove them at will, that they were not fixtures, but chattels which the mortgagor or those claiming under him might remove.<sup>4</sup>

1677. A thing is deemed a part of the realty when it is

<sup>1</sup> Kendall v. Hathaway, 67 Vt. 122, 30 Atl. Rep. 859.

<sup>2</sup> G. S. 1888, § 3016.

<sup>3</sup> P. S. 1882, ch. 171, §§ 1, 2.

<sup>4</sup> Choate v. Kimball, 56 Ark. 55, 19 S. W. Rep. 108.

imbedded in the soil, or permanently rests upon it.<sup>1</sup> This is the case with buildings of a permanent nature. A statue resting upon a pedestal in front of a building is a part of the realty, the court saying: "A thing may be as firmly affixed to the land by gravitation as by clamps or cement."<sup>2</sup> And so a monument consisting of a stone foundation extending below the frost line, a marble base surmounted by a marble shaft, and a statue surmounting such shaft, erected by a cemetery company for the purpose of ornamentation, is a part of the realty.<sup>3</sup>

**1678.** When an article of a personal nature is attached to the realty for a temporary purpose, with the intention of removing it when it has served its purpose, it does not become a fixture.<sup>4</sup> A cabin set on wooden blocks, not attached to the soil, and of the value of only twenty-five dollars, was regarded as being necessarily a temporary structure, and was therefore held to be personal property.<sup>5</sup> Where engines, boilers, and saws were moved by their owner from another place to land the title to which was in dispute, simply to be near certain timber land, without any intention of permanently locating upon the land, such machinery remained chattels, and did not become fixtures which another person, upon establishing his title to the land, could claim as part of the land.<sup>6</sup>

Articles which are merely incidental to the particular business carried on at the time, and not designed to be permanent adjuncts to the building, and not essential to the profitable occupation of it, will be deemed personal property, although the advantageous use of them may require a fastening by nails or bolts.<sup>7</sup>

**1679.** Fixtures may become chattels by agreement of parties as between themselves. Many things ordinarily considered fixtures to the realty may become to all intents and purposes personal property by agreement of all parties interested in both the realty and fixtures.<sup>8</sup> The owner of machinery, or other things in

<sup>1</sup> See *Strickland v. Parker*, 54 Me. 263; *Cavis v. Beckford*, 62 N. H. 229.

<sup>2</sup> *Snedeker v. Warring*, 12 N. Y. 170.

<sup>3</sup> *Oakland Cemetery Co. v. Bancroft*, 161 Pa. St. 197, 28 Atl. Rep. 1021.

<sup>4</sup> *Curtis v. Leasia*, 78 Mich. 480, 44 N. W. Rep. 500; *De Lacy v. Tillman*, 83 Ala. 155, 3 So. Rep. 294.

<sup>5</sup> *Pennybecker v. McDougal*, 48 Cal. 160.

<sup>6</sup> *Brown v. Baldwin*, 121 Mo. 126, 25 S. W. Rep. 863.

<sup>7</sup> *Hawkins v. Hersey*, 86 Me. 394, 30 Atl. Rep. 14, citing *McConnell v. Blood*, 123 Mass. 47, 25 Am. Rep. 12.

<sup>8</sup> *Smith v. Waggoner*, 50 Wis. 155, 6 N. W. Rep. 568; *Ford v. Cobb*, 20 N. Y. 344; *Godard v. Gould*, 14 Barb. 662; *Shell v. Haywood*, 16 Pa. St. 523. And see *Hensley v. Brodie*, 16 Ark. 511; *Good-*

the nature of fixtures, may treat them as personal property, and by executing a chattel mortgage of them is estopped from asserting, as against such mortgage, that they are part of the real estate.<sup>1</sup> The holder of a subsequent chattel mortgage of such fixtures, after taking possession of them as personal property and removing them, is estopped to deny that they are personal property, as against one who claims them under a prior chattel mortgage.<sup>2</sup>

1680. A conditional sale of personal property is valid as between the parties, and as against third persons having notice of such sale,<sup>3</sup> so that such property retains its character of personality as against such parties although it be annexed to the realty in such a manner and for such a purpose that in the absence of such agreement it would be regarded as affixed to the realty, and would pass by a conveyance as a part of it.<sup>4</sup> Thus, where grates, though affixed to a house, were removed without injury to the building, and the owner of the house, when sued for the price, offered to return them to the seller, the grates were declared not to be fixtures as between the parties. The grates were sold under an express warranty that they would heat the rooms, and it was conceded that they would not. Thus it clearly appeared that the parties did not intend to make them fixtures, and this, coupled with the manner of their being affixed, settled the fact that they were not fixtures.<sup>5</sup>

1681. One who has sold fixtures by bill of sale may be estopped to claim afterwards that they are parcel of the realty. Thus, the owner of a brewery in selling it conveyed the real estate by deed, and the stock in trade and fixtures by bill of

ing *v. Riley*, 50 N. H. 400; *Docking v. Frazell*, 34 Kans. 29, 7 Pac. Rep. 618, 38 Kans. 420, 17 Pac. Rep. 160.

<sup>1</sup> *Corcoran v. Webster*, 50 Wis. 125, 6 N. W. Rep. 513.

<sup>2</sup> *Smith v. Waggoner*, 50 Wis. 155, 6 N. W. Rep. 568; *Manwaring v. Jenison*, 61 Mich. 117, 135, 27 N. W. Rep. 899, per *Morse, J.*

<sup>3</sup> *Harkness v. Russell*, 118 U. S. 663, 7 S. Ct. Rep. 51.

<sup>4</sup> *New Chester Water Co. v. Holly Manuf. Co.* 3 U. S. App. 264, 3 C. C. A. 399, 53 Fed. Rep. 19, affirming *Holly*

*Manuf. Co. v. New Chester Water Co.* 48 Fed. Rep. 879; *Ellison v. Salem Coal & M. Co.* 43 Ill. App. 120; *Greither v. Alexander*, 15 Iowa, 470; *Tyson v. Post*, 108 N. Y. 217, 221, 15 N. E. Rep. 316; *Sayles v. National Water Purifying Co.* 16 N. Y. Supp. 555; *Marshall v. Bachelder*, 47 Kans. 442, 28 Pac. Rep. 168; *Fortman v. Geoppper*, 14 Ohio St. 558; *Harkey v. Cain*, 69 Tex. 146, 6 S. W. Rep. 637; *Myrick v. Bill*, 3 Dak. 284, 17 N. W. Rep. 268.

<sup>5</sup> *Aldine Manuf. Co. v. Barnard*, 84 Mich. 632, 48 N. W. Rep. 280.

sale, and took back a mortgage of the real estate to secure the payment of a portion of the purchase-money. The purchaser afterwards executed a chattel mortgage of the fixtures. In a controversy between the mortgagee of the realty and the mortgagee of the fixtures it was held that, inasmuch as the deed, bill of sale, and mortgage of the realty were executed at the same time and were parts of the same transaction, each should be held to have been designed by the parties to perform its appropriate office in consummating the sale, and that, as between the former and the latter, the property included in the bill of sale should be regarded as personalty.<sup>1</sup>

But the fact that property personal in its nature, and not incorporated with the realty, has, in transmission of title to the mortgagor, passed by a deed of the land, and there has been a long-existing localization of such property, does not destroy its character as personal property.<sup>2</sup> Of course an effectual mortgage of such property can only be made by a delivery of it, or by a chattel mortgage duly recorded.<sup>3</sup>

**1682. Machinery or other chattels annexed to the realty** pass by a subsequent deed or mortgage of the land though they were purchased by the landowner under a contract that provided that they should remain the property of the seller until paid for. The private agreement of the parties to the sale of the chattels cannot change the character of the property except between themselves. It cannot prevent the application of the general rule that fixtures are part of the realty, so far as purchasers and mortgagees of the realty are concerned.<sup>4</sup> "Upon the question whether the character of property can be changed by agreement from realty to personalty as against a *bona fide* purchaser without notice, there is not entire harmony of authorities, but we regard the better opinion as being that such purchaser must have notice of the agreement before he acquires title, or he will be entitled to claim and hold everything which appears to be, and by its ordinary nature is, a part of the realty. To hold otherwise would contravene the policy of the laws requiring

<sup>1</sup> Fortman v. Goepper, 14 Ohio St. 558.

<sup>3</sup> Sturgis v. Warren, 11 Vt. 433.

<sup>2</sup> Keeler v. Keeler, 31 N. J. Eq. 181; Williamson v. N. J. Southern R. Co. 29 N. J. Eq. 311, 328.

<sup>4</sup> Fifield v. Farmers' Nat. Bank, 148 Ill. 163, 35 N. E. Rep. 802, affirming 47 Ill. App. 118; Dobschuetz v. Holliday, 82 Ill. 371.

conveyances of interests in real estate to be recorded, seriously endanger the rights of purchasers, afford opportunities for frauds, and introduce uncertainty and confusion into land titles.”<sup>1</sup>

As against a *bona fide* purchaser of land without notice, a parol agreement between the grantor and grantee of land reserving to the grantor as personalty, with the right to enter and remove the same, a sawmill, engine, and boiler, which were permanently affixed to the soil, is not enforceable.<sup>2</sup>

1683. Some authorities hold, however, that a purchaser or mortgagee of the realty must abide by the title of the grantor as regards fixtures;<sup>3</sup> “for to constitute a fixture there must not only be physical annexation in some form to the realty, but there must be unity of title, so that a conveyance of the realty would of necessity convey the fixture also. When the ownership of the land is in one person and of the thing affixed to it is in another, and in its nature is capable of severance without injury to the former, the latter cannot, in contemplation of law, become a part of the former, but must necessarily remain distinct property, to be used and dealt with as personal estate only. And the fact that the owner of the thing affixed to the freehold has also an undivided interest in the latter cannot render the former a fixture when the interests are different in extent. A thing cannot, as to an undivided interest therein, be real estate, and as to another undivided interest be personalty. It must be the one thing or the other.”<sup>4</sup>

1684. It is generally held that an agreement of parties will avail to make fixtures personal property as against creditors of the mortgagor, when it avails for this purpose between the parties themselves; for creditors levying upon the property, and others purchasing it upon execution sale, stand in a different position from *bona fide* purchasers without notice: they acquire only

<sup>1</sup> Hunt v. Bay State Iron Co. 97 Mass. 279, 283.

<sup>2</sup> Muir v. Jones, 23 Oreg. 332, 31 Pac. Rep. 646; Pierce v. Emery, 32 N. H. 484; Haven v. Emery, 33 N. H. 66; Pea v. Pea, 35 Ind. 387.

The case of Russell v. Richards, 10 Me. 429, 25 Am. Dec. 254, is to the contrary. But in Fifield v. Maine Cent. R. Co. 62 Me. 77, 80, it is said that “the case

of Russell v. Richards does not accord with the adjudged cases in Massachusetts and New Hampshire in this respect, and the general course of decision is rather opposed to it.”

<sup>3</sup> Lansing Iron & Engine Works v. Walker, 91 Mich. 409, 51 N. W. Rep. 1061; Adams v. Lee, 31 Mich. 440; Robertson v. Corsett, 39 Mich. 777.

<sup>4</sup> Adams v. Lee, 31 Mich. 440.

the rights which the judgment debtor had.<sup>1</sup> Therefore, where the makers of an engine and boiler sold them to a manufacturer of stoves, to be set up in a cheap board building upon land belonging to the latter, and for the purchase-money received a chattel mortgage, it being understood between the parties that the mortgage should be valid notwithstanding any annexation of the chattels to the realty, the mortgage was held good against a purchaser of the land upon execution issued upon a judgment recovered against the mortgagor. As between the mortgagor and mortgagees, the former would clearly not be permitted to set up that the machinery had become real estate; and the purchaser of the premises upon execution could acquire no greater rights. The rights and equities of the mortgagees existed before the recovery of the judgment against the mortgagor, and are superior to those acquired under the levy of the execution. The annexation of the chattels to the realty is deemed to have been made by the mortgagor in pursuance of and subject to his agreement with the mortgagees, and not as a permanent accession to the freehold.<sup>2</sup>

A subsequent attaching creditor, though he becomes a purchaser of the property upon an execution sale under such attachment, is not regarded as a *bona fide* purchaser without notice. He acquires no greater interest in the property than the judgment debtor himself had.<sup>3</sup>

1685. There is a limitation upon the right of parties to change the status of property by agreement, arising from the essential character of the property itself, and the mode of its annexation to the realty.<sup>4</sup> "It will readily be conceded that the ordinary distinction between real estate and chattels exists in the nature of the subject, and cannot in general be changed by the convention of the parties. Thus, it would not be competent for parties to create a personal chattel interest in a part of the separate bricks, beams, or other materials of which the walls of a house were composed. Rights by way of license might be cre-

<sup>1</sup> *Manwaring v. Jenison*, 61 Mich. 117, 27 N. W. Rep. 899.

<sup>2</sup> *Sisson v. Hibbard*, 75 N. Y. 542. See, also, *Western Union Telegraph Co. v. Burlington & S. W. Ry. Co.* 11 Fed. Rep. 1; *Sword v. Low*, 122 Ill. 487, 13 N. E. Rep. 826; *Manwaring v. Jenison*, 61 Mich. 117, 27 N. W. Rep. 899; *Henkle v. Dil-*

*lon*, 15 Oreg. 610, 17 Pac. Rep. 148. Nursery stock is severed from the freehold by the giving of a chattel mortgage thereon. *Duffus v. Bangs*, 43 Hun, 52.

<sup>3</sup> *Manwaring v. Jenison*, 61 Mich. 117, 27 N. W. Rep. 899.

<sup>4</sup> *Fortman v. Goepper*, 14 Ohio St. 558.

ated in such a subject, but it could not be made alienable as chattels, or subjected to the general rules by which the succession of that species of property is regulated. But it is otherwise with things which, being originally personal in their nature, are attached to the realty in such a manner that they may be detached without being destroyed or materially injured, and without the destruction of, or material injury to, the things real with which they are connected; though their connection with the land or other real estate is such that, in the absence of an agreement or of any special relation between the parties in interest, they would be a part of the real estate.”<sup>1</sup>

**1686.** The manner and degree of annexation to the realty are to be considered in determining whether a conditional sale is effectual when the articles sold are in some manner attached to the realty. The principle seems to be that such a sale is effectual only in case the article may be detached without injury to the realty. Thus it is clear that bricks placed in a wall for the construction of a building cannot retain their character as personal property by virtue of an agreement that they should remain such, or by virtue of a conditional sale.<sup>2</sup> But salt-kettles mortgaged to the seller as personal property were held to remain such after they had been set securely in an arch for the manufacture of salt, but removable by displacing a portion of the brickwork, and in the course of business actually removed and reset annually; so that the holder of the chattel mortgage could hold them as against a subsequent purchaser of the realty without notice of the chattel mortgage other than the constructive notice from the recording of the mortgage.<sup>3</sup>

**1687.** Articles which are already attached to the realty may in legal effect be severed by a sale of them to be removed. A mill privilege was conveyed by a deed which, in a distinct clause, conveyed the machinery and appurtenances of a gristmill which was not within the bounds of the privilege conveyed, with the right to use the gristmill for two years. As a part of the transaction, the purchaser gave a mortgage back to

<sup>1</sup> Ford v. Cobb, 20 N. Y. 344, 348, per Denio, J.

<sup>2</sup> Ford v. Cobb, 20 N. Y. 344, 348, per Denio, J.

<sup>3</sup> Ford v. Cobb, 20 N. Y. 344. And

see Sayles v. National Water Purifying Co. 16 N. Y. Supp. 555; Phoenix Mills v. Miller, 17 N. Y. Supp. 158; Andrews v. Chandler, 27 Ill. App. 103.



secure the purchase-money. This mortgage was recorded as a real property mortgage, and not as a chattel mortgage. The mortgagor afterwards gave a chattel mortgage of the machinery. The question arose, in regard to some of the machinery, whether it was covered by the first mortgage or the second. It was held that the machinery of the gristmill was not a fixture of the mill privilege sold, as it was not attached to it. Though the use of this mill was transferred, it was for only a limited time, and really by way of a lease. The transaction made the machinery personal property, whatever it may have been before.<sup>1</sup>

Things which have been only temporarily detached from the realty and are still upon the land may be regarded as remaining a part of it. Thus boards which have been in use as a permanent floor in a corn-barn remain a part of the realty though they have been taken up with the purpose of using them again.<sup>2</sup>

**1688.** To convey a fixture before it is severed from the land a deed is required, executed with the same formalities as are required for the conveyance of the land. After the chattel has been severed, it may be transferred in the same manner as any chattel. Thus a mortgage of such a fixture, while it is a part of the realty, must be by deed, recorded in the registry of deeds of the county as a deed of realty. The recording of it as a chattel mortgage is of no effect as notice.<sup>3</sup>

A conveyance of the land presumptively conveys the fixtures upon it. The grantor wishing to retain a fixture must do so by an exception in the deed. A parol agreement is not effectual.<sup>4</sup>

An actual severance and removal of a fixture from the realty generally restores its character as a chattel if so intended.<sup>5</sup>

**1689.** There may be a fixture upon public land, so that it cannot be taken upon execution as the personal property of the occupant. The interest acquired by occupancy of public land is recognized by the courts as a legal estate, and such interest in the land carries with it any structure annexed to the soil.<sup>6</sup> Accord-

<sup>1</sup> Merrill v. Wyman, 80 Me. 491, 15 Atl. Rep. 58. See White v. Foster, 102 Mass. 375.

<sup>2</sup> Hackett v. Amsden, 57 Vt. 432.

<sup>3</sup> Trull v. Fuller, 28 Me. 545.

<sup>4</sup> Mott v. Palmer, 1 N. Y. 564, 570.

<sup>5</sup> Sampson v. Graham, 96 Pa. St. 405.

<sup>6</sup> This doctrine is maintained in Cali-

fornia: Merritt v. Judd, 14 Cal. 59, 60; McKiernan v. Hesse, 51 Cal. 594. In Colorado: Sears v. Taylor, 4 Colo. 38; Gillett v. Gaffney, 3 Colo. 351. The statute, G. S. § 225, provides that the terms "land" and "real estate" shall embrace mining claims.

ingly if a person in the occupation of a mining claim on public land has placed thereon an engine and boilers necessary for the development of the mine, and attached them to the ground, they become fixtures, and could not be seized upon execution as personalty.<sup>1</sup>

1690. The fact that a deed or mortgage enumerates some fixtures but does not enumerate others, which afterwards become the subject of dispute, has been held to afford reason to suppose that these were intentionally omitted in the deed, and did not pass by it,<sup>2</sup> upon the principle, *Expressio unius est exclusio alterius*; but on the other hand it is declared that the express mention of some fixtures is not alone sufficient to exclude other things which are strictly fixtures.<sup>3</sup> A conveyance expressly including all fixtures has the same effect as a conveyance which does not mention fixtures, for in either case the operation of the conveyance is confined to things that are strictly fixtures.<sup>4</sup>

If it be intended that some fixtures shall pass by a deed or mortgage and that others shall not, the fixtures that are to pass should be described;<sup>5</sup> and if it be intended that some things which are not strictly fixtures shall pass, these must be particularly enumerated.<sup>6</sup>

A mortgage of a factory, with the water-wheel, belting, machinery, and "tools," in the absence of any evidence in regard to the machinery and tools, includes the realty, with all such fixtures as, between grantor and grantee, would pass as parcel of the realty, though "tools" may be so affixed to the realty as to be a part of it.<sup>7</sup>

## II. *Buildings as Fixtures.*

1691. If one erects a building or other structure with his own materials on the land of another without the owner's consent, it is presumptively a fixture, which the builder cannot remove without the owner's consent, though this presumption may

<sup>1</sup> Roseville Alta Min. Co. v. Iowa Gulch Min. Co. 15 Colo. 29, 24 Pac. Rep. 920. See, also, Merritt v. Judd, 14 Cal. 59.

<sup>2</sup> Trappes v. Harter, 2 C. & M. 153, 177; Kirch v. Davies, 55 Wis. 287, 11 N. W. Rep. 689; *In re Eureka Mower Co.* 86 Hun, 309, 33 N. Y. Supp. 486.

<sup>3</sup> Southport Banking Co. v. Thompson, L. R. 37 Ch. D. 64.

<sup>4</sup> Wiltshear v. Cottrell, 1 El. B. 674.

<sup>5</sup> Waterfall v. Penistone, 6 E. & B. 876; Walmsley v. Milne, 7 C. B. N. S. 115, 133.

<sup>6</sup> Steward v. Lombe, 1 Brod. & B. 506.

<sup>7</sup> Allen v. Woodard, 125 Mass. 400, 28 Am. Rep. 250.

be repelled by the attendant circumstances.<sup>1</sup> If there is no previous or contemporaneous agreement that the building shall remain personal property, it becomes a part of the realty, and cannot afterwards be made a chattel by parol agreement.<sup>2</sup>

1692. If one builds a house on his own land with the materials of another, the nature of the property annexed is changed and becomes a part of the freehold, and the right of property is vested in the owner of the land, who is only obliged to answer to the owner of the materials for the value of them.<sup>3</sup>

But if one takes personal property belonging to another without his consent, and attaches it to his realty in such a way that it may be removed and used elsewhere, and the property is such that its identity is not lost by the annexation, as in the case of machinery, the owner of the realty is not allowed to assert that the property has become a part of the realty. The owner of the chattel may recover it in replevin.<sup>4</sup>

1693. Where, however, one erects buildings on the land of another with his consent, an understanding that they may be sold or removed by the builder may be readily implied.<sup>5</sup> One engaged in the manufacture of staves erected machinery, consisting of engines, boilers, and saws, upon land to which he supposed he had a good title; but another claiming title to the land agreed that, if the title should be adjudged to be in him, he would sell the land to the manufacturer at a certain price, and encouraged the manufacturer to go on with his improvements. When the title was finally declared to be in the claimant, and he claimed the

<sup>1</sup> *Elwes v. Briggs Gas Co.* L. R. 33 Ch. D. 562, 567; *Bonney v. Foss*, 62 Me. 248; *Peirce v. Goddard*, 22 Pick. 559, 33 Am. Dec. 764; *Washburn v. Sproat*, 16 Mass. 449; *First Parish v. Jones*, 8 Cush. 184; *Howard v. Fessenden*, 14 Allen, 124; *Harmon v. Kline*, 52 Ark. 251, 12 S. W. Rep. 496; *Ritchmyer v. Morsse*, 3 Keyes, 349, 4 Abb. Ct. App. 55; *Huebschmann v. McHenry*, 29 Wis. 655.

<sup>2</sup> *Aldrich v. Husband*, 131 Mass. 480, where the building was erected by a tenant in common, though it would seem the consent of the co-tenant would be implied in such case. *Parsons v. Copeland*, 38 Me. 537. See, also, *Gibbs v. Estey*, 15 Gray, 587; *Howard v. Fessenden*, 14

*Allen*, 124; *Morris v. French*, 106 Mass. 326; *Westgate v. Wixon*, 128 Mass. 304.

<sup>3</sup> 2 Kent Com. 360; *Peirce v. Goddard*, 22 Pick. 559, 33 Am. Dec. 764.

<sup>4</sup> *Gill v. De Armant*, 90 Mich. 425, 51 N. W. Rep. 527. And see *Silsbury v. McCoon*, 3 N. Y. 379, 53 Am. Dec. 307; *Betts v. Lee*, 5 Johns. 348, 4 Am. Dec. 368; *Snyder v. Vaux*, 2 Rawle, 423, 21 Am. Dec. 466; *Davis v. Easley*, 13 Ill. 192.

<sup>5</sup> *Osgood v. Howard*, 6 Me. 452, 20 Am. Dec. 322; *Russell v. Richards*, 10 Me. 429, 25 Am. Dec. 254; *Pullen v. Bell*, 40 Me. 314, as explained in *Lapham v. Norton*, 71 Me. 83, 87; *Handforth v. Jackson*, 150 Mass. 149, 22 N. E. Rep. 634.

buildings and machinery erected by the manufacturer as fixtures to the land, it was held, the fixtures having been placed upon the land with his consent pending the dispute about the title, that they remained personal property, and could be removed by the manufacturer.<sup>1</sup>

**1694.** *Prima facie* a building is not a chattel, but passes with the freehold.<sup>2</sup> Where, in a contract for the sale of land, the owner reserved the right to remove a building thereon at any time before the closing of the transfer, and sold the building to another, but the building was not removed when the deed was delivered under the contract, and possession of both the land and building passed to the grantee, it was held that as against him there was no agreement whereby the house was to be regarded as in the nature of a chattel if not removed before the conveyance was completed, and that title to the building passed to him with the land.<sup>3</sup>

**1695.** A building of a permanent character, erected by a vendee in possession under an executory contract of purchase, is part of the realty, and cannot be removed by him or his successors in interest, in the absence of an agreement to that effect.<sup>4</sup> "It is well settled that erections made by a mortgagor, or one occupying land under a bond for a deed, are to be regarded as real estate, and are not removable by the occupant as personal property."<sup>5</sup> And so, where a vendee in possession under a bond for a deed built a barn, but failed to perform the conditions of his bond, and the barn was attached and removed by a creditor, it was held that the vendor was entitled to recover damages against the creditor for such removal. The barn was built for the permanent improvement of the land and not for a temporary purpose. When

<sup>1</sup> *Brown v. Baldwin*, 121 Mo. 126, 25 S. W. Rep. 863.

<sup>2</sup> *Smith v. Benson*, 1 Hill, 176; *Dolliver v. Ela*, 128 Mass. 557; *Leland v. Garsert*, 17 Vt. 403; *Lipsky v. Borgmann*, 52 Wis. 256, 38 Am. Rep. 735.

<sup>3</sup> *Brown v. Fox*, 12 Misc. Rep. 147, 33 N. Y. Supp. 57.

<sup>4</sup> *Miller v. Waddingham*, 91 Cal. 377, 27 Pac. Rep. 750, 25 Pac. Rep. 688. Also, *Allen v. Mitchell*, 13 Tex. 373; *Fratt v. Whittier*, 58 Cal. 126, 41 Am. Rep. 251; *Ogden v. Stock*, 34 Ill. 522, 85 Am. Dec.

332; *Milton v. Colby*, 5 Met. 78, 81; *Howard v. Fessenden*, 14 Allen, 124, 128; *Westgate v. Wixon*, 128 Mass. 304, 306; *Dolliver v. Ela*, 128 Mass. 557; *Hinkley & Egery Iron Co. v. Black*, 70 Me. 473, 35 Am. Rep. 346; *Kingsley v. McFarland*, 82 Me. 231, 19 Atl. Rep. 442; *Michigan Mut. L. Ins. Co. v. Cronk*, 93 Mich. 49, 52 N. W. Rep. 1035.

<sup>5</sup> *Hemenway v. Cutler*, 51 Me. 407, per Appleton, C. J. Also, *Kingsley v. McFarland*, 82 Me. 231, 19 Atl. Rep. 442.

built, it became a part of the realty, and inured to the benefit of the plaintiff as additional security for the performance of the condition of the bond.<sup>1</sup>

Even houses built on mudsills resting upon the soil, which is not disturbed, are affixed to the land within the terms of a statute declaring that "a thing is deemed to be affixed to the land when it is . . . permanently resting upon it, as in the case of buildings."<sup>2</sup>

1696. Buildings or other fixtures erected by one in possession of land under a contract of purchase become a part of the realty, in the absence of any agreement, express or implied, with the landowner, that they shall remain personal property. The relation of the parties in such case does not imply any agreement that the buildings are not to become a part of the realty. On the contrary, it is to be supposed that both the vendor and vendee contemplated the completion of the contract of purchase, and that the vendee intended the buildings as a permanent improvement upon the land he was about to acquire, and that the vendor contemplated the improvement as additional security for the purchase-money of the land he was about to convey.<sup>3</sup>

The same rule applies when the building is erected by a trespasser, though he believes he has good title to the land.<sup>4</sup>

Buildings erected under an agreement with the owner of land to convey them to the builder, upon his paying a certain sum within a limited time, are not strictly personal property, but they are fixtures, and constitute a part of the realty. The builder has an equitable interest in the realty, and not a pure ownership of the buildings as chattels; and therefore a mortgage by him of the

<sup>1</sup> *Westgate v. Wixon*, 128 Mass. 304. The court, per Morton, J., said: "As a general rule, buildings are part of the realty, and belong to the owner of the land on which they stand. Even if built by a person who has no interest in the land, they become a part of the realty, unless there is an agreement by the owner of the land, either express or implied from the relations of the parties, that they shall remain personal property. . . . The barn in question was a substantial structure. It is clear, from the facts agreed upon, that Abbott built it, not for any temporary purpose, but for the permanent improve-

ment of the land, which he expected to become his property according to the terms of the bond."

<sup>2</sup> *Miller v. Waddingham*, 91 Cal. 377, 27 Pac. Rep. 750, 25 Pac. Rep. 688.

<sup>3</sup> *Kingsley v. McFarland*, 82 Me. 231, 19 Atl. Rep. 442, per Virgin, J.; *Lapham v. Norton*, 71 Me. 83; *Hinkley, & Co. v. Black*, 70 Me. 473, 481, 35 Am. Rep. 346; *Westgate v. Wixon*, 128 Mass. 204; *Milton v. Colby*, 5 Met. 78; *Michigan Mut. L. Ins. Co. v. Cronk*, 93 Mich. 49, 52 N. W. Rep. 1035.

<sup>4</sup> *Honzik v. Delaglise*, 65 Wis. 494, 27 N. W. Rep. 171.

buildings should be recorded as a mortgage of real estate, and not as a chattel mortgage.<sup>1</sup>

Thus one under an oral contract of purchase entered into possession of land with the understanding that he should erect buildings thereon, and upon receiving a conveyance should give back a mortgage to secure the whole purchase-money. He hired money from a third person with which to make the improvements, and as security therefor gave the lender a chattel mortgage of the buildings. The agreement of purchase not being carried out, the owner brought a writ of entry to obtain possession of the land and buildings thereon. The vendee and the holder of the chattel mortgage, while not contesting the plaintiff's right of possession of the land, claimed that the buildings were personal property. It was held that the plaintiff was entitled to judgment for both the land and the buildings.<sup>2</sup>

1697. Buildings erected on the land of another, with his permission, may remain the personal property of the builder by virtue of an implied agreement of the parties, in the absence of any other facts or circumstances tending to show a different intention. Thus where one by license of the owner of land placed thereon a building and machinery designed for the manufacture of oatmeal, with an engine and boiler to operate the machinery, and gave a chattel mortgage on the building and machinery to one who loaned the money used for building and equipping the mill, the mere fact that the mill and fixtures were erected with the permission of the owner of the land was regarded as sufficient, *prima facie*, to establish an implied agreement that they should be the personal property of the builder. The Supreme Court of Minnesota, so holding, admit that in all the cases examined there were other facts or circumstances in evidence tending to support such an agreement. The case before the court arose upon stipulated facts which were probably more or less incompletely stated; for it would be difficult to conceive of any case where there would not be other facts and circumstances bearing upon the question of the intention of the parties.

In regard to such agreement the court, in an admirable opinion by Mr. Justice Mitchell, say: "There is no doubt but that such a

<sup>1</sup> Eastman v. Foster, 8 Met. 19; Holt County Bank v. Tootle, 25 Neb. 408, 41 N. W. Rep. 291.      <sup>2</sup> Morse v. Hayden, 82 Me. 231, 19 Atl. Rep. 443.

building and machinery would, in the absence of any agreement of the parties to the contrary, become a part of the realty and belong to the owner of the soil. *Prima facie*, all buildings belong to the owner of the land on which they stand as part of the realty. It is only by virtue of some agreement with the owner of the land that buildings can be held by another party as personal property. If erected wrongfully, or without such agreement, they become the property of the owner of the soil. But it is entirely competent for the parties to agree that they shall remain the personal property of him who erects them, and such an agreement may be either express, or implied from the circumstances under which the buildings are erected.”<sup>1</sup>

**1698.** A house or other structure built upon the land of another by license, and so built that it may be readily removed, does not become a fixture to the land, but may be removed by the builder. But if such builder fails to remove it within a reasonable time after being ejected from the land by the owner thereof, such structure becomes a part of the realty, and ceases to be the property of such licensee.<sup>2</sup> Buildings erected on a military reservation by a post trader, under authority from the war department, for the purposes of trade, do not become a part of the realty, and the owner, when he ceases to be post trader, may remove and dispose of the same as his own property.<sup>3</sup>

It is not necessary, in order to preserve the personal character of such fixtures, that there should be any express agreement for that purpose between the parties. Their intention or agreement for the separate ownership of the property may be implied from

<sup>1</sup> Merchants' Nat. Bank v. Stanton, 55 Minn. 211, 218, 56 N. W. Rep. 821. See Little v. Willford, 31 Minn. 173, 17 N. W. Rep. 282; Ingalls v. St. Paul, M. & M. Ry. Co. 39 Minn. 479, 40 N. W. Rep. 524; Howard v. Fessenden, 14 Allen, 124; Brown v. Corbin, 121 Ind. 455, 23 N. E. Rep. 276; Harmon v. Kline, 52 Ark. 251, 12 S. W. Rep. 496; Brown v. Turner, 113 Mo. 27, 20 S. W. Rep. 660; Lowenberg v. Bernd, 47 Mo. 297.

<sup>2</sup> Turner v. Kennedy (Minn.), 58 N. W. Rep. 823. The fact that the house in this case was built on skids turned up at the ends like sleigh runners, which rested on boards on the ground, so that it could

be readily hauled away, was regarded as a circumstance going to show that the builder intended that the house should remain personal property, and that he intended to remove it; but it would not excuse him for failing to remove it for an unreasonable length of time. See, also, Tudor Iron Works v. Hitt, 49 Mo. App. 472; Lowenberg v. Bernd, 47 Mo. 297; Hines v. Ament, 43 Mo. 298; Matson v. Calhoun, 44 Mo. 368; Korbe v. Barbour, 130 Mass. 255; Hinkley, &c. Iron Co. v. Black, 70 Me. 473; Lapham v. Norton, 71 Me. 85; Dame v. Dame, 38 N. H. 429.

<sup>3</sup> Mayer v. Waters, 45 Kans. 78, 25 Pac. Rep. 212.

the circumstances attending the transaction and the conduct of the parties.<sup>1</sup>

1699. A building erected by one person on the land of another may be mortgaged as personal property, if it was so erected under an understanding or agreement that it might be removed at any time.<sup>2</sup> *Prima facie*, such a building would be a fixture, and would not be removable.<sup>3</sup> The legal effect of putting it on another's land is to make it part of the freehold; and, to sustain a mortgage of it as personal property, an agreement of the parties controlling the legal effect of the transaction must be proved.. If the mortgagor, after mortgaging such a building, removes it to other land which he subsequently purchases, and then mortgages the land to another with the buildings and fixtures thereon, but the latter mortgagee has full knowledge of the chattel mortgage, this will have priority over the mortgage of the land.<sup>4</sup> If the owner of the land purchase such building after it has been mortgaged, the lien is not thereupon extinguished.<sup>5</sup>

1700. A grantor cannot reserve by parol a building on the land conveyed permanently attached to it. The grantor can no more reserve a building by parol than he can reserve trees growing upon the land, or a ledge of rocks, or a mine, or a part of the land. Therefore where a barn, resting on large stones at the corners and upon smaller ones at other places, was reserved by parol when the owner conveyed the land on which the barn was situated, and there were successive conveyances of the land by deeds which made no reservation of the barn, which still remained upon the land, the original grantor has no right to remove it. As between the grantor and his grantee, the former would not be permitted to show that the barn was reserved by parol, as such

<sup>1</sup> First Parish v. Jones, 8 Cush. 184, 190, per Bigelow, J.; Korbe v. Barbour, 130 Mass. 255, 257, per Colt, J.; Tudor Iron Works v. Hitt, 49 Mo. App. 472.

<sup>2</sup> Smith v. Benson, 1 Hill, 176; Lanphere v. Lowe, 3 Neb. 131, 134, 137; Holt County Bank v. Tootle, 25 Neb. 408, 41 N. W. Rep. 291; Brown v. Corbin, 121 Ind. 455, 23 N. E. Rep. 276; Denham v. Sankey, 38 Iowa, 269; Goodenow v. Allen, 68 Me. 308; Deering v. Ladd, 22 Fed. Rep. 575, a case of a mortgage of an elevator

built on railroad land under license; Docking v. Frazell, 34 Kans. 29, 7 Pac. Rep. 618, a case of a hotel moved upon leased land.

<sup>3</sup> Price v. Malott, 85 Ind. 266; Docking v. Frazell, 34 Kans. 29, 7 Pac. Rep. 618, 38 Kans. 420, 17 Pac. Rep. 160.

<sup>4</sup> Eastman v. Foster, 8 Met. 19; Holt Co. Bank v. Tootle, 25 Neb. 408, 41 N. W. Rep. 291.

<sup>5</sup> Smith v. Park, 31 Minn. 70, 16 N. W. Rep. 490.



evidence would contradict the deed. "If this barn had been placed upon the lot by some third person with the consent of the owner, and with the understanding that such third person could at any time remove it, it would have remained personal property, and would not have passed to a purchaser under any form of conveyance, providing such purchaser had notice of the fact. But where the land and the buildings thereon belong to the same person, then the buildings are a part of the real estate, and pass with it upon any conveyance thereof. In such a case the grantor can retain title to the buildings only by some reservation in the deed, or by some agreement in writing which will answer the requirements of the statute of frauds. Any other rule would be exceedingly dangerous, and would enable a grantor, in derogation of his grant, upon oral evidence to reserve buildings and trees and other portions of his real estate, and thus, perhaps, defeat the main purpose of the grant."<sup>1</sup>

**1701. A mortgagee in possession, who has erected buildings and other fixtures, may lawfully take them down and remove them, if they are not so connected with the soil that they cannot be removed without prejudice to it. So long as he is in possession he may exercise the right of removal, and need not resort to a proceeding in equity for the purpose of declaring and enforcing such right.**<sup>2</sup>

### III. *Domestic Fixtures.*

**1702. Fixtures in and about a house.** — A deed or mortgage of a house passes the presses, cupboards, glazed doors, movable partitions, grates, ranges, and other like fixtures contained in it.<sup>3</sup> It also passes the windows and blinds, though temporarily separated from the house;<sup>4</sup> the door-keys, which are regarded as appurtenances to the doors, which are part of the house;<sup>5</sup> a sundial erected on a permanent foundation;<sup>6</sup> a furnace so placed in a house that it cannot be removed without disturbing the brick-

<sup>1</sup> *Leonard v. Clough*, 133 N. Y. 292, 31 N. E. Rep. 93, 16 L. R. A. 305, per Earl, C. J., reversing 59 Hun, 627, 14 N. Y. Supp. 339; *Muir v. Jones*, 23 Oreg. 332, 31 Pac. Rep. 646.

<sup>2</sup> *Cooke v. Cooper*, 18 Oreg. 142, 22 Pac. Rep. 945.

<sup>3</sup> *Co. Litt.* 47 b, 53 a; *Lyde v. Russell*, 1 B. & Ad. 394; *Longstaff v. Meagoe*, 2 Ad. & El. 167; *Colegrave v. Dias Santos*, 2 Barn. & Cress. 76.

<sup>4</sup> *Peck v. Batchelder*, 40 Vt. 233.

<sup>5</sup> *Liford's case*, 11 Coke, 46 b, 50 b.

<sup>6</sup> *Snedeker v. Warring*, 12 N. Y. 170.

work of the house, and causing a portion of the ceiling to fall.<sup>1</sup> But whether a portable iron furnace for heating a house, standing on the cellar floor, and held in position merely by its own weight, and capable of being removed without injury to the building, is a fixture, the authorities are not agreed.<sup>2</sup> A cooking-stove or range is declared not to be a fixture though fastened to the floor.<sup>3</sup>

Whether steam radiators, attached to the floors and to the steam-pipes by being screwed to them, are a part of the realty, is a question upon which the decisions are not agreed; but upon principle it would seem that they should be regarded as part of the realty. "When, under ordinary circumstances, the owner of the building attaches such radiators to his steam plant, it should be held that he intended them as a permanent annexation to the realty."<sup>4</sup>

<sup>1</sup> *Main v. Schwarzwaelder*, 4 E. D. Smith, 273; *Stockwell v. Campbell*, 39 Conn. 362, 12 Am. Rep. 393.

Whether a portable furnace set in brick is a part of the realty is a question of fact, or of mixed law and fact. *Allen v. Mooney*, 130 Mass. 155; *Turner v. Wentworth*, 119 Mass. 459; *Towne v. Fiske*, 127 Mass. 125, 34 Am. Rep. 353; *Maguire v. Park*, 140 Mass. 21, 1 N. E. Rep. 750; *Rahway Sav. Inst. v. Irving St. Baptist Church*, 36 N. J. Eq. 61.

<sup>2</sup> *Rahway Sav. Inst. v. Irving St. Baptist Church*, 36 N. J. Eq. 61, holds that it is not a fixture. But, on the other hand, it is held to be a fixture in *Stockwell v. Campbell*, 39 Conn. 362, 12 Am. Rep. 393; *Ridgeway Stove Co. v. Way*, 141 Mass. 557, 6 N. E. Rep. 714. "It cannot be held that the mere fact that a chattel is placed in a part of a house which has been adapted to receive it will make it a fixture; for example, a bedstead in a house obviously would not be made a fixture by the mere fact that it was placed in an alcove made to receive a bedstead." Per Runyon, Ch.

<sup>3</sup> *John Van Range Co. v. Allen* (Miss.), 7 So. Rep. 499.

<sup>4</sup> *Capehart v. Foster* (Minn.), 63 N. W. Rep. 257. The court say: "We are cited to *National Bank v. North*, 160 Pa. St. 303, 309, 28 Atl. Rep. 694, which holds to the contrary. "This case holds that such

radiators are analogous to gas fixtures, and therefore not a part of the realty. By following the same process of reasoning by analogy, you would strip a house of all modern improvements, and by continuing the process you would overturn the greater part of the law of fixtures. A correct rule should not, in this manner, be overturned by an inconsistent exception."

The grounds of the decision of the Court of Common Pleas of Pennsylvania, adopted by the Supreme Court, are stated thus: "Of no such appliances can it be said that they are of such a nature or character as to be necessary to carry out the obvious purpose for which the building was erected, permanently to increase its value for occupation and use, or to constitute lasting accessions to the property. The same considerations of personal comfort, convenience, and safety that call for their adoption at one time will require the discarding of them later on. So far as they consist of movable articles merely standing upon the floors, though screwed to pipes, in walls, or under floors, their relation to the realty itself is no different from that of any other sort of detachable heating apparatus, from a portable furnace down to a gas stove, and the consequences of their severance from the realty are precisely the same in kind. There is, in a word, nothing in the act of

Whether iron screens with marble slabs upon them, placed in front of steam-radiating pipes, resting on the floor and kept in position by their own weight, are a part of the steam-heating apparatus of a house, and pass by a deed of the house, upon conflicting evidence is a question for the jury.<sup>1</sup>

Whether the ranges, hot-water boilers, sinks, and washtubs are fixtures or movables, depends upon when and how the articles were attached to the houses.<sup>2</sup>

**1703.** Articles of furniture or ornament are not fixtures, though attached to the building, such as carpets, curtains, hangings, and the like.<sup>3</sup> Mantel mirrors hung upon hooks driven into the walls, and pier mirrors, though made to order for the house, and having cornices of the same design as those of the room and connected with them, but so attached that they can be removed and put into another house, are not covered by a mortgage of the realty.<sup>4</sup> But mirrors set into the walls, so as to be a part of them at the time of the erection of a house, are a part of the realty.<sup>5</sup>

On this principle gas fixtures, consisting of chandeliers and burners screwed to the ends of the gas-pipes projecting from the walls and ceilings of the building, are regarded as personal property.<sup>6</sup> Such gas fixtures are not a part of the realty, even as

introducing such articles into a dwelling-house, and nothing in their nature, object, purpose, or relation to the house, which can give rise to an inference that they were put there to be a part of the realty, or to increase the security of its mortgage. . . . Whilst the traps, regulators, service and distributing pipes, risers, and the valves belonging to them, may fairly be considered as necessary to the completion of a modern dwelling-house where the facilities for steam-heating exist, and must, in the nature of things, be substantially the same in every case, varying only in dimensions, the radiators, with their valves, are put up in more or less expensive style, according to the taste and means of the person who intends to occupy the house, or according to the purpose for which it may be designed, as a dwelling for his own family or as a house to be rented to others."

<sup>1</sup> *Leonard v. Stickney*, 131 Mass. 541.

<sup>2</sup> *Manning v. Ogden*, 70 Hun, 399, 24 N. Y. Supp. 70.

<sup>3</sup> *Finney v. Grice*, L. R. 10 Ch. D. 13; *Hellawell v. Eastwood*, 6 Ex. 295; *Manning v. Ogden*, 24 N. Y. Supp. 70.

<sup>4</sup> *McKeage v. Hanover F. Ins. Co.* 81 N. Y. 38, 37 Am. Rep. 471, affirming 16 Hun, 239; *Loan v. Gregg*, 55 Mo. App. 581.

<sup>5</sup> *Ward v. Kilpatrick*, 85 N. Y. 413, 39 Am. Rep. 674; *Spinney v. Barbe*, 43 Ill. App. 585; *Lockwood v. Lockwood*, 3 Redf. (N. Y.) 330.

<sup>6</sup> *Shaw v. Lenke*, 1 Daly, 487; *McKeage v. Hanover F. Ins. Co.* 81 N. Y. 38, 37 Am. Rep. 471, affirming 16 Hun, 239; *Kirchman v. Lapp*, 19 N. Y. Supp. 831; *Vaughen v. Haldeman*, 33 Pa. St. 522, 75 Am. Dec. 622; *Jarechi v. Philharmonic Society*, 79 Pa. St. 403, 21 Am. Rep. 78; *Heysham v. Dettre*, 89 Pa. St.

between vendor and vendee or mortgagor and mortgagee. They are merely a part of the furniture of the room, — a substitute for the lamps and lamp-holders, candlesticks and chandeliers, formerly used to hold candles.<sup>1</sup>

Pictures painted on canvas and cemented to the ceiling or walls of a building are fixtures, and are subject to a mortgage of the realty.<sup>2</sup>

1704. A church organ is a fixture if it is built into the church as part of the structure, so that in design and architectural embellishment it appears to be a permanent annexation to the church building.<sup>3</sup>

Settees or seats used in a church or hall, not in any way permanently attached to the building, are not fixtures, for they are

506; *Seeger v. Pettit*, 77 Pa. St. 437, 18 Am. Rep. 452; *Lawrence v. Kemp*, 1 Duer, 363; *Manning v. Ogden*, 24 N. Y. Supp. 70; *Kirchman v. Lapp*, 19 N. Y. Supp. 831; *Hays v. Doane*, 11 N. J. Eq. 84; *Guthrie v. Jones*, 108 Mass. 191; *Towne v. Fiske*, 127 Mass. 125, 34 Am. Rep. 365; *Montague v. Dent*, 10 Rich. 135, 67 Am. Dec. 572; *Chapman v. Union Mut. L. Ins. Co.* 4 Ill. App. 29; *Rogers v. Crow*, 40 Mo. 91, 93 Am. Dec. 299; *Fratt v. Whittier*, 58 Cal. 126, 41 Am. Rep. 251. The only authority to the contrary in this country being *Johnson v. Wiseman*, 4 Met. (Ky.) 357.

<sup>1</sup> *Capehart v. Foster* (Minn.), 63 N. W. Rep. 257, per Cauty, J., citing *McKeage v. Hanover F. Ins. Co.* 81 N. Y. 38, 37 Am. Rep. 471, affirming 16 Hun, 239; *Manning v. Ogden*, 24 N. Y. Supp. 70; *Rogers v. Crow*, 40 Mo. 91, 93 Am. Dec. 299; *Ewell*, Fixt. 299, observing that, "while this doctrine is rather doubtful in principle, it is too well established as the law of the country generally to be now overturned."

In a case decided by the Superior Court of Cincinnati, *Central Trust, &c. Co. v. Cincinnati Grand Hotel Co.* 26 W. L. Bul. 149, such articles were held to pass with the realty as fixtures to it.

In *National Bank v. North*, 160 Pa. St. 303, 28 Atl. Rep. 694, 697, the court, incidentally speaking of gas fixtures, say :

"Of course, express stipulation may make them pass with the realty. *Jarechi v. Philharmonic Society*, 79 Pa. St. 403, 21 Am. Rep. 78; *Heysham v. Dettre*, 89 Pa. St. 506; *Fratt v. Whittier*, 58 Cal. 126, 41 Am. Rep. 251; *Sewell v. Angerstein*, 18 L. T. N. S. 300; or an intent to do so may be so clear from the attending circumstances and expressions as to have the same effect. *Ewell*, Fixt. p. 300; *Funk v. Brigaldi*, 4 Daly, 359; *Central Trust & Safe Deposit Co. v. Cincinnati Grand Hotel Co.* 26 W. L. Bul. 149. But, in the absence of such an element, the rule as above stated seems very well settled. In this connection, however, it must not be overlooked what is meant by gas fixtures. There is a clear distinction, pointed out in *Vaughen v. Haldeman*, 33 Pa. St. at page 522, reiterated in *Jarechi v. Philharmonic Society*, 79 Pa. St. 403, 21 Am. Rep. 78, and recognized in *Ewell*, Fixt. p. 299, and cases there cited, between gas fittings and gas fixtures, the former term including all the piping down to the points of opening where chandeliers, brackets, etc., used for lighting, are designed to be attached, the latter only covering those attachments."

<sup>2</sup> *Cahn v. Hewsey*, 31 Abb. N. C. 387, 8 Misc. Rep. 384, 29 N. Y. Supp. 1107.

<sup>3</sup> *Chapman v. Union Mut. L. Ins. Co.* 4 Ill. App. 29; *Rogers v. Crow*, 40 Mo. 91, 93 Am. Dec. 299.

merely furniture.<sup>1</sup> But chairs in a theatre of a pattern made with special reference to the size and plan of the auditorium and screwed to the floor are a part of the building. Such chairs are clearly intended to be a part of the structure as much as any other portion of it, for they are indispensable to its use as a theatre.<sup>2</sup>

**1705. A deed or mortgage of a lot with an opera house** thereon passes all the furniture, fixtures, and furnishings necessary to make a complete opera house, especially if the mortgage specifies "all buildings and improvements thereon, or to be erected thereon." The whole building is to be considered in reference to its uses, and such a house, when erected and furnished for the purposes designated, is the building and improvements contemplated in the deed.<sup>3</sup>

**1706. Fixtures of trade.** — A show-case with drawers and sash, though fastened in place by nails, does not become part of the realty.<sup>4</sup> Shelving and counters in a store, though nailed to the building, and necessary for its use as a store, and so used for many years, are not a part of the realty.<sup>5</sup>

**1707. The fittings of a hotel or public house are generally fixtures.**<sup>6</sup> Ice in an ice-house belonging to a hotel and used for hotel purposes may be treated as a fixture.<sup>7</sup>

An electric annunciator attached to the wall, and to all the wires of the electric-bell system of a hotel, is a part of the realty.<sup>8</sup>

An office desk in a hotel, about twenty-five feet long, resting on a tile floor, between projections in the walls, to which it is fastened by means of screws, the space behind the desk forming the hotel office, is regarded as a part of the realty.<sup>9</sup>

A bar fastened by nails and screws to the walls and floors of a

<sup>1</sup> Chapman v. Union Mut. L. Ins. Co. 4 Ill. App. 29.

<sup>2</sup> Grosz v. Jackson, 6 Daly, 463.

<sup>3</sup> Grosvenor v. Bethell, 93 Tenn. 577, 26 S. W. Rep. 1096.

<sup>4</sup> Cross v. Marston, 17 Vt. 533, 44 Am. Dec. 353; Kimball v. Grand Lodge, 131 Mass. 59; Clifton Heights Land Co. v. Randell, 82 Iowa, 89, 47 N. W. Rep. 905.

<sup>5</sup> Johnson v. Mosher, 82 Iowa, 29, 47 N. W. Rep. 996. But, *contra*, see Wood-

ham v. First Nat. Bank, 48 Minn. 67, 50 N. W. Rep. 1015, where the counter was a bar in a saloon fastened to the floor by nails and screws.

<sup>6</sup> Walmsley v. Milne, 7 C. B. N. S. 115; *Ex parte Barclay*, 5 De G., M. & G. 403.

<sup>7</sup> Hill v. Mundy, 89 Ky. 36, 11 S. W. Rep. 956.

<sup>8</sup> Capehart v. Foster (Minn.), 63 N. W. Rep. 257.

<sup>9</sup> Capehart v. Foster (Minn.), 63 N. W. Rep. 257.

building is a fixture, and passes by a deed or mortgage of the realty.<sup>1</sup>

#### IV. *Agricultural Fixtures.*

1708. Manure made in the course of husbandry upon a farm is an incident of it, and, whatever may be its condition or situation, whether lying in the barnyard or laid in heaps, passes as appurtenant to the land as being in the nature of a fixture.<sup>2</sup> This is the rule between vendor and purchaser, between the heir and personal representatives, and between landlord and tenant.

It is, however, an incident of such a character that it is personal property, whenever the parties interested agree so to treat it. It is only constructively annexed to the realty when it is not spread upon the land and incorporated with the soil. The owner of the farm in conveying it may orally reserve the manure. If, in negotiating a sale of the farm, it is agreed that the purchaser shall buy it at a valuation to be agreed upon, it does not pass with the land upon a conveyance of that.<sup>3</sup> A sale of the manure as personal property, to be removed, is in itself a severance of it from the soil.<sup>4</sup>

Manure made in stables or otherwise, not in the ordinary course of husbandry, is not regarded as an incident of the real estate upon which it is situated.<sup>5</sup>

The rule that manure is appurtenant to the realty being one of policy, designed to promote the interests of agriculture, it does

<sup>1</sup> Woodham v. First Nat. Bank, 48 Minn. 67, 50 N. W. Rep. 1015.

<sup>2</sup> Parsons v. Camp, 11 Conn. 525; Vehen v. Mosher, 76 Me. 469; Chase v. Wingate, 68 Me. 204, 28 Am. Rep. 36; Norton v. Craig, 68 Me. 275; Lassell v. Reed, 6 Me. 222; Gallagher v. Shipley, 24 Md. 418, 87 Am. Dec. 611; Strong v. Doyle, 110 Mass. 92; Fay v. Muzzey, 13 Gray, 53, 74 Am. Dec. 619; Daniels v. Pond, 21 Pick. 367, 32 Am. Dec. 269; Snow v. Perkins, 60 N. H. 493, 49 Am. Rep. 333; Hill v. De Rochemont, 47 N. H. 88; Perry v. Carr, 44 N. H. 118; Sawyer v. Twiss, 26 N. H. 345; Needham v. Allison, 24 N. H. 355; Plumer v. Plumer, 30 N. H. 558; Conner v. Coffin, 22 N. H. 538; Kittredge v. Woods, 3 N. H. 503, 14 Am. Dec. 393; Goodrich v. Jones, 2 Hill, 142; Middlebrook v. Corwin, 15 Wend. 169; Lewis v.

Jones, 17 Pa. St. 262, 55 Am. Dec. 550; Collier v. Jenks (R. I.), 32 Atl. Rep. 208; Wetherbee v. Ellison, 19 Vt. 379. That manure, before it is spread upon the ground, is personal property, see Yearworth v. Pierce, Aleyn, 31; Ruckman v. Outwater, 28 N. J. L. 581; Smithwick v. Ellison, 2 Ired. 326, 38 Am. Dec. 697.

<sup>3</sup> Strong v. Doyle, 110 Mass. 92. *Contra*, see Conner v. Coffin, 22 N. H. 538.

<sup>4</sup> French v. Freeman, 43 Vt. 93.

<sup>5</sup> Snow v. Perkins, 60 N. H. 493, 49 Am. Rep. 333; Needham v. Allison, 24 N. H. 355; Sawyer v. Twiss, 26 N. H. 345; Plumer v. Plumer, 30 N. H. 558; Daniels v. Pond, 21 Pick. 367, 32 Am. Dec. 269; Lassell v. Reed, 6 Me. 222; Parsons v. Camp, 11 Conn. 525; Collier v. Jenks (R. I.), 32 Atl. Rep. 208.

not apply when the conveyance is not of a farm, but of only a small part of a farm upon which the manure happens to be piled at the time of the sale.<sup>1</sup>

1709. Fence-rails, which have been fixtures to the realty, become personalty when they are permanently detached from the land. Thus, fence-rails piled on the land at the time of its sale do not pass by the deed, though they had previously been in a fence on the land for nearly fifty years. They are not of necessity a part of the realty unless they are in the fence, and even in such case they may remain as personalty if such be the agreement between the parties interested at the time the fence is built.<sup>2</sup>

But fencing materials which have been used upon a farm for fences but are temporarily detached, without any intent to divert them from such use, pass by a conveyance of the farm.<sup>3</sup>

In like manner fencing materials, such as rails, boards, or posts of wood or stone, deposited on a farm with the intention of using them in building necessary fences, are part of the realty, will pass by a conveyance of the farm, and cannot be levied on as personal property.<sup>4</sup>

Hop-poles intended for permanent use, though they are temporarily taken out of the ground and piled upon it, with the intention of using them again for hop-raising in the proper season, are part of the realty.<sup>5</sup>

But, contrary to some of these decisions, it was held in Illinois that hewed timber intended for a building, and stone posts intended for a fence but not attached to the soil, are not fixtures. The mere intention some time to use the timber and posts for these purposes cannot make them fixtures before they are actually so used.<sup>6</sup> Rails in a fence built on another's land, in ignorance of the true boundary, are not fixtures.<sup>7</sup>

<sup>1</sup> *Collier v. Jenks* (R. I.), 32 Atl. Rep. 208.

<sup>2</sup> *Harris v. Scovel*, 85 Mich. 32, 48 N. W. Rep. 173. And see *Curtis v. Leasia*, 78 Mich. 480, 44 N. W. Rep. 500.

<sup>3</sup> *Goodrich v. Jones*, 2 Hill, 142.

<sup>4</sup> *Hackett v. Amsden*, 57 Vt. 432; *Ripley v. Paige*, 12 Vt. 353; *Noble v. Sylvester*, 42 Vt. 146; *Conklin v. Parsons*, 1 Chand. (Wis.) 240.

<sup>5</sup> *Bishop v. Bishop*, 11 N. Y. 123, 62 Am. Dec. 68.

<sup>6</sup> *Cook v. Whiting*, 16 Ill. 480. To like effect, see *Thweat v. Stamps*, 67 Ala. 96. But see *McLaughlin v. Johnson*, 46 Ill. 163.

<sup>7</sup> *Curtis v. Leasia*, 78 Mich. 480, 44 N. W. Rep. 500. And see *Atchison, &c. R. Co. v. Morgan*, 42 Kans. 23, 21 Pac. Rep. 809.

1710. Stone quarried and laid up for use elsewhere than upon the land should be regarded as severed from the realty, and as converted into personalty; and therefore, upon a sale of the land while such stone remained upon the land, it would not pass by the deed as incident to the land.<sup>1</sup>

1711. A mortgage of a plantation will not cover the wagons and tools used upon it, or the stock and cattle, unless such property be expressly included in the mortgage.<sup>2</sup> But a sugar-mill on a plantation is a fixture.<sup>3</sup> Rough plank used in a gin-house to spread cotton-seed upon, though not nailed down, are fixtures and pass by a conveyance of the land.<sup>4</sup>

### V. *Machinery in Mills.*

1712. A distinction is properly made between such fixtures in a mill as are indispensable to its use as a mill and the movable machines used in it, which may be dispensed with upon a change in business to which the mill may be readily adapted.<sup>5</sup> Of the former class are such as are used for furnishing the motive power; and if the mill is adapted to one business only, the machinery necessary for that business may be included in the same class.<sup>6</sup> To this class also belongs machinery specially adapted to carry out the purpose for which the mill was erected, and presumably to increase its value, although it may be removed without injury to the building.<sup>7</sup> Of the other class are movable

<sup>1</sup> Noble v. Sylvester, 42 Vt. 93.

<sup>2</sup> Vason v. Ball, 56 Ga. 268.

<sup>3</sup> Hutchins v. Masterson, 46 Tex. 551, 26 Am. Rep. 286.

<sup>4</sup> Bryan v. Lawrence, 5 Jones, 337.

<sup>5</sup> Farrar v. Chauffetete, 5 Denio, 527; McConnell v. Blood, 123 Mass. 47, 25 Am. Rep. 12; Smith Paper Co. v. Servin, 130 Mass. 511; Keeler v. Keeler, 31 N. J. Eq. 181; Ferris v. Quimby, 41 Mich. 202, 2 N. W. Rep. 9; Shelton v. Ficklin, 32 Gratt. 727; Morris's App. 88 Pa. St. 368; Price v. Jenks, 14 Phila. 228; Tillman v. De Lacy, 80 Ala. 103.

<sup>6</sup> Delaware, L. & W. R. Co. v. Oxford Iron Co. 36 N. J. Eq. 452; Teaff v. Hewitt, 1 Ohio St. 511, 59 Am. Dec. 634; Potts v. N. J. Arms Co. 17 N. J. Eq. 395; Bigler v. Nat. Bank, 26 Hun, 520; Case Manufacturing Co. v. Garven, 45 Ohio St.

289, 13 N. E. Rep. 493; Phoenix Mills v. Miller, 17 N. Y. Supp. 158, 42 N. Y. St. Rep. 575; Helm v. Gilroy, 20 Oreg. 517, 26 Pac. Rep. 851; Cooper v. Harvey, 16 N. Y. Supp. 660, 41 N. Y. St. Rep. 594; Phelan v. Boyd (Tex.), 14 S. W. Rep. 290.

<sup>7</sup> Southbridge Sav. Bank v. Mason, 147 Mass. 500, 18 N. E. Rep. 406; Pierce v. George, 108 Mass. 78; Hopewell Mills v. Taunton Sav. Bank, 150 Mass. 519, 23 N. E. Rep. 327, 15 Am. St. Rep. 235. In the latter case Knowlton, J., said: "We are of opinion that this rule is applicable to the case at bar. The building mortgaged was a cotton-mill; and the machinery in controversy was all procured for use in manufacturing cotton cloth. Most of it was heavy; and there is much to indicate that, while there were changes in the kinds of goods manufactured, the



machines used in a mill adapted to various kinds of business, which may be wholly set aside, and still the value and usefulness of the mill property would not be materially impaired. Such machinery, not being indispensable to the enjoyment of the realty, is generally considered not to be a part of it, and not to pass by a deed or mortgage of it.<sup>1</sup>

1713. The courts of different States are not agreed as to the legal status of articles of machinery; for, while the policy of some seems to be to treat them as chattels wherever the intention of the parties will permit, other courts are disposed to regard them as fixtures to the realty. A mortgage was made of certain land, and the mills thereon.<sup>2</sup> In the mills were various articles of machinery for carding, spinning, and preparing cotton yarn

machines were not of a kind intended to be moved from place to place, but to be put in position, and there used with the building until they should be worn out, or until, for some unforeseen cause, the real estate should be changed, and put to a different use. Of most of them, it is said in the agreed statement that they were fastened to the floor for the purpose of steadying them when in use; but it is also said that this is not a statement of the only purpose for which they were fastened. They seem to have been attached to the building, and connected with the motive power, with a view to permanence." Also, *Parsons v. Copeland*, 38 Me. 537; *Holland v. Hodgson*, L. R. 7 C. P. 328; *Longbottom v. Berry*, L. R. 5 Q. B. 123; *McRea v. Cent. Nat. Bank*, 66 N. Y. 489; *Hill v. National Bank*, 97 U. S. 450; *Harlan v. Harlan*, 15 Pa. St. 507; *Delaware, &c. R. R. Co. v. Oxford Iron Co.* 36 N. J. Eq. 452; *Roddy v. Brick*, 42 N. J. Eq. 218, 6 Atl. Rep. 806; *Ottumwa Woollen Mill Co. v. Hawley*, 44 Iowa, 57; *Cooper v. Harvey*, 16 N. Y. Supp. 660; *Lyle v. Palmer*, 42 Mich. 314, 3 N. W. Rep. 921; *Calumet Iron & Steel Co. v. Lathrop*, 36 Ill. App. 249; *Cunningham v. Cureton (Ga.)*, 23 S. E. Rep. 420; *Langdon v. Buchanan*, 62 N. H. 657; *Farmers' Loan & T. Co. v. Minneapolis Engine Works*, 35 Minn. 543, 29 N. W. Rep. 349; *Stillman v. Flenniken*, 58 Iowa, 450, 10 N. W. Rep.

842, 43 Am. Rep. 120; *Morris's App.* 88 Pa. St. 368; *Taylor v. Collins*, 51 Wis. 123, 8 N. W. Rep. 22; *Green v. Phillips*, 26 Gratt. 752; *Patton v. Moore*, 16 W. Va. 428; *McFadden v. Crawford*, 36 W. Va. 671, 15 S. W. Rep. 408.

<sup>1</sup> *Rogers v. Brokaw*, 25 N. J. Eq. 496; *Robertson v. Corsett*, 39 Mich. 777; *Scheifele v. Schmitz*, 42 N. J. Eq. 700, 11 Atl. Rep. 257; *Penn. Mut. Ins. Co. v. Semple*, 38 N. J. Eq. 575; *Wolford v. Baxter*, 33 Minn. 12, 21 N. W. Rep. 744, 53 Am. Rep. 1; *Maguire v. Park*, 140 Mass. 21, 1 N. E. Rep. 750; *Carpenter v. Walker*, 140 Mass. 416, 5 N. E. Rep. 160; *Southbridge Sav. Bank v. Exeter Machine Works*, 127 Mass. 542; *Hubbell v. East Cambridge Savings Bank*, 132 Mass. 447, 43 Am. Rep. 446; *Winslow v. Merchants' Ins. Co.* 4 Met. 306, 38 Am. Dec. 368; *McConnell v. Blood*, 123 Mass. 47, 25 Am. Dec. 12; *Gale v. Ward*, 14 Mass. 352, 7 Am. Dec. 233. In the latter case, Mr. Chief Justice Parker said the articles in controversy "must be considered as personal property, because, although in some sense attached to the freehold, yet they could be easily disconnected, and were capable of being used in any other building erected for similar purposes."

<sup>2</sup> *Vanderpoel v. Van Allen*, 10 Barb. 157. See, also, *Cresson v. Stout*, 17 Johns. 116, 8 Am. Dec. 373; *Potter v. Cromwell*, 40 N. Y. 287, 100 Am. Dec. 485.

and cotton twine. These were subsequently seized upon an execution against the mortgagor, and were claimed as well by the mortgagee. It appeared that the machines might be easily removed without injury to them or to the building, and might be used for the same purpose in any other building.<sup>1</sup> The court held that they were not properly fixtures, and therefore not subject to the mortgage. Under quite similar circumstances a mortgage of a woollen factory was held not to pass the looms used in it for the manufacture of broadcloth, and merely fastened to the floor by screws to keep them in their places.<sup>2</sup> In these cases the annexation to the freehold was not considered to be of such a character as to evince an intent to make the machines permanent accessions to the freehold. It is to be observed, however, that other courts have decided cases quite similar, if not altogether like these cited from the New York reports, directly contrary to the decisions in these;<sup>3</sup> and it is to be further observed that the policy of the decisions in New York, Vermont, and Ohio seems to be to favor treating machinery and like articles fixed to the realty as chattels.<sup>4</sup>

Other courts, for good reasons, hold such machinery to be fixtures, and to be covered by a mortgage of the realty without particular mention. Thus, in a case recently decided in Iowa,<sup>5</sup> the mortgage, after describing the land, upon which was situated a woollen manufactory filled with machinery for making cloth from wool, granted "all and singular the tenements, hereditaments, and appurtenances thereto belonging or in any wise appertaining." Other mortgages were subsequently made which in terms covered the machinery, and upon a foreclosure of the former mortgage a contention arose in regard to the machinery of the mill. The court, after critically reviewing the cases, say: "It being conceded by all the cases that the engine, boiler, and attach-

<sup>1</sup> The highest authorities agree in holding that these facts alone should have little weight in deciding the question. See cases cited in this section, and *Walsley v. Milne*, 7 C. B. N. S. 115, 118.

<sup>2</sup> *Murdock v. Gifford*, 18 N. Y. 28. In the Supreme Court it was held that the mortgage carried the looms, on the ground that they were intended to be a permanent and essential part of the woollen factory. *Murdock v. Harris*, 20 Barb. 407. See

*McRea v. Central Nat. Bank*, 66 N. Y. 489, for a review of the cases in New York. *Blancke v. Rogers*, 26 N. J. Eq. 563; *Rogers v. Brokaw*, 25 N. J. Eq. 496.

<sup>3</sup> *Ottumwa Woollen Mill Co. v. Hawley*, 44 Iowa, 57, 24 Am. Rep. 719.

<sup>4</sup> *Teaff v. Hewitt*, 1 Ohio St. 511, 59 Am. Dec. 634.

<sup>5</sup> *Ottumwa Woollen Mill Co. v. Hawley*, 44 Iowa, 57, 24 Am. Rep. 719.

ments, being the motive power, are fixtures, and that the stones or burrs of a gristmill, with the attachments, are likewise fixtures, it is not easy to understand why any dividing line should be made at the point where the belting attaches to the other machinery. Is there anything in the whole record of this case tending to show that the machinery in question was intended to be any less permanent than the engine, shafting, or belt? The fair presumption is, that the whole machinery, including that now in question, was placed in the building with the intention that it should remain there as part of the machinery until worn out or displaced by other. This assumption is as strong and controlling as to the carding-machines, spinning-jacks, *et cetera*, as it is as to the engine, shafting, and belts." Therefore the court conclude that all of the machinery which was propelled by the engine was part of the real estate, and passed by the foreclosure sale.<sup>1</sup>

1714. There is no certain criterion by which to determine in all cases what belongs to the one class and what to the other. Different courts decide differently in regard to the same articles; and even the decisions of the same court do not always seem to be perfectly consistent. Some courts are inclined to regard all things used in a factory, which are part of the machinery necessary in the process of manufacture, as fixtures and covered by a mortgage of the factory;<sup>2</sup> while other courts are inclined to regard all movable machinery, not indispensable to carrying on the work of the factory, as personalty.<sup>3</sup> The varying circumstances of the cases seem sometimes to have an immediate influence upon the determination of the courts, greater than the statement of them in the reports would seem to warrant. But in doubtful cases, where the mode and extent of the annexation of the chattels to the realty do not determine their character as fixtures, the intention with which they were put upon the estate, whether for permanent use or for a temporary purpose, comes in

<sup>1</sup> To like effect see *Parsons v. Copeland*, 38 Me. 537; *Harlan v. Harlan*, 15 Pa. St. 507, 53 Am. Dec. 612; *Teaff v. Hewitt*, 1 Ohio St. 511, 59 Am. Dec. 634.

<sup>2</sup> *Huston v. Clark*, 162 Pa. St. 435, 29 Atl. Rep. 866, 3 Pa. Dist. Rep. 2; *Johnson v. Wiseman*, 4 Metc. (Ky.) 357, 360.

<sup>3</sup> *Chase v. Tacoma Box Co.* 11 Wash. 377, 39 Pac. Rep. 639; *Cherry v. Arthur*, 5 Wash. 787, 32 Pac. Rep. 744; *Wolford v. Baxter*, 33 Minn. 12, 21 N. W. Rep. 744; *Farmers' Loan & Trust Co. v. Minneapolis Eng. & Mach. Works*, 35 Minn. 543, 29 N. W. Rep. 349; *Keeler v. Keeler*, 31 N. J. Eq. 181; *Rogers v. Brokaw*, 25 N. J. Eq. 496.

with a controlling influence to settle the doubt.<sup>1</sup> This intention is to be gathered, not merely or chiefly from the manner in which the chattels are annexed to the realty, but from the character of the improvement, whether it is essential to the proper use of the realty.<sup>2</sup>

1715. The adaptation of machinery to the use made of it, and to the place in which it is used, often determines its character as a fixture. If such things as an engine and boilers, shafting and gearing, and heavy articles of machinery, such as are used in a foundry or machine-shop, are actually and permanently annexed to the freehold, and are peculiarly adapted to the positions in which they are placed, it does not matter, as regards the question of the legal effect of the annexation, that the owner had no special intent to make these things a part of the freehold.<sup>3</sup> "A man who builds a mill or a house, for his own use and occupation, with everything useful and convenient for the purpose, seldom has any special intent that the creation shall be a part of the freehold, or that its auxiliaries shall constitute a part of the freehold. He builds as he wishes, having no reflection as to the legal character of the structure, thinking nothing, and generally knowing nothing, and therefore having no special intent, on the subject."<sup>4</sup>

Parts of machines which are essential to their use retain their character as fixtures though temporarily detached. Such are the belts for driving the machines.<sup>5</sup>

<sup>1</sup> *Kelly v. Austin*, 46 Ill. 156, 92 Am. Dec. 243, per Walker, J.; *Tolles v. Winton*, 63 Conn. 440, 28 Atl. Rep. 542; *Capen v. Peckham*, 35 Conn. 88, 92; *Stockwell v. Campbell*, 39 Conn. 362, 12 Am. Rep. 393; *Ottumwa Woollen Mill Co. v. Hawley*, 44 Iowa, 57, 24 Am. Rep. 719; *McRea v. Central Nat. Bank*, 66 N. Y. 489; *Morris's App.* 88 Pa. St. 368; *Smith Paper Co. v. Servin*, 130 Mass. 511; *Seedhouse v. Broward*, 34 Fla. 509, 16 So. Rep. 425.

In *Helm v. Gilroy*, 20 Oreg. 517, 522, 26 Pac. Rep. 851, Bean, J., said: "It has often been remarked that the law of fixtures is one of the most uncertain titles in the entire body of jurisprudence. The line between personal property and fixtures is often so close and so nicely drawn that

no precise rule has or can be laid down to control in all cases. Each case must depend largely on its own particular facts."

<sup>2</sup> *Green v. Phillips*, 26 Gratt. 752, 21 Am. Rep. 323; *Shelton v. Ficklin*, 32 Gratt. 727; *Tillman v. De Lacy*, 80 Ala. 103; *Rogers v. Prattville Manuf. Co.* 81 Ala. 483, 60 Am. Rep. 171; *Maguire v. Park*, 140 Mass. 21, 1 N. E. Rep. 750; *Carpenter v. Walker*, 140 Mass. 416, 5 N. E. Rep. 160; *Lavenson v. Standard Soap Co.* 80 Cal. 245, 22 Pac. Rep. 184.

<sup>3</sup> *Beaupre v. Dwyer*, 43 Minn. 485, 45 N. W. Rep. 1094; *Case Manuf. Co. v. Garven*, 45 Ohio St. 289, 13 N. E. Rep. 493.

<sup>4</sup> *Voorhees v. McGinnis*, 48 N. Y. 278, 286, per Hunt, J.

<sup>5</sup> *Sheffield Build. Soc. v. Harrison*, L.

1716. Even before a machine has been permanently attached to the realty it may be in law a fixture, by reason of its purpose and adaptation for permanent use in connection with the realty. Thus, where a company operating a rolling-mill purchased two large pieces of machinery, weighing from fifty to sixty hundredweight, known as "railroad spike machines," for the purpose of attaching them to said mill, and manufacturing railroad spikes with them, and brought the machinery on a car which was standing on a railroad switch belonging to the company, near said mill, on its land, one of which machines was unloaded and the other still on the car, and the foundations in said rolling-mill had been prepared to receive the machines, and while in this condition they were levied on under an attachment against the company and sold as personalty, it was held that, under this state of facts, the machines were a part of the realty of the rolling-mill company, and could not be levied on and sold as personalty.<sup>1</sup> In like manner it is held that, if an engine and boiler have been bought by the owner of a mill, and hauled into the mill-yard upon his grounds, with the *bona fide* intention of attaching them to the mill, although not yet actually attached thereto, and they are necessary for the purposes for which they are to be used, they must be regarded as a part of the realty, and not liable to the levy of an execution as personal property.<sup>2</sup>

1717. A steam-engine and boiler, with the appurtenances belonging to them, permanently affixed, and used for furnishing the motive power of a mill, together with the shafts and pulleys connected with the engine, are fixtures, and pass to a mortgagee of the realty.<sup>3</sup> The machinery of the motive power,

R. 15 Q. B. D. 358; Longbottom v. Berry, L. R. 5 Q. B. 123.

<sup>1</sup> McFadden v. Crawford, 36 W. Va. 671, 15 S. E. Rep. 408.

<sup>2</sup> Patton v. Moore, 16 W. Va. 428.

<sup>3</sup> *In re M'Kibbin*, 4 Ir. Ch. 520; Hubbard v. Bagshaw, 4 Sim. 326; Harris v. Haynes, 34 Vt. 220; Sweetzer v. Jones, 35 Vt. 317, 82 Am. Dec. 639; Dudley v. Hurst, 67 Md. 44, 8 Atl. Rep. 901; Ottumwa Woollen Mill Co. v. Hawley, 44 Iowa, 57, 24 Am. Rep. 719; Roseville Alta Min. Co. v. Iowa Gulch Min. Co. 15 Colo. 29, 24 Pac. Rep. 920; Doughty v. Owen (N. J. Eq.), 19 Atl. Rep. 540;

Quinby v. Manhattan Cloth and Paper Co. 24 N. J. Eq. 260; Keeler v. Keeler, 31 N. J. Eq. 181; Watson v. Watson Manufacturing Co. 30 N. J. Eq. 483; Scheifele v. Schmitz, 42 N. J. Eq. 700, 11 Atl. Rep. 257; Roddy v. Brick, 42 N. J. Eq. 218, 6 Atl. Rep. 806; Coleman v. Stearns Manuf. Co. 38 Mich. 30; Taylor v. Collins, 51 Wis. 123, 8 N. W. Rep. 22; Southbridge Sav. Bank v. Exeter Machine Works, 127 Mass. 542; Tillman v. De Lacy, 80 Ala. 103; De Lacy v. Tillman, 83 Ala. 155, 3 So. Rep. 294; McNally v. Connolly, 70 Cal. 3, 11 Pac. Rep. 320; Lavenson v. Standard Soap Co. 80 Cal. 245, 22 Pac.

whether a steam-engine or a water-wheel, and all the shafting and other means of communicating this power, are as a general rule fixtures.<sup>1</sup> A steam-engine and boilers fixed in a mill by the mortgagor after the execution of the mortgage become subject to it.<sup>2</sup> It is not material that they are the property of another, as, for instance, that they were leased to the mortgagor, if he annexes them to the freehold with the consent of the owner.<sup>3</sup> But if the land and the engine are held by different titles, the latter does not necessarily become part of the realty when set up and used by one who does not own the land.<sup>4</sup> Even if they were subject at the time to a chattel mortgage, this would not hold against the mortgage of the realty after they are attached to it.<sup>5</sup> Nor does it make any difference that, although erected in a permanent manner, they can be removed without injury to the building in which they are placed or with which they are connected.<sup>6</sup> A mortgage of a factory by a lessee passes to the mortgagee a steam-engine used in it, although the lessor could not claim it.<sup>7</sup>

Rep. 184, 13 Am. St. Rep. 147; Tolles v. Winton, 63 Conn. 440. See, however, Padgett v. Cleveland, 33 S. C. 339, 11 S. E. Rep. 1069; Calumet Iron & Steel Co. v. Lathrop, 36 Ill. App. 249; Walker v. Grand Rapids Flouring Mill Co. 70 Wis. 92, 35 N. W. Rep. 332; Horne v. Smith, 105 N. C. 322, 11 S. E. Rep. 373; Moore v. Vallentine, 77 N. C. 188, per Pearson, C. J.

<sup>1</sup> Hill v. Wentworth, 28 Vt. 428; Keve v. Paxton, 26 N. J. Eq. 107; Keeler v. Keeler, 31 N. J. Eq. 181; Powell v. Monson & Brimfield Manuf. Co. 3 Mason, 459; McConnell v. Blood, 123 Mass. 47, 25 Am. Rep. 121.

In Rhode Island, by statute, the water-wheels, steam-engines, boilers, main belts which first give motion to the shafting, all shafting, whether upright or horizontal, and hangers for the same, except such as are used to drive a special machine, all drums, pulleys, wheels, gearing, steam-pipes, gas-pipes and gas fixtures, water-pipes and fixtures, kettles and vats set and used in any mechanical or manufacturing establishment, are declared to be real estate, whenever the same belong to the owner of the real estate to which they are

attached. All other machinery, tools, and apparatus of every description, used and employed in any manufacturing establishment, are declared to be personal estate, and as such shall be considered, in assignments of dower, in attachments, and in all cases whatsoever, except in the assessment and payment of taxes. P. S. 1882, ch. 171, §§ 1, 2.

<sup>2</sup> Winslow v. Merchants' Ins. Co. 4 Met. 306, 38 Am. Dec. 368; M'Kim v. Mason, 3 Md. Ch. Dec. 186; Rice v. Adams, 4 Harr. 332; Randolph v. Gwynne, 7 N. J. Eq. 88, 51 Am. Dec. 265; Cope v. Romeyne, 4 McLean, 384; Dudley v. Hurst, 67 Md. 44, 8 Atl. Rep. 901.

<sup>3</sup> Fryatt v. Sullivan Co. 5 Hill, 116. And see Roberts v. Dauphin Deposit Bank, 19 Pa. St. 71.

<sup>4</sup> Robertson v. Corsett, 39 Mich. 777.

<sup>5</sup> Frankland v. Moulton, 5 Wis. 1; Voorhees v. McGinnis, 48 N. Y. 278. See, however, Padgett v. Cleveland, 33 S. C. 339, 11 S. E. Rep. 1069.

<sup>6</sup> Sparks v. State Bank, 7 Blackf. 469; Voorhees v. McGinnis, 48 N. Y. 278.

<sup>7</sup> Day v. Perkins, 2 Sandf. Ch. 359.

A steam-engine placed in a building to furnish motive power for tenants remains a fixture though it is temporarily disconnected from the boiler, and passes by a conveyance of the realty made while the engine was so disconnected.<sup>1</sup>

1718. A deed or mortgage of a mill passes the stones, tacklings, and implements necessary for working it.<sup>2</sup> A factory bell hung in a tower built to receive it is a part of the realty.<sup>3</sup> A deed or mortgage of a sugar-house carries with it an engine and machinery attached to it.<sup>4</sup> Machinery set in bricks and run by steam power, for the purpose of manufacturing cotton-seed oil, constitutes a part of the realty, and part of the security under a mortgage of the realty.<sup>5</sup> A cotton-gin and press are fixtures and a part of the freehold, and are carried by a mortgage of it, whether erected before or after the mortgage.<sup>6</sup> Hop-poles upon a farm are covered by a mortgage of the land.<sup>7</sup> Platform scales fastened to sills laid upon a brick wall set in the ground, intended for permanent use, are fixtures.<sup>8</sup>

So, also, machinery used in quarrying slate and preparing it for market;<sup>9</sup> machinery and appliances of a grain elevator;<sup>10</sup> machinery used in the manufacture of soap and candles;<sup>11</sup> a stone-mill for crushing stone;<sup>12</sup> and machinery of a shoe factory, intended to form a part of the plant.<sup>13</sup>

Of course, whenever it appears from the instrument itself that the parties did not intend that the machinery in the mill should be covered by the mortgage, it will not constitute a part of the mortgagee's security.<sup>14</sup>

<sup>1</sup> Tolles v. Winton, 63 Conn. 440, 28 Atl. Rep. 542.

<sup>2</sup> Place v. Fagg, 4 Man. & R. 277.

<sup>3</sup> Alvord Carriage Manuf. Co. v. Gleason, 36 Conn. 86.

<sup>4</sup> Citizens' Bank v. Knapp, 22 La. Ann. 117.

<sup>5</sup> Theurer v. Nautre, 23 La. Ann. 749.

<sup>6</sup> Bond v. Coke, 71 N. C. 97; Latham v. Blakely, 70 N. C. 368; Fairis v. Walker, 1 Bailey, 540; Jones v. Bull, 85 Tex. 136, 19 S. W. Rep. 1031.

<sup>7</sup> The lien of the mortgagee upon them is superior to the title acquired by one who, with knowledge of such mortgage, takes a chattel mortgage upon the poles, immediately after their removal from the

farm, to secure an antecedent debt. Sullivan v. Toole, 26 Hun, 203.

<sup>8</sup> Arnold v. Crowder, 81 Ill. 56, 25 Am. Rep. 260; Bliss v. Whitney 9 Allen, 114, 85 Am. Dec. 745.

<sup>9</sup> Williams's App. 24 W. N. C. 365, 16 Atl. Rep. 810; *Ex parte* Moore's Banking Co. L. R. 14 Ch. D. 379.

<sup>10</sup> McGorrick v. Dwyer, 78 Iowa, 279, 43 N. W. Rep. 215, 5 L. R. A. 594.

<sup>11</sup> Lavenson v. Standard Soap Co. 80 Cal. 245, 22 Pac. Rep. 184.

<sup>12</sup> Davis v. Mugan, 56 Mo. App. 311.

<sup>13</sup> Fifield v. Farmers' Nat. Bank, 148 Ill. 163, 35 N. E. Rep. 802, 39 Am. St. Rep. 166.

<sup>14</sup> Waterfall v. Penistone, 6 El. & Bl.

1719. Machines physically attached to the freehold do not necessarily become a part of the realty. It is the settled rule in America that machines which are merely attached to the freehold for the purpose of steadying them for their convenient use do not necessarily, as matter of law, become fixtures.<sup>1</sup> Of course machines may be so attached to the realty in such a permanent way as to indicate very strongly, if not conclusively, that they were attached as permanent adjuncts to the building or the soil; but generally the character and purpose of the machines themselves have quite as much to do with the question whether they are fixtures as has the mode of annexation.

Thus, a boiler and engine which are portable and not attached to the realty, except that they are belted to the main shaft, though they cannot be removed except by moving a shed built over them to protect them from the weather, or by enlarging the opening to the building, do not necessarily, as a matter of law, pass under a deed or mortgage of the building and the land.<sup>2</sup>

And thus, also, machines separately constructed, adapted for use in any building in which they can be put, secured in position by bolts, screws, nails, or cleats, and capable of being removed without injury to themselves or to the building in which they are placed, do not necessarily, as matter of law, pass under a mortgage of the building and the land on which it stands.<sup>3</sup>

An engine and boiler mortgaged to the maker were set up on a foundation, and an engine-house was built over them. The land was already subject to a mortgage. It was held that the mortgagee of the land acquired no title to the engine and boiler as against the mortgagee of these chattels, although it appeared that they could not be removed without some injury to the walls built up about them; for within the limitation before mentioned the chattels could be removed without taking away or destroying that which was essential to the support of the main building, or

876. And see *Begbie v. Fenwick*, L. R. 8 Ch. App. 1075, 19 W. R. 402; *Brown on Fix.* 3d ed. pp. 148, 149.

<sup>1</sup> *Carpenter v. Walker*, 140 Mass. 416, 420, 5 N. E. Rep. 160, per Holmes, J.; *Carpenter v. Allen*, 150 Mass. 281, 22 N. E. Rep. 900; *McConnell v. Blood*, 123 Mass. 47, 25 Am. Rep. 12; *Hubbell v. East Cambridge Savings Bank*, 132 Mass.

447, 43 Am. Rep. 446; *Maguire v. Park*, 140 Mass. 21, 1 N. E. Rep. 750; *Case Manuf. Co. v. Garven*, 45 Ohio St. 289, 13 N. E. Rep. 493.

<sup>2</sup> *Carpenter v. Walker*, 140 Mass. 416, 5 N. E. Rep. 160; *Carpenter v. Allen*, 150 Mass. 281, 22 N. E. Rep. 900.

<sup>3</sup> *Maguire v. Park*, 140 Mass. 21, 1 N. E. Rep. 750.



other part of the real estate to which they were attached, and without destroying or of necessity injuring the chattels themselves.<sup>1</sup>

**1720. Movable articles or appliances are not fixtures, as a general rule.** A movable sugar-wagon, constructed of sheet and cast iron, with three adjustable low wheels, used in a sugar-mill for the purpose of holding syrup and conveying it from place to place by being pushed by hand, not actually or constructively annexed to the realty, or to anything appurtenant thereto, but being placed in the mill for use only, and not to enhance the value of the realty, is personal property, and not a fixture.<sup>2</sup>

A stone derrick capable of removal from point to point is not a fixture though fastened by means of a post set in the ground and guy ropes.<sup>3</sup>

A deed or mortgage of a tract of land does not include as a fixture a portable steam sawmill, boiler, and engine which are not attached to the soil, but may be moved from place to place.<sup>4</sup>

But, on the other hand, boxes made to be used with machinery in hoisting coal from mines are a part of the realty, because they are an indispensable part of the machinery for mining and shipping coal, and are connected with machinery which was attached

<sup>1</sup> *Tift v. Horton*, 53 N. Y. 377, 13 Am. Rep. 537. For similar cases and a similar decision, see *Sisson v. Hibbard*, 10 Hun, 430, 75 N. Y. 542; *Tibbetts v. Moore*, 23 Cal. 208; *First Nat. Bank v. Elmore*, 52 Iowa, 541, 3 N. W. Rep. 547; *Eaves v. Estes*, 10 Kans. 314, 15 Am. Rep. 345; *Henry v. Von Brandenstein*, 12 Daly, 480; *Long v. Cockern*, 128 Ill. 29, 21 N. E. Rep. 201, 29 Ill. App. 304. See, however, *Frankland v. Moulton*, 5 Wis. 1; *Voorhees v. McGinnis*, 48 N. Y. 278, where the things annexed were regarded as permanent improvements of the land, and as having been intended as such by the owner who annexed them.

<sup>2</sup> *Winslow v. Bromich*, 54 Kans. 300, 38 Pac. Rep. 276. *Horton, C. J.*, speaking of the sugar-wagons, said: "They are not like the wheels or stones to a mill, or the keys to a house, or the blinds and

shutters to windows. Being adapted to convey syrup from place to place in the mill, they must be considered in the same class as buckets, kettles, barrels, and similar vessels used for like purposes." Citing *Walker v. Sherman*, 20 Wend. 636; *Haeussler v. Glass Co.* 52 Mo. 452; *Graves v. Pierce*, 53 Mo. 423; *Ex parte Astbury*, L. R. 4 Ch. App. 630; *Ewell, Fixt.* (1876) 22, 23; §§ 1712-1715.

<sup>3</sup> *Honeyman v. Thomas*, 25 Oreg. 539, 36 Pac. Rep. 636.

<sup>4</sup> *Taylor v. Watkins*, 62 Ind. 511. And see *Carpenter v. Walker*, 140 Mass. 416; *Long v. Cockern*, 29 Ill. App. 304, affirmed 128 Ill. 29, 21 N. E. Rep. 201; *Lansing Iron & Engine Works v. Walker*, 91 Mich. 409, 51 N. W. Rep. 1061; *Choate v. Kimball*, 56 Ark. 55, 19 S. W. Rep. 108.

to the realty. "Such boxes," said the court, "are a part of one system of machinery, each part being indispensable to the working of the other, and without which the other parts would be utterly valueless for the purposes intended."<sup>1</sup> In like manner, cars and other appliances absolutely necessary for the mining and shipping of coal are a part of the realty, and pass by a mortgage of this as against execution creditors of the mortgagor.<sup>2</sup> In like manner, it is held that small portable cars used in connection with a drier in a brick-yard, and used upon tracks built for the purpose, are fixtures to the realty and subject to a mechanic's lien.<sup>3</sup>

**1721. Various articles of machinery.**—A shingle-machine put into a mill by a mortgagor becomes a part of the mortgage security.<sup>4</sup> Mill-saws attached to a sawmill and used in it become a part of the realty, and subject to a mortgage of the mill previously made.<sup>5</sup> Heavy machinery for making paper, fastened to a building or to its foundations, is regarded as a fixture.<sup>6</sup> So machinery in a fruit-canning factory;<sup>7</sup> machinery for manufacturing soap;<sup>8</sup> machinery and appliances of a slaughter-house;<sup>9</sup> machinery in a brewery;<sup>10</sup> and tubs, vats, and casks, which are placed in a brewery with a design of permanent use therein, and which are too large to pass out through any existing opening, are part of

<sup>1</sup> *Dobschuetz v. Holliday*, 82 Ill. 371.

<sup>2</sup> *Baker v. Atherton*, 15 Pa. Co. Ct. 471, 7 Kulp, 418.

<sup>3</sup> *Curran v. Smith*, 37 Ill. App. 69.

<sup>4</sup> *Corliss v. McLagin*, 29 Me. 115. In *Trull v. Fuller*, 28 Me. 545, the owner of a sawmill made a mortgage of a clap-board-machine and shingle-machine set up in the sawmill and used there, which was recorded as a personal mortgage. Subsequently a creditor of the mortgagor levied an execution upon the land and mill, and it was held that these machines passed to a purchaser of the real estate under the execution as parcel of the realty. But in *Wells v. Maples*, 15 Hun, 90, a shingle-machine not fastened to the building, except so far as necessary to keep it in place, was held not to be covered by a mortgage of the realty. A similar decision was made in *Choate v. Kimball*, 56 Ark. 55, 19 S. W. Rep. 108.

<sup>5</sup> *Burnside v. Twitchell*, 43 N. H. 390;

*Johnston v. Morrow*, 60 Mo. 339; *Robertson v. Corsett*, 39 Mich. 777; *Coleman v. Stearns Manufacturing Co.* 38 Mich. 30.

<sup>6</sup> *Quinby v. Manhattan Cloth and Paper Co.* 24 N. J. Eq. 260; *Fish v. N. Y. Waterproof Paper Co.* 29 N. J. Eq. 16; *Hill v. Farmers' & Mechanics' Nat. Bank*, 97 U. S. 450, 8 Cent. L. J. 175.

<sup>7</sup> *Dudley v. Hurst*, 67 Md. 44, 8 Atl. Rep. 901.

<sup>8</sup> *Lavenson v. Standard Soap Co.* 80 Cal. 245, 22 Pac. Rep. 184.

<sup>9</sup> *Kloess v. Katt*, 40 Ill. App. 99.

<sup>10</sup> *Neilson v. Williams*, 42 N. J. Eq. 291, 11 Atl. Rep. 257; *Scheifele v. Schmitz*, 42 N. J. Eq. 700, 11 Atl. Rep. 257. See, however, *Wolford v. Baxter*, 33 Minn. 12, 21 N. W. Rep. 744, 53 Am. Rep. 1; *Wade v. Donau Brewing Co.* 10 Wash. 284, 38 Pac. Rep. 1009.

the realty, and are fixtures;<sup>1</sup> machinery in a nail factory;<sup>2</sup> machinery in a foundry;<sup>3</sup> machinery of a sash and door and planing-mill;<sup>4</sup> machinery of an ice-factory;<sup>5</sup> a machine for turning kegs, a machine for jointing staves, and a machine for cutting staves, were held to pass by a mortgage of a keg factory in which they were used, and to which they were attached.<sup>6</sup>

But, on the other hand, a planing and matching machine, a planer in a sawmill, and a machine for making mouldings, used in a sash and blind factory, were held not to pass by a mortgage of the realty.<sup>7</sup> And so machines used in a shoe-shop, although attached to the building by nails or bolts, are not covered by a mortgage of the realty.<sup>8</sup> To constitute such machines fixtures, they must be actually annexed to the freehold in such a way as to evince an intention of making them a permanent accession to the freehold.<sup>9</sup>

Where, in the case of machinery, the principal part is a fixture by actual annexation to the soil, parts not physically annexed, but which if removed would leave the principal thing unfit for use, and would not of themselves, and standing alone, be well adapted for general use elsewhere, are considered constructively annexed.<sup>10</sup>

<sup>1</sup> *Equitable Trust Co. v. Christ*, 47 Fed. Rep. 756. And see *Bryan v. Lawrence*, 5 Jones, 337. Casks in a brewery which are nine feet high and seven feet in diameter, so large as not to be removable from the building without making a hole in the floor, and used in the process of manufacturing beer, are fixtures. *Meyer v. Orynski* (Tex. Civ. App.), 25 S. W. Rep. 655. But, contrary to the above, it was held in *Woolford v. Baxter*, 33 Minn. 12, that coops, hogsheads, and fermenting tubs of a brewery are personal property.

<sup>2</sup> *Delaware, L. & W. R. Co. v. Oxford Iron Co.* 36 N. J. Eq. 452.

<sup>3</sup> *Kisterbock v. Lanning* (Pa.), 7 Atl. Rep. 596; *Beaupre v. Dwyer*, 43 Minn. 485, 45 N. W. Rep. 1094.

<sup>4</sup> *Helm v. Gilroy*, 20 Oreg. 517, 26 Pac. Rep. 851.

<sup>5</sup> *Simpson v. Masterson* (Tex.), 31 S. W. Rep. 419.

<sup>6</sup> *Lafin v. Griffiths*, 35 Barb. 58. And see *Snedeker v. Warring*, 12 N. Y. 170,

174; *Walker v. Sherman*, 20 Wend. 636, 639.

<sup>7</sup> *Rogers v. Brokaw*, 25 N. J. Eq. 496; *Cherry v. Arthur*, 5 Wash. St. 787, 32 Pac. Rep. 744. And see *Wells v. Maples*, 15 Hun, 90.

<sup>8</sup> *McConnell v. Blood*, 123 Mass. 47, 25 Am. Rep. 12; *Padgett v. Cleveland*, 33 S. C. 339, 11 S. E. Rep. 1069. See, however, *Helm v. Gilroy*, 20 Oreg. 517, 26 Pac. Rep. 851.

<sup>9</sup> *Blancke v. Rogers*, 26 N. J. Eq. 563; *Roddy v. Brick*, 42 N. J. Eq. 218, 6 Atl. Rep. 806.

<sup>10</sup> *Dudley v. Hurst*, 67 Md. 44, 8 Atl. Rep. 901. "Thus the key of a lock, the sail of a windmill, the leather belting of a sawmill, although actually severed from the principal thing and stored elsewhere, pass by constructive annexation. They must be such as to go to complete the machinery which is affixed to the land, and which, if removed, would leave the principal thing incomplete and unfit for use."

But machinery of a shoe manufactory attached to the floors by nails and screws, and belted to the shafting, if intended to form a part of the manufacturing plant, is a fixture to the realty, and passes by a deed or mortgage of the land upon which the building is erected.<sup>1</sup>

1722. Mining machinery, placed in a building erected on land by persons working the mine under a miner's license, is not a fixture so that a mechanic's lien can attach to it. The relation of the owner of the mining machinery to the owner of the real estate fixes its status. It comes clearly within the principle of a trade or manufacturing fixture, and the owner of the land acquires no title thereto. It was plainly not affixed to the land for the better enjoyment of the land itself, but it was put there for the exclusive purpose of carrying on the mining operations.<sup>2</sup>

1723. The poles, wires, and lamps of an electric light company engaged in lighting a city are an integral part of the company's land and machinery for producing the light, and they pass as fixtures under a mortgage of the lot, with all machinery and appurtenances.<sup>3</sup>

Dynamos, excitors, and machinery erected by an electric light company as a part of its electric plant, for permanent use upon land subject to a mortgage, become a part of the realty and subject to the mortgage as against judgment creditors of the mortgagor, though such appliances and machinery can be removed without injury to the building in which they were placed.<sup>4</sup> But machinery placed in a building for the purpose of supplying it with electric light, without any intention to annex it to the

Per Stone, J. In this case the entire machinery of a fruit-canning factory was held to pass under a mortgage, though some articles, such as crates, capping-machines, and work-tables, were not actually annexed to the soil; but, being essentially necessary to the working of the principal machinery, they were regarded as constructively annexed.

<sup>1</sup> *Fifield v. Farmers' Nat. Bank*, 148 Ill. 163, 35 N. E. Rep. 802, affirming 47 Ill. App. 118.

<sup>2</sup> *Springfield Foundry Co. v. Cole (Mo.)*, 31 S. W. Rep. 922; *Richardson v. Koch*, 81 Mo. 264; *Conrad v. Saginaw Mining*

*Co.* 54 Mich. 249, 20 N. W. Rep. 39. And see *Cooper v. Johnson*, 143 Mass. 108, 9 N. E. Rep. 33.

<sup>3</sup> *Regina v. North Staffordshire Ry. Co.* 3 El. & El. 392; *Fecht v. Drake (Ariz.)*, 12 Pac. Rep. 694; *Keating Implement & Mach. Co. v. Marshall Electric Light & P. Co.* 74 Tex. 605, 12 S. W. Rep. 489.

<sup>4</sup> *New York Security Co. v. Saratoga Gas, &c. Co.* 34 N. Y. Supp. 890. Otherwise if erected on leased land. *Havens v. West Side Elec. Light Co.* 44 N. Y. St. Rep. 589, 17 N. Y. Supp. 580.

realty, does not pass to a purchaser of the realty at foreclosure sale.<sup>1</sup>

Where electric wires and fixtures were put into a building by an electric light company under a contract entitling the company to enter the building for the removal of lamps or wires, and it appeared that some of the wires were put in by removing the plaster where they were to run, and fastening them to the wall with staples, after which the place was replastered and papered, it was held that the ownership of the wires so placed was a question of the intention of the parties, and was for the jury.<sup>2</sup>

**1724. Telegraph wires of one company placed upon the poles of another company,** under an agreement between the companies for the use of the poles of one company by the other, do not become fixtures and part of the realty so that they are covered by a mortgage of the company owning the poles.<sup>3</sup>

**1725. Looms in a mill.** — In the English courts there have been several cases involving the determination of the question whether looms in a mill pass by mortgage of it in which they are not particularly named.<sup>4</sup> A mortgage was made of a mill "with the warehouse, counting-house, engine-house, boiler-house, weaving-shed, wash-house, gas-works, and reservoirs belonging, adjoining, or near thereto, and also the steam-engine, shafting, going-gear, machinery, and all other fixtures whatever," affixed to the land and premises. The assignees in bankruptcy of the mortgagor took possession of and sold, among other things, a large number of looms that were in the mill. Each loom rested upon four feet, and was attached to the floor by means of a wooden plug driven through each foot. The mortgagee claimed the looms as part of his security, and the Court of Common Pleas gave judgment in his favor, and this was affirmed by the Court of Exchequer Chamber.<sup>5</sup>

<sup>1</sup> *Vail v. Weaver*, 132 Pa. St. 363, 19 Atl. Rep. 138.

<sup>2</sup> *Harrisburg Electric Light Co. v. Goodman*, 129 Pa. St. 206, 19 Atl. Rep. 844, 846. The jury found that the electric light company were entitled to remove the wires. A motion for a new trial was denied, and judgment on the verdict was affirmed by the Supreme Court.

<sup>3</sup> *Farnsworth v. Western Union Tel. Co.* 6 N. Y. Supp. 735, 53 Hun, 636.

<sup>4</sup> *Holland v. Hodgson*, L. R. 7 C. P. 328, 41 L. J. C. P. N. S. 146, 20 W. R. 990.

<sup>5</sup> In the latter court Mr. Justice Blackburn said: "Since the decision of this court in *Climie v. Wood*, L. R. 3 Exch. 257, and on appeal, L. R. 4 Exch. 328, it must be considered as settled law (except

The American cases are to like effect; and it is not essential that the machinery is attached to the building otherwise than by its own weight.<sup>1</sup>

**1726. Cotton looms.** — Under a mortgage of a mill for the manufacture of cotton cloth, with the appurtenances, “together with the steam-engines, boilers, shafting, piping, mill-gearing, gasometers, gas-pipes, drums, wheels, and all and singular other the machines, fixtures, and effects fixed up in or attached or belonging to the said mill or factory, buildings, or premises,” the question arose, upon a subsequent sale of the estate under a

perhaps in the House of Lords), that what are commonly known as trade or tenant’s fixtures form part of the land, and pass by a conveyance of it; and that though, if the person who erected those fixtures was a tenant with a limited interest in the land, he has a right as against the freeholder to sever the fixtures from the land, yet, if he be a mortgagor in fee, has no right as against his mortgagee. . . . It was admitted, and we think properly admitted, that where there is a conveyance of the land the fixtures are transferred, not as fixtures, but as a part of the land, and the deed of transfer does not require registration as a bill of sale.”

The learned judge further says that it has been contended, and justly, that *Hel-lawell v. Eastwood*, 6 Exch. 295, is very like the present case, with this exception: that there the tenant had a limited interest only, whereas here he has the fee; and if that case should apply to this case, it would follow (but for that exception, perhaps) that the looms which were in question remained chattels. But that case was decided in 1851. In 1853 the Court of Queen’s Bench had, in *Wiltshere v. Cottrell*, 1 E. & B. 674, to consider what articles passed by the conveyance in fee of a farm; and there the court decided that a certain threshing-machine inside a barn, fixed by screws and bolts to four posts which were let into the earth, passed by the conveyance. It seems difficult to point out how the threshing-machine in that case was more for the improvement of the inheritance of the farm than the

looms in the present case were for the improvement of the manufactory. Then there was the case of *Mather v. Fraser*, 2 Kay & J. 536, in 1856, and that of *Walmsley v. Milne*, 7 C. B. N. S. 115, in 1859, in which similar decisions to that in *Wiltshere v. Cottrell* were given. These cases “seem authorities for this principle, — that when an article is affixed by the owner of the fee, though only affixed by bolts and screws, it is to be considered as part of the land, at all events where the object of setting up the article is to enhance the value of the premises to which it is annexed, for the purposes to which those premises are applied. The threshing-machine in *Wiltshere v. Cottrell* was affixed by the owner of the fee to the barn as an adjunct to the barn, and to improve its usefulness as a barn, in much the same way as the hay-cutter in *Walmsley v. Milne* was affixed to the stable as an adjunct to it, and to improve its usefulness as a stable. And it seems difficult to say that the machinery in *Mather v. Fraser* was not as much affixed to the mill as an adjunct to it, and to improve the usefulness of the mill as such, as either the threshing-machine or the hay-cutter.” In conclusion, he says, it is of great importance that the law as to what is the security of a mortgage should be settled, and that these decisions should not be reversed unless clearly wrong.

<sup>1</sup> *Cavis v. Beckford*, 62 N. H. 229; *Lyle v. Palmer*, 42 Mich. 314, 3 N. W. Rep. 921.

power of sale contained in the mortgage, whether a large number of looms for weaving cotton yarn into cloth, and which were set into the floors without any fastening, passed by the mortgage and by the subsequent sale. Lord Romilly, giving the decision of the Court of Chancery,<sup>1</sup> said: "My opinion is, that those words mean that the mill and everything that properly belongs to the mill is the thing that is mortgaged. I do not think that the furniture of the mill does properly belong to the mill; it is liable to be changed from time to time. . . . I do not doubt that looms are machinery in one sense; but the question is, are they, properly speaking, machinery belonging to the mill? In one sense, no doubt, they belong to the mill, because they are put into the mill; but I read those words as 'belonging essentially to the mill,' and forming necessarily a part of it, whatever may be the purpose to which the mill may be applied. To whatever purpose the mill may be applied, the steam-power, the gas-lighting, and the like, do form a part of it; but the others do not, being merely accidental, and no more form a part of the mill than a carpet forms part of a house. If a house and all the things belonging to the house were assigned, that would not necessarily include the furniture unless it was so specified. . . . I am clear the looms are not fixtures in any proper sense of the term."<sup>2</sup>

In like manner, in a recent case in New Jersey, it was held that spinning-frames, twisting-frames, and like machinery, though fastened to the floor by nails or screws, or held in position by cleats, are personal property, and pass under a chattel mortgage as against a mortgage of the realty subsequently given; but that the steam-engine, boilers, shafting, belting, couplings and pulleys used to communicate the power, the water-wheels and water-wheel governors, the gas-generator and gas-pump connected with it, the gas pipes and burners, and the steam-heating pipes, whether laid on hooks along the walls or resting on the floor, are parts of the mill, and pass by the mortgage of the realty as against a prior chattel mortgage.<sup>3</sup>

Hardly in accord with these cases is a recent decision in Mas-

<sup>1</sup> *Hutchinson v. Kay*, 23 Beav. 413. See, also, *McKim v. Mason*, 3 Md. Ch. Dec. 186, relating to machinery for the manufacture of cotton goods. See §§ 1712-1715.

<sup>2</sup> The soundness of this decision may well be questioned. Not in accord with §§ 1712-1715, 1725.

<sup>3</sup> *Keeler v. Keeler*, 31 N.J. Eq. 181. The comment in the preceding note applies.

sachusetts. The mortgage of a cotton-mill covered also "all machinery, tools, and fixtures therewith appertaining." The mill was built for, and had always been used for, the manufacture of cotton cloth. The question arose whether the mortgage covered certain looms subsequently put into the mill. These looms were not specially built for use in this particular mill, and could equally well be used for the same purpose in any other cotton-mill with the ordinary room to hold them and power to operate them. The looms were each about seven feet long, three feet wide, two and one half feet high, and of six hundred pounds weight, screwed down to the flooring of the weaving-room in order to steady them when in use, and connected by pulleys, belts, and shafting with the power operating the factory. They did not replace machines like them, and were used for the manufacture of a kind of cloth different from that made in the mill when it was mortgaged. It was held that the machinery became a part of the realty and was subject to the mortgage.<sup>1</sup>

**1727. Machinery of a silk-mill.** — A silk manufacturer mortgaged certain land, "also all that silk-mill there erected or in the course of erection, and all other buildings then or thereafter to be erected thereon; and also all those the steam-engine or steam-engines, boilers, steam-pipes, main shafting, mill-gearing, mill-wright's work, and all other machinery and fixtures whatsoever there erected or set up, or to be thereafter, etc., upon the said plat of land, mill, and premises, with the appurtenances."<sup>2</sup> A second mortgage was made more comprehensive in terms; and, the first mortgagee having sold the property under an order of court, the question arose upon a claim by the second mortgagee whether the spinning-mills and other machinery passed under the first mortgage. The Master of the Rolls held that only such machinery passed by the mortgage under the words "other machinery" as was of the same nature with the articles specified in the enumeration previously made, and that therefore only the machinery used for the purpose of giving power to the mill was included in the mortgage. On appeal, however, it was decided that all the machinery placed in the mill, whether for creating

<sup>1</sup> *Hopewell Mills v. Taunton Sav. Bank*, 150 Mass. 519, 23 N. E. Rep. 327, 15 Am. St. Rep. 235. The opinion by Mr. Justice Knowlton deserves careful study.

<sup>2</sup> *Haley v. Hammersley*, 3 De Gex, F. & J. 587, 9 W. R. 562.



power or for being moved, was included in the mortgage. "It seems rather improbable," said Lord Chancellor Campbell, "that the parties should have contemplated such a damaging disruption of the machinery as must take place if the mortgagees, in seeking to make good their security, must tear in pieces the machinery in the mill, removing and selling one half of it, which would be comparatively of little value without the other half." He concurs with the Vice-Chancellor Page Wood in his general view of the law upon this subject in *Mather v. Fraser*,<sup>1</sup> and is of opinion that, according to the true construction of the mortgage deed, all the disputed articles are included in the mortgage to the defendants.

**1728.** A mortgage of an iron rolling-mill was held to pass the entire set of rolls used in the mill, whether in place and fixed for use or temporarily detached.<sup>2</sup> The rolls, being adapted to the manufacture of bars of different shapes and sizes, cannot all be used at once; but they are equally a part of the mill when unfixed to give place to others. "Duplicates necessary and proper for an emergency," said Chief Justice Gibson, "consequently follow the realty, on the principle by which duplicate keys of a banking-house or the toll-dishes of a mill follow it." A similar decision was made in a recent case in England.<sup>3</sup>

<sup>1</sup> K. & J. 536.

<sup>2</sup> *Voorhis v. Freeman*, 2 Watts & S. 116, 37 Am. Dec. 490.

<sup>3</sup> *Ex parte Astbury*, L. R. 4 Ch. App. 630. Mr. Justice Giffard, giving the opinion, said: "There appear to be connected with rolling-machines parts which, beyond all doubt, are not fixed, in the strict sense of the term; but it is in evidence that if a machine is ordered it is sent with one set of rolls, and it is quite manifest that without rolls the machine could not do any part of the work for which it is made. One set of rolls clearly passes. But we have here duplicate rolls, and with reference to them — I am not now speaking of rolls which can be considered as in any sense unfinished, but of duplicate rolls which have been actually fitted to the machine — I cannot see why, if one set of rolls passes, the duplicate rolls should not pass also. It comes, in fact, to this, that

the machine with one set of rolls is a perfect machine, but the machine with a duplicate set is a more perfect machine. . . . The fact is that, whether there is one set of rolls or a duplicate set, they are each part and parcel of the machine, and come within the term 'belonging to the machine as part of it.' Dictum of Lord Cottenham in *Fisher v. Dixon*, 12 Cl. & F. 312. Then comes the case as to the different sizes of rolls. But if the duplicates of the same size pass, it follows that the rolls of different sizes pass, if they render the machine still more perfect than if the rolls were all of the same size. . . . But I cannot hold that the rolls which have never been fitted to the machine, and have never been used in the machine, and which require something more to be done to them before they are fitted to the machine, belong to the machine, or that they are essential parts of it."

In the same case it was held that the straightening plates embedded in the floor were also fixtures, but that the weighing machines were not.

## VI. *Rolling-Stock of Railroads.*

1729. Whether the rolling-stock and fixtures of a railroad are personal property, or are in some sense fixtures, and therefore pass by a mortgage of the realty, is a question that has been much discussed, and the decisions are conflicting. On the one hand it is said that railway cars are a necessary part of the entire establishment; that their wheels are fitted to the rails; that they are peculiarly adapted to the use of the railway, and cannot be used for any other purpose; and that they are necessary incidents of the real estate in a mortgage of it. In an early case before the Supreme Court of New York, it was decided that rolling-stock was to be deemed fixtures.<sup>1</sup> But the Court of Appeals several years afterwards established the doctrine in this State to be that rolling-stock is personal in its character, and that a mortgage of it must be recorded as a chattel mortgage.<sup>2</sup> And finally, in 1868, it was provided by statute that a mortgage executed by a railroad company shall be effectual as to personal property covered by it if recorded as a mortgage of real estate, without filing it as a chattel mortgage.<sup>3</sup>

<sup>1</sup> *Farmers' Loan & Trust Co. v. Hendrickson*, 25 Barb. 484. Mr. Justice Strong, delivering the opinion of the court, said: "The property of a railway company consists mainly of the roadbed, the rails upon it, the depot erections, and the rolling-stock, and the franchises to hold and use them. The roadbed, the rails fastened to it, and the buildings at the depots, are clearly real property. That the locomotives and passenger, baggage, and freight cars are a part, and a necessary part, of the entire establishment, there can be no doubt. Are they so permanently and inseparably connected with the more substantial realty as to become constructively fixtures? . . . It may be that, if an appeal should be made to the common sense of the community, it would be determined that the term 'fixtures' could not well be applied to such movable

carriages as railway cars. But such cars move no more rapidly than do pigeons from a dovecote or fish in a pond, both of which are annexed to the realty."

This decision was followed by *Stevens v. Buffalo & N. Y. City R. Co.* 31 Barb. 590, and *Beardsley v. Ontario Bank*, 31 Barb. 619, holding that rolling-stock is personalty, and a mortgage of it subject to the Chattel Mortgage Act. A few years later the same court held that a mortgage of a railroad need not be recorded as a chattel mortgage in order to bind the rolling-stock. *Bement v. Plattsburgh & Montreal R. Co.* 47 Barb. 104, 51 Barb. 45.

<sup>2</sup> *Hoyle v. Plattsburgh & Montreal R. Co.* 54 N. Y. 314, 13 Am. Rep. 595; *Randall v. Elwell*, 52 N. Y. 521, 11 Am. Rep. 747.

<sup>3</sup> 3 R. S. 8th ed. 1889, p. 1783.

A like confusion and contradiction of authority upon this subject, and a like final settlement of it by legislation, is to be found in many States.<sup>1</sup> As a summary of the adjudications upon this subject, it may be said that, while there are many and strong arguments for holding that rolling-stock is part of the realty of a railroad,<sup>2</sup>—and this view seems to have the support of the United States courts,<sup>3</sup>—the weight of authority in the state courts seems to be against that position.<sup>4</sup>

<sup>1</sup> **California**: Such mortgages are recorded in the office of the county recorder, where mortgages of real estate are recorded, but in books kept for personal mortgages. Civil Code, §§ 2955, 2959, 2961. **Connecticut**: Recorded in office of secretary of state. Acts 1877, ch. 38. **Dakota**: Recorded as real estate mortgage in the office of register of deeds for the county. R. C. 1877, p. 304. **Florida**: Rolling-stock declared fixtures, and mortgage recorded in office of secretary of state. Acts 1874, ch. 1987. **Iowa**: Rolling-stock regarded as fixtures, and mortgage recorded in office of the county recorder. Code 1873, §§ 1284, 1285. **Minnesota**: Rolling-stock part of the realty, and mortgages of it recorded in the registry of deeds. **Montana**: Mortgages of it recorded as mortgages of real estate. Laws 1873, p. 102. **New Jersey**: Recorded as mortgages of real estate. R. S. 1877, p. 924, § 82. **Ohio**: Recorded in registry of deeds as a real estate mortgage. R. S. 1860, p. 322. **Vermont**: Recorded in office of county clerk of each county through which the road passes. G. S. 1870, ch. 28, §§ 100–102. **West Virginia**: Recorded in county registry. Act April 13, 1873. **Wisconsin**: Rolling-stock declared fixtures and recorded in office of secretary of state. Laws 1872, ch. 119, §§ 39, 40; Laws 1877, ch. 144, § 1.

Rolling-stock is declared personal property, and subject to execution as such, by provisions of the Constitutions of **Illinois**, Const. 1870, art. xi. § 10; **Missouri**, Const. 1875, art. xii. § 16; **Arkansas**, Const. 1874, art. xvii. § 11; **Nebraska**, Const. 1875, art. xi. § 2; **Texas**, Const. 1876, art.

x. § 4; **West Virginia**, Const. 1872, art. xi. § 8.

<sup>2</sup> *Palmer v. Forbes*, 23 Ill. 301; *Hunt v. Bullock*, 23 Ill. 320; *Titus v. Mabee*, 25 Ill. 257; *Youngman v. Elmira & Williamsport R. Co.* 65 Pa. St. 278; *Covey v. Pittsburgh, Fort Wayne & Chicago R. Co.* 3 Phila. 173; *Phillips v. Winslow*, 18 B. Mon. 431, 68 Am. Dec. 729; *Douglass v. Cline*, 12 Bush, 608, 630; *State v. Northern Cent. Ry. Co.* 18 Md. 193; *Morrill v. Noyes*, 56 Me. 458, 96 Am. Dec. 486; *Pierce v. Emery*, 32 N. H. 484; *Meyer v. Johnston*, 53 Ala. 237, 332.

<sup>3</sup> *Pennock v. Coe*, 23 How. 117; *Galveston R. Co. v. Cowdrey*, 11 Wall. 459; *Dunham v. Cincinnati, Peru, &c. Ry. Co.* 1 Wall. 254; *Minnesota Co. v. St. Paul Co.* 2 Wall. 609, note, p. 648, 6 Wall. 742; *Farmers' Loan & Trust Co. v. St. Joseph & Denver City Ry. Co.* 3 Dill. 412; *Scott v. Clinton & Springfield R. Co.* 6 Biss. 529; *Pullan v. Cincinnati & Chicago Air-Line R. Co.* 4 Biss. 35. The same rule was early adopted in **Illinois**: *Palmer v. Forbes*, 23 Ill. 301; *Titus v. Mabee*, 25 Ill. 257; *Titus v. Ginheimer*, 27 Ill. 462, *Curran v. Smith*, 37 Ill. App. 69.

<sup>4</sup> *Williamson v. N. J. Southern R. Co.* 29 N. J. Eq. 311; *Coe v. Columbus, Piqua & Ind. R. Co.* 10 Ohio St. 372, 75 Am. Dec. 518; *Boston, Concord & Montreal R. Co. v. Gilmore*, 37 N. H. 410, 22 Am. Dec. 336.

This subject, imperfectly presented here, is more fully discussed in *Jones on Corporate Bonds and Mortgages*, §§ 136–144; *Speiden v. Parker*, 46 N. J. Eq. 292, 19 Atl. Rep. 21.

1730. A mortgage by a railroad company covering future acquired property attaches to rolling-stock subject to the lien of a conditional sale of such rolling-stock, or to the lien of a chattel mortgage of it for the purchase-price, whether recorded or not.<sup>1</sup> "Being loose property, susceptible of separate ownership, and separate liens, such liens, if binding on the railroad company itself, are unaffected by a prior general mortgage given by the company and paramount thereto."<sup>2</sup> But the rule is otherwise when the property purchased is annexed to real property already covered by a general mortgage, as where iron rails are laid down and become a part of a railroad.

### VII. *Rights of Mortgagees as to Fixtures.*

1731. As a general rule, a mortgage of land passes fixtures already upon it, without any special mention being made of them, and even without any general description of them, or evidence of intention to include them, such as might be afforded as to machinery or other articles employed for manufacturing purposes by a special mention of a mill aside from the description of the land.<sup>3</sup> This was the decision in an early case in Massachusetts,<sup>4</sup> in which it was held that a kettle in a fulling-mill set in brick-work, and used for dyeing cloth, passed by a mortgage of the land upon which the mill stood. The grounds of the decision were, that this fixture could not be removed without actual injury to the mill; that it was essential to the use of the mill; and that, being attached to it at the time of making the mortgage, it passed by it as part of the security.

Fixtures pass with the estate and as a part of it. In a mortgage deed the premises were described as certain land "with the paper-mill, etc., thereon, and water privilege, appurtenances, etc., together with all its privileges and appurtenances." The ma-

<sup>1</sup> United States v. New Orleans R. Co. 12 Wall. 362, per Bradley, J.; New Chester Water Co. v. Holly Manuf. Co. 3 U. S. App. 264, 3 C. C. A. 399, 53 Fed. Rep. 19.

<sup>2</sup> Galveston R. Co. v. Cowdrey, 11 Wall. 459.

<sup>3</sup> Clore v. Lambert, 78 Ky. 224; Cunningham v. Cureton (Ga.), 23 S. E. Rep. 420, 421.

<sup>4</sup> Union Bank v. Emerson, 15 Mass. 159. See, also, Southbridge Sav. Bank v. Stevens Tool Co. 130 Mass. 547; Hamilton v. Huntley, 78 Ind. 521, 41 Am. Rep. 593. In Hunt v. Mullanphy, 1 Mo. 508, 14 Am. Dec. 300, a kettle annexed in like manner to the freehold was held not to be covered by the mortgage, on the ground that it was not permanently annexed.

chinery in controversy was fastened to the floor of the mill by means of iron bolts with nuts upon the ends of them. The machinery, however, could be removed without injury to the building, and might be used in other paper-mills. The machinery was subsequently attached by a creditor of the mortgagor, but it was held that it passed by the mortgage of the land and mill as a part of the realty.<sup>1</sup>

**1732.** Personal property which is incorporated with the realty does not pass by a chattel mortgage as against a subsequent purchaser or mortgagee of the realty. Thus, as between a mortgagee of the machinery of a cotton-mill permanently attached to the realty and used with it, and a subsequent mortgagee of the realty, the title of the latter will prevail.<sup>2</sup> Such permanent fixtures include the machinery for furnishing the motive power of the mill; the steam-engine securely set in its foundation, and its adjuncts, the boilers, together with the shafting, belting, couplings, and pulleys to communicate the power; also the water-wheels and water-wheel governor. They include also the apparatus for furnishing light and warmth to the buildings; the gas-generator, the gas-pump, and the gas-pipes; and also the gas-burners, when adapted expressly to the mill; also the steam-heating pipes, though laid upon hooks, and capable of being removed without disturbing the building, or the hooks holding them; and other heating-pipes resting upon the floor without being attached to it. They are all part of the system of piping adapted to the building and used with it.<sup>3</sup> Property which has once become real estate, through annexation to the realty, cannot afterwards

<sup>1</sup> *Lathrop v. Blake*, 23 N. H. 46; *Burnside v. Twitchell*, 43 N. H. 390. In *Gale v. Ward*, 14 Mass. 352, 356, 7 Am. Dec. 223, the fact that certain carding-machines could be removed from the mill without injury to it, and might be used in any other building erected for a similar purpose, was a reason for considering them personal property, and not covered by a mortgage of the realty. A like view was taken in *Fullam v. Stearns*, 30 Vt. 443, in respect to a planing-machine, a circular saw and frame, and a boring-machine.

See, on meaning of "appurtenances" in a chattel mortgage of a building, *Frey v. Drahos*, 6 Neb. 1, 39 Am. Rep. 353.

<sup>2</sup> *Smith v. Waggoner*, 50 Wis. 155, 6 N. W. Rep. 568; *Pierce v. George*, 108 Mass. 78, 11 Am. Rep. 310, 314. See, *contra*, *Henry v. Von Brandenstein*, 12 Daly, 480. And see *Beckman v. Sikes*, 35 Kans. 120, 10 Pac. Rep. 592. In **Ver-****mont**, machinery attached to or used in a shop, mill, quarry, mine, printing-office, or factory may be mortgaged by deed executed, acknowledged, and recorded as deeds of real estate. Such mortgages may be assigned, discharged, or foreclosed, like mortgages of real estate. R. L. 1880, § 1980, Laws 1888, p. 85.

<sup>3</sup> *Keeler v. Keeler*, 31 N. J. Eq. 181, 8 Am. L. Rec. 670.

be made personal property, by the mere agreement of the parties, so as to affect others who may be or may become interested in the realty.<sup>1</sup>

Where a mortgage was made of the boilers, engines, saws, and gearing of a steam sawmill before these articles were annexed to the realty, with power in the mortgagee to take possession of them upon default, whether they should have been attached to the realty, and should have become a part of it, or not, and subsequently a mortgage was made of the realty to one who had no actual notice of this agreement, it was held that the chattel mortgage, though duly recorded, was inoperative as against the mortgage of the realty.<sup>2</sup>

**1733. A mortgage of machinery as personal property made after it has been set up, and so affixed to the realty as to become a part of it, although made to the manufacturer contemporaneously with the bill of sale from him to the owner of the land, passes no title to the machinery as against a subsequent purchaser of the real estate, although he purchase with actual knowledge of the mortgage.<sup>3</sup> Evidence of a general usage and custom between manufacturers and purchasers of such property to regard it as personal property is incompetent.<sup>4</sup> The annexation of the machinery to the freehold, *de facto*, renders it part of the realty; and although the annexation be consented to by the manufacturer under an agreement with the owner of the realty that he would give the former a mortgage of the machinery as personal property, such agreement is inoperative and void as against any one who afterwards acquires title to the realty in fee.**

But machinery of a cotton-mill merely fastened to the floor by nails or screws, or held in position by cleats to keep it in position, is not part of the realty, and would pass by a chattel mortgage in preference to a subsequent mortgage of the realty. It does not matter that in putting down a new floor it was laid down around the feet and standards of the machines.<sup>5</sup>

<sup>1</sup> Docking v. Frazell, 34 Kans. 29, 7 Pac. Rep. 618, 38 Kans. 420, 17 Pac. Rep. 160; Beckman v. Sikes, 35 Kans. 120, 10 Pac. Rep. 592.

<sup>2</sup> Brennan v. Whitaker, 15 Ohio St. 446. See Fortman v. Goepper, 14 Ohio St. 558, 565; Beckman v. Sikes, 35 Kans. 120, 10 Pac. Rep. 592.

<sup>3</sup> Richardson v. Copeland, 6 Gray, 536, 66 Am. Dec. 424.

<sup>4</sup> Richardson v. Copeland, 6 Gray, 536, 66 Am. Dec. 424; Keeler v. Keeler, 31 N. J. Eq. 181, 8 Am. L. Rec. 670.

<sup>5</sup> Keeler v. Keeler, 31 N. J. Eq. 181, 8 Am. L. Rec. 670. And see Gale v. Ward, 14 Mass. 352, 7 Am. Rep. 223; Sturgis

1734. Whether the record of the chattel mortgage is effectual as against subsequent purchasers, mortgagees, and creditors, is a question upon which there is some conflict of authority. On the one hand, it is said that the constructive notice imparted by the record of such mortgage before the chattels were affixed is as effectual to protect the mortgagee as actual notice would be.<sup>1</sup> On the other hand, it is declared that, when personal chattels become affixed to the realty with the consent and coöperation of the mortgagee of such chattels, they become at once *de facto*, by operation of law, part and parcel of the land, and necessarily lose their chattel character, so that they could not be replevied as chattels, but would pass to a purchaser of the land of which they visibly constituted a part. The mortgagee of the chattels having consented to the conversion of this personal property into real property, his right to claim it under his mortgage ceased at the precise moment of time when by his consent it ceased to be chattels and became realty. The record then ceased to be constructive notice of the mortgage lien.<sup>2</sup> And the better opinion is, that a purchaser of the realty is bound only to take notice of the record title of the realty, and is not in any way bound to examine the records for chattel mortgages, for he is not affected by the record of a chattel mortgage upon fixtures of such realty.<sup>3</sup>

A mortgage of real estate including factories and shops, together with the engines, machinery, and other personal chattels which are fixtures when attached to the realty, need not be registered as a chattel mortgage when it is the intention of the parties, as shown by the terms of the instrument, that such chattels should pass with the freehold as part and parcel of it.<sup>4</sup>

As against the mortgagor's assignee of a lease, under the provisions of which all fixtures annexed to the property are to retain their character of personalty, the record of the mortgage is constructive notice.<sup>5</sup>

*v. Warren*, 11 Vt. 433; *Godard v. Gould*, 14 Barb. 662; *McEntee v. Scott*, 2 Thomp. & C. 284.

<sup>1</sup> *Sowden v. Craig*, 26 Iowa, 156, 96 Am. Dec. 125; *Sword v. Low*, 122 Ill. 487, 13 N. E. Rep. 826.

<sup>2</sup> *Sowden v. Craig*, 26 Iowa, 156, 165, 96 Am. Dec. 125, per Dillon, C. J., dissenting from the decision of the court.

<sup>3</sup> *Richardson v. Copeland*, 6 Gray, 536, 66 Am. Dec. 424; *Bringholff v. Munzenmaier*, 20 Iowa, 513.

<sup>4</sup> *Potts v. N. J. Arms & Ordnance Co.* 17 N. J. Eq. 395.

<sup>5</sup> *Kribbs v. Alford*, 120 N. Y. 519, 24 N. E. Rep. 811, 31 N. Y. St. Rep. 564.

1735. The rule is, however, that record of a chattel mortgage is notice only of an incumbrance upon chattels. In a case in Ohio a question arose between the holder of a chattel mortgage of the fixtures and a mortgagee of the realty in respect to the boilers, engines, saws, and gearing of a steam sawmill.<sup>1</sup> The chattel mortgage was made before the articles were annexed to the property, but it recited that they were designed to be used in the mortgagor's sawmill, and power was given the mortgagees to take possession of them upon default, whether they should be attached to the freehold and in law become a part of the realty or not. The mortgage of the real estate was afterwards taken without notice of this agreement. The record of the chattel mortgage was constructive notice only of an incumbrance upon chattels; but when the mortgage of the real estate was made, these things were not chattels, but real estate, and the record of the mortgage as a chattel mortgage was no notice to the mortgagee of the realty. The court declared that it devolved upon the mortgagee of the chattels, who sought to change the legal character of the property after it was annexed to the realty and to create incumbrances upon it, either to pursue the mode prescribed by law for incumbering the kind of estate to which it appeared to the world to belong, and for giving notice of such incumbrance; or, otherwise, take the risk of its loss in case it should be sold and conveyed as part of the real estate of a purchaser without notice.<sup>2</sup>

<sup>1</sup> *Brennan v. Whitaker*, 15 Ohio St. 446. For a similar case with like decision, see *Frankland v. Moulton*, 5 Wis. 1. See, also, *Fortman v. Goepper*, 14 Ohio St. 558. In *Voorhees v. McGinnis*, 48 N. Y. 278, the owner of a saw and grist mill erected a substantial building, and placed therein a steam-engine, boiler, shafting, and gearing, which were constructed with especial reference to the place in which they were to be used, but without any intent on the part of the person making the improvement either of making them a part of the freehold, or of removing them in the future, and gave a real-estate mortgage upon the property. Subsequently the boiler and machinery were removed for the purpose of having them replaced by a new boiler and new machinery, and, while the new boiler and

machinery were at the shop for repair, the owner of the mill gave a chattel mortgage upon them; and after the repairs were completed, and the mill was in running order, he gave another mortgage upon them and other machinery. After the repairs and before the last chattel mortgage, he gave a real-estate mortgage on the premises, and the plaintiff acquired title under the foreclosure and sale on the two real estate mortgages. The holders of the chattel mortgages removed the machinery covered by these mortgages. It was held that, although the mortgagor had no special intent upon the subject, the facts disclosed that the boiler, engine, shafting, and gearing were permanent accessions to the freehold.

<sup>2</sup> Per White, J., in *Brennan v. Whitaker*, 15 Ohio St. 446. He dissents from



As against a mortgagee of the realty, to sustain a claim to the fixtures, there must be either an actual severance of them previously made, or actual notice of the agreement by the mortgagor that they should be severed.

**1736.** Whether, as against subsequent purchasers without notice, the character of property can be changed by agreement from realty to personalty, is a question upon which the authorities are not in entire harmony, though the better opinion is that such purchasers are not bound unless they have notice of the agreement before acquiring title. Ordinarily they are entitled to claim and hold everything which appears to be, and by its ordinary nature is, a part of the realty. To hold otherwise would contravene the policy of the laws requiring conveyances of interests in real estate to be recorded. It would seriously endanger the rights of purchasers, afford opportunities for frauds, and introduce uncertainty and confusion into land titles.<sup>1</sup> This is the doctrine established in Massachusetts, Connecticut, New Hampshire, Vermont, New Jersey, Kansas, and other States.<sup>2</sup> "The public records of chattel mortgages and land titles are an important protection of purchasers. Constructive notice is not given by the record of a chattel mortgage in the county registry of deeds,

the ruling in *Ford v. Cobb*, 20 N. Y. 344, where it was held that an agreement evidenced by a chattel mortgage was effectual against a subsequent purchaser of the land without notice; and cites to the contrary *Richardson v. Copeland*, 6 Gray, 536, 66 Am. Dec. 424, and other cases.

<sup>1</sup> *Hunt v. Bay State Iron Co.* 97 Mass. 279, per Foster, J., in substantially his language. In this case iron rails were sold to a railroad company under an agreement that they should be laid down on a specified part of the road, but should remain the vendor's property until paid for; and it was held that, while the rails continued to be personal property as between the vendor and the company, and also between the vendor and subsequent incumbancers and purchasers of the railroad having notice of the agreement when they acquired title, they did not remain personalty as between the vendor and prior mortgagees of the railroad, or owners of

the land over which the railroad was located and the iron was laid, who remain entitled to possession of such land as security for their damages, unless they have consented to such agreement. See *Pierce v. Emery*, 32 N. H. 484; *Haven v. Emery*, 33 N. H. 66; *Southbridge Savings Bank v. Exeter Machine Works*, 127 Mass. 542; *Pierce v. George*, 108 Mass. 78, 11 Am. Rep. 310.

<sup>2</sup> See cases already cited in this section, and also *Campbell v. Roddy*, 44 N. J. Eq. 244, 14 Atl. Rep. 279; *Docking v. Frazell*, 34 Kans. 29, 7 Pac. Rep. 618; *Beckman v. Sikes*, 35 Kans. 120, 10 Pac. Rep. 592; *Tibbetts v. Horne*, 65 N. H. 242, 23 Atl. Rep. 145; *Corey v. Bishop*, 48 N. H. 146; *Carroll v. McCullough*, 63 N. H. 95; *Page v. Edwards*, 64 Vt. 124, 23 Atl. Rep. 917; *Powers v. Denison*, 30 Vt. 752; *Davenport v. Shants*, 43 Vt. 546; *Prince v. Case*, 10 Conn. 375.

or by the record of a realty mortgage in the town clerk's office. Before taking a mortgage of the land, the mortgagee was not bound to examine the record of chattel mortgages for the title of machinery that was annexed to the land in a manner that made it apparently as much a part of the land as the removable doors and windows of the mill. The mortgagee of the machinery, being bound to know this, should have taken a mortgage of the land, or other security consistent with the safety intended to be given to innocent purchasers by the registry law. By taking no mortgage of the realty, of which, with his assent, the machinery became an apparent part, he gave the mill-owners apparent authority to convey the machinery as realty. The purpose of the registry law would be defeated if the county record could not be relied upon in such a case by a subsequent purchaser having no notice of a defect in the apparent title."<sup>1</sup>

1737. The courts of a few States, particularly those of New York and Illinois, accord very great efficacy to the mortgagor's agreement that fixtures shall remain chattels, so as to give effect to a chattel mortgage of them, as against subsequent purchasers and mortgagees of the land. They go even to the extent of holding that a chattel mortgage executed in view that the chattels are about to be annexed to the realty is sufficient evidence of the intention and agreement of the parties that they are to retain their character as personal property.<sup>2</sup> An express agreement in the mortgage between the owner of the land and the owner of the chattels, that the character of the latter shall not be changed by annexation, but that the mortgagee in case of default may enter and remove them,<sup>3</sup> may make the intention of the parties more emphatic, but apparently it is not regarded as

<sup>1</sup> *Tibbetts v. Horne*, 65 N. H. 242, 246, 23 Atl. Rep. 145, per Doe, C. J.

<sup>2</sup> *Ford v. Cobb*, 20 N. Y. 344; *Sisson v. Hibbard*, 10 Hun, 420, 75 N. Y. 542; *Mott v. Palmer*, 1 N. Y. 564; *Kinsey v. Bailey*, 9 Hun, 452; *Eaves v. Estes*, 10 Kans. 314, 15 Am. Rep. 345; *Andrews v. Chandler*, 27 Ill. App. 103; *Sword v. Low*, 122 Ill. 487, 502, 13 N. E. Rep. 826. In the latter case, *Shope, J.*, reviewed the decisions, and in conclusion said: "We think that where the mortgagor and mortgagee agree that the property shall be

treated as personalty, and the mortgagor covenants that it shall be subject to seizure and sale as a chattel upon the maturity and non-payment of the debt, and where the character of the personalty and mode of attachment is such that it may be removed without material injury to the freehold," the article retains its character as a chattel, and does not become a part of the realty.

<sup>3</sup> *Tift v. Horton*, 53 N. Y. 377, 13 Am. Rep. 537.

essential, or as having any legal effect which the fact of the mortgage alone would not have. A provision that the mortgagee may enter and take possession of the mortgaged chattels in case of a default also manifests an intention that the property should retain its character of personalty after its annexation and use as part of the realty; but doubtless the mortgage, without such provision, would sufficiently manifest such intention.<sup>1</sup>

But even under this view chattels may be so annexed to the freehold in a permanent manner, and may become so incorporated with it as a permanent accession to the realty, that the fact that the property is already subject to a chattel mortgage is not sufficient to preserve its personal character, either as against an existing or subsequent mortgagee of the realty. "It comes to this: A man employs a carpenter and mason to build a brick house for him upon his lot, and pays them in full the price agreed upon. The mason puts his brick in the walls. The carpenter places his joists and timbers in the proper places in the house. The house is finished and is occupied by the owner. It then appears that the maker of the brick held a chattel mortgage upon them, executed by the mason, and that the sawyer of the timber held a chattel mortgage upon it, executed by the carpenter. Are these articles, now a part of the house, still held upon the chattel mortgages, so that the creditors can despoil the house to obtain their possession, or compel the owner to pay their value? I take it they are not. Their character as personal property is ended. They have become a part of the house; they are real estate; will pass under a deed of the land; may be subjected by a mortgage of the land, or may be held by the owner of the house."<sup>2</sup>

**1738.** If a subsequent purchaser or mortgagee of the realty knew, at the time of his purchase or mortgage, of the existence of a chattel mortgage upon the fixtures, or of an agreement by the owner that the fixtures might be removed, he may be regarded as having taken his deed or mortgage subject to such chattel mortgage or agreement.<sup>3</sup>

<sup>1</sup> As in *Ford v. Cobb*, 20 N. Y. 344, 287, per Hunt, J. And see *Pierce v. Sisson v. Hibbard*, 10 Hun, 420; *Eaves v. Estes*, 10 Kans. 314, 15 Am. Rep. 345. The New York cases seem to be in some confusion. Compare the cases cited with *Voorhees v. McGinnis*, 48 N. Y. 278.

*George*, 108 Mass. 98, 11 Am. Rep. 310; *Meredith v. Kunze*, 78 Iowa, 111, 42 N. W. Rep. 619; *Cross v. Marston*, 17 Vt. 533, 540, 44 Am. Dec. 353; *Haven v. Emery*, 33 N. H. 66.

<sup>2</sup> *Voorhees v. McGinnis*, 48 N. Y. 278,

<sup>3</sup> *Warner v. Kenning*, 25 Minn. 173;

1739. By agreement of the persons interested, the character of personalty may be reimpressed upon chattels after this has been lost by annexation to the land so that the chattels have become fixtures, but have not been so incorporated with the realty as to lose their identity, provided the reconversion of the fixtures into personalty does not interfere with the rights of creditors or of third persons. Thus the owner of land upon which were the plant and machinery of a marine railway had contracted to sell the property, and a third person advanced the money to the purchaser to enable him to make the cash payment required, under an oral agreement between the lender, the vendor, and the vendee that the lender should advance the money and take title to the plant and machinery as security, and that he could remove the same at any time. The owner conveyed the land, and took back a mortgage to secure the remainder of the purchase-money. In an action to foreclose the mortgage it was held that the agreement was valid, and thereby the fixtures became personalty and were not covered by the mortgages, though the mortgages, except for the agreement, would cover the fixtures. The oral agreement is not within the rule that forbids parol evidence to contradict a written instrument, because the lender upon the security of the chattels was not a party to the written instrument, namely, the mortgage.<sup>1</sup>

1740. To make effectual an intention that the chattels shall retain their character of personalty, it is essential that they be so annexed that they can be removed without serious damage to the freehold, and without substantially destroying their own qualities or value.<sup>2</sup> The nature of the articles annexed may be such, or the mode of their annexation may be such, that they lose the essential attributes of personal property by annexation itself. "Thus, a house or other building, which, from its

Rowland v. West, 62 Hun, 583, 586; Fryatt v. Sullivan Co. 5 Hill, 116; San Antonio Brewing Asso. v. Arctic Ice Mach. Manuf. Co. 81 Tex. 99, 16 S. W. Rep. 797; Simons v. Pierce, 16 Ohio St. 215; Greither v. Alexander, 15 Iowa, 470; Wal-ler v. Bowling, 108 N. C. 289, 12 S. E. Rep. 990.

<sup>1</sup> Tyson v. Post, 108 N. Y. 217, 15 N. E. Rep. 316.

<sup>2</sup> Ford v. Cobb, 20 N. Y. 344, 351, per

Denio, J.; Tift v. Horton, 53 N. Y. 377, 13 Am. Rep. 537; Sisson v. Hibbard, 10 Hun, 420, 75 N. Y. 542; Kinsey v. Bailey, 9 Hun, 452; Grand Island Banking Co. v. Frey, 25 Neb. 66, 40 N. W. Rep. 599, 13 Am. St. Rep. 478; Henkle v. Dillon, 15 Oreg. 610, 17 Pac. Rep. 148; Tibbetts v. Horne, 65 N. H. 242, 23 Atl. Rep. 145; Cherry v. Arthur, 5 Wash. 787, 32 Pac. Rep. 744.

size, or the materials of which it was constructed, or the manner in which it was fixed to the land, could not be removed without practically destroying it, would not, I conceive, become a mere chattel by means of any agreement."

1741. Detachable and removable machinery is susceptible of ownership distinct from the land and buildings, and may be the subject of particular and separate liens.<sup>1</sup> If a mortgagee, with full knowledge, consents to the arrangement, the machinery will clearly remain personal property as against the mortgagee, and may be removed by the seller retaining title thereto, although it has the character of a fixture and has been permanently annexed.<sup>2</sup> Such machinery, when affixed to the realty, does not become subject to an existing mortgage of the realty unless it is affixed by the owner of the chattel or with his assent. Thus, if machinery belonging to a third person be put into a mill upon a written agreement that it is to remain subject to the order of such third person until it be paid for in full, the act of the mill-owner in affixing the machinery to the mill is not sufficient to subject it to the operation of an existing mortgage.

Even if the mortgagee does not consent to the arrangement, it is held by some authorities that the machinery remains personal property as against him, on the ground that the owner of the machinery is not put upon inquiry as to the state of the title to the mill so as to be charged with constructive notice of the mortgage, and he does not assent to the affixing of the machinery to the realty absolutely, but only in a qualified way.<sup>3</sup>

But, on the other hand, the better rule seems to be that an agreement, between the seller and buyer of a chattel so annexed

<sup>1</sup> *Holly Manuf. Co. v. New Chester Water Co.* 48 Fed. Rep. 879, 889; *Harlan v. Harlan*, 20 Pa. St. 303; *Benedict v. Marsh*, 127 Pa. St. 309, 18 Atl. Rep. 26; *Vail v. Weaver*, 132 Pa. St. 363, 19 Atl. Rep. 138; *Cherry v. Arthur*, 5 Wash. 787, 32 Pac. Rep. 744.

<sup>2</sup> *Hawkins v. Hersey*, 86 Me. 394, 30 Atl. Rep. 14; *Bartholomew v. Hamilton*, 105 Mass. 239.

<sup>3</sup> *Cherry v. Arthur*, 5 Wash. 787, 32 Pac. Rep. 744; *Cochran v. Flint*, 57 N. H. 514; *Buzzell v. Cummings*, 61 Vt. 213, 18 Atl. Rep. 93; *Davenport v. Shants*, 43 Vt. 546; *Page v. Edwards*, 64 Vt. 124,

23 Atl. Rep. 917. In *Vail v. Weaver*, 132 Pa. St. 363, 19 Atl. Rep. 138, it was held that the engine, machinery, and appliances of an electric light plant erected upon and firmly attached to real estate do not pass to a purchaser of the real estate at a sale upon a mortgage of the realty, made and recorded before the plant was placed by the mortgagor on the mortgaged premises, unless it was the intention to make the plant a part of the realty when it was erected. To like effect see *Holly Manuf. Co. v. New Chester Water Co.* 48 Fed. Rep. 879.

to the realty as to become a part of it, that the chattel shall remain the personal property of the seller until paid for, does not bind a subsequent mortgagee without notice.<sup>1</sup>

**1742. Machinery remains personal property until it is actually annexed to the realty, and a chattel mortgage placed upon it before it is attached to the realty is superior to a vendor's lien reserved upon the land for purchase-money.<sup>2</sup> Much less could a mortgagee of the realty claim such a fixture when his mortgage expressly excepts the fixture from its operation.<sup>3</sup>**

Salt-kettles, which were mortgaged to the seller as personalty at the time of the purchase, were taken by the purchaser to his salt-works and embedded in brick arches in such a way that they could be removed without injury by displacing a portion of the brick-work at an inconsiderable expense; and the course of the manufacture required them to be so removed and reset annually. There was no evidence of an agreement that they should remain personalty, except such as was furnished by the mortgage itself and the circumstances attending its execution. The mortgage was held good as against a subsequent purchaser of the salt-works who had no notice of the facts other than that derived from the filing of the chattel mortgage.<sup>4</sup>

**1743. If the real estate is subject to a mortgage when chattels are annexed to it, which are not at the time subject to any personal mortgage, or to any equitable agreement for their subsequent removal, the chattels, if of the nature to become fixtures, become so immediately upon being attached to the land; and any chattel mortgage, or agreement that the articles should**

<sup>1</sup> Southbridge Sav. Bank v. Exeter Machine Works, 127 Mass. 542; Southbridge Sav. Bank v. Stevens Tool Co. 130 Mass. 547; Wentworth v. Woods Mach. Co. 163 Mass. 28, 39 N. E. Rep. 414; Hopewell Mills v. Taunton Sav. Bank, 150 Mass. 519, 23 N. E. Rep. 327; Carpenter v. Allen, 150 Mass. 281, 22 N. E. Rep. 900; Carpenter v. Walker, 140 Mass. 416, 5 N. E. Rep. 160; Southbridge Sav. Bank v. Mason, 147 Mass. 500, 18 N. E. Rep. 406; Hubbell v. E. Cambridge Sav. Bank, 132 Mass. 447, 449, 43 Am. Rep. 446; Thompson v. Vinton, 121 Mass. 139; Hunt v. Bay State Iron Co. 97 Mass. 279; Hawkins v. Hersey, 86 Me. 394, 30

Atl. Rep. 14; John Van Range Co. v. Allen (Miss.), 7 So. Rep. 499.

<sup>2</sup> Miller v. Wilson, 71 Iowa, 610, 33 N. W. Rep. 128. In this case the owner of mill property, subject to a lien for purchase-money, purchased an engine and machinery to be annexed to the mill, and the machinery had been delivered on the ground, and the owner intended to annex it to the realty, and had begun to erect a building in which to place it, though none of it was in place when he executed a chattel mortgage of the machinery.

<sup>3</sup> Badger v. Batavia Paper M. Co. 70 Ill. 302.

<sup>4</sup> Ford v. Cobb, 20 N. Y. 344.

be considered personal property, will have no effect.<sup>1</sup> The chattels, once having been annexed to the realty and become bound by a mortgage of the realty, cannot be dissevered except with the consent of the mortgagee.

In a case where machinery for a sawmill was sold to the owner under a condition that it should remain the property of the vendor until paid for, and after a part of it had been set up in the mill a mortgage was made of the mill premises, the mortgagee having no notice of this agreement, it was held that the part of the machinery which had been put up in the mill passed by the mortgage, but that as to such of the machinery as was then lying in the mill-yard the mortgagee gained no title as against the unpaid vendor.<sup>2</sup>

**1744.** Fixtures annexed after a mortgage are part of the realty in those States which hold to the doctrine that a mortgage is a conveyance. Such fixtures are subject to the mortgage, and it does not matter by whom they are annexed, whether by the mortgagor or by his tenant or licensee under a lease or license subsequent to the mortgage, or under a conditional sale, or an agreement, to which the mortgagee is not a party, that the chattels annexed shall remain personal property.<sup>3</sup>

**1745.** Buildings erected on the mortgaged premises by the mortgagor are annexed to the freehold and cannot be removed by him, or by any one under his authority, or without his authority, while the debt remains unpaid.<sup>4</sup> When, however, the building is

<sup>1</sup> *Vanderpoel v. Allen*, 10 Barb. 157; *McFadden v. Allen*, 50 Hun. 361, 3 N. Y. Supp. 356, affirmed 134 N. Y. 489, 32 N. E. Rep. 21, 19 L. R. A. 446; *United States v. New Orleans R. Co.* 12 Wall. 362.

<sup>2</sup> *Davenport v. Shants*, 43 Vt. 546; *Miller v. Wilson*, 71 Iowa, 610, 33 N. W. Rep. 128.

<sup>3</sup> *Merchants' Nat. Bank v. Stanton*, 55 Minn. 211, 220, 56 N. W. Rep. 821, per Mitchell, J.; *Watertown Steam Engine Co. v. Davis*, 5 Houst. 192; *Rowand v. Anderson*, 33 Kans. 264, 52 Am. Rep. 529; *Hopewell Mills v. Taunton Sav. Bank*, 150 Mass. 519, 23 N. E. Rep. 327; *Thompson v. Vinton*, 121 Mass. 139; *Southbridge Sav. Bank v. Exeter Mach. Works*,

127 Mass. 542, 545; *Smith Paper Co. v. Servin*, 130 Mass. 511; *Kisterbock v. Laning (Pa.)*, 7 Atl. Rep. 596; *Case Manuf. Co. v. Garven*, 45 Ohio St. 289, 13 N. E. Rep. 493.

<sup>4</sup> **New Hampshire**: *Burnside v. Twitchell*, 43 N. H. 390. **Massachusetts**: *Cole v. Stewart*, 11 Cush. 181; *Winslow v. Merchants' Ins. Co.* 4 Met. 306, 38 Am. Dec. 368; *Butler v. Page*, 7 Met. 40, 39 Am. Dec. 757; *Guernsey v. Wilson*, 134 Mass. 482; *Tarbell v. Page*, 155 Mass. 256, 29 N. E. Rep. 585. **Vermont**: *Sweetzer v. Jones*, 35 Vt. 317, 82 Am. Dec. 639, per Kellogg, J. **Wisconsin**: *Frankland v. Moulton*, 5 Wis. 1. **Louisiana**: *New Orleans Nat. Bank v. Raymond*, 29 La. Ann. 355, 29 Am. Rep. 335. **Illinois**:

erected merely for temporary use, and it is apparent that there was an intention that it should not become attached to the land even so slightly as by the sinking into the soil of the blocks upon which it rested, the mortgagee of the land will acquire no interest in it, although placed there by the mortgagor. If erected by a firm of which the mortgagor is a member for purposes of trade, it is all the more clear that it was not intended as a permanent improvement, or to become a part of the realty.<sup>1</sup> But a building erected by the side of a mill, for use as an office in connection with the mill, was held to be a part of the realty, although intended to be temporary only, and to be ultimately removed, and not attached to the mill nor fixed to the ground, but resting upon wooden blocks upon the surface of the earth. The use for which the building was erected was regarded as determining its character as part of the realty.<sup>2</sup> The fact that a house erected on mortgaged land rests on posts, instead of masonry, does not give the builder a right, as against the mortgagee, to remove such house, on the failure of the owner of the premises to pay for the labor and material used, unless, at the time of its erection, there was an agreement to that effect between the parties.<sup>3</sup>

The owner of a lot of land, having by parol license allowed a third person to erect a building upon it, afterwards made a mortgage of it to one who had no notice of such license. It was held that the mortgagee was entitled to the building, and having entered into possession might maintain trespass against one removing it; and it was held, too, that the mere fact that the person who erected the building occupied it was no notice of his claim to it.<sup>4</sup>

**1746.** An existing mortgage of the realty may have priority of a chattel mortgage of machinery subsequently annexed, although the chattel mortgage be made at the time the articles were attached.<sup>5</sup> If the mortgagee of the chattels has actual know-

*Baird v. Jackson*, 98 Ill. 78; *Wood v. Whelen*, 93 Ill. 153; *Matzon v. Griffin*, 78 Ill. 477; *Dorr v. Dudderar*, 88 Ill. 107.

<sup>1</sup> *Kelly v. Austin*, 46 Ill. 156, 92 Am. Dec. 243.

<sup>2</sup> *State Savings Bank v. Kircheval*, 65 Mo. 682, 27 Am. Rep. 310; *Wight v. Gray*, 73 Me. 297.

<sup>3</sup> *Rowland v. Sworts*, 17 N. Y. Supp. 399.

<sup>4</sup> *Powers v. Dennison*, 30 Vt. 752; *Prince v. Case*, 10 Conn. 375, 27 Am. Dec. 675.

<sup>5</sup> *Bass Foundry v. Gallentine*, 99 Ind. 525; *Voorhees v. McGinnis*, 48 N. Y. 278; *Cooper v. Harvey*, 16 N. Y. Supp. 660; *Tibbetts v. Horne*, 65 N. H. 242, 23 Atl.



ledge of the mortgage of the realty, or constructive knowledge of it by record, his mortgage of chattels annexed or about to be annexed to the realty is subject to the legal consequences of the annexing of such chattels to the mortgaged realty. In a late case in Massachusetts the right to certain machinery in a building used as a machine-shop was contested between a mortgagee of the real estate and a mortgagee of the machinery described as personal property.<sup>1</sup> Before either of the mortgages was made, the mortgagor owned the machine-shop, and also the machinery, and used both for manufacturing purposes. It was held that such machines and their appurtenances as were specially adapted to be used in the shop and were annexed to it passed by the mortgage of the real estate. In this class were included punches, polishing frames, vibrators, a polisher and fan-blower, the pulleys, shafting, and hangers. These were bolted or screwed to the floors or timbers of the building, although it appeared that they could be removed without substantial injury to it. The wheels belonging to the polishing machines were placed in the same class, although they could be detached and removed without injury. But other articles not appearing to be essential parts of the shop, and not attached to it, were held not to pass by the mortgage of the real property, but by the mortgage of the personalty. Of these articles not considered fixtures in any sense of the word were the lathes fastened to a bench by screws, and operated by a foot movement; grindstones resting upon frames standing upon the floor; a rattler and frame, tack machines, the splitter, the anvils, the vises, the lathes, and a portable forge.

1747. It is not competent for an owner of real estate to bind existing mortgagees by any arrangement to treat as personalty annexations to the freehold. The legal character of such annexations is determined by the law to be real estate. Mortgagees, as well as other parties in interest, are entitled to the

Rep. 145. See, *contra*, *Padgett v. Cleveland*, 33 S. C. 339, 11 S. E. Rep. 1069. See, also, *Buzzell v. Cummings*, 61 Vt. 213, 18 Atl. Rep. 93.

<sup>1</sup> *Pierce v. George*, 108 Mass. 78, 11 Am. Rep. 310. And see, also, *Winslow v. Merchants' Ins. Co.* 4 Met. 306, 38 Am. Dec. 368; *McConnell v. Blood*, 123 Mass. 47, 25 Am. Rep. 12; *Allen v. Woodard*,

125 Mass. 400, 28 Am. Rep. 250; *Parsons v. Copeland*, 38 Me. 537; *Richardson v. Copeland*, 6 Gray, 536, 66 Am. Dec. 424; *Millikin v. Armstrong*, 17 Ind. 456; *First Nat. Bank v. Elmore*, 52 Iowa, 541, 3 N. W. Rep. 547; *Campbell v. Roddy*, 44 N. J. Eq. 244, 14 Atl. Rep. 279, reversing *Roddy v. Brick*, 42 N. J. Eq. 218, 6 Atl. Rep. 806.

benefit of this rule of law, which can be taken from them only by their own waiver.<sup>1</sup> Thus, a prior mortgage of real estate, which in terms, or as a matter of law, embraces articles of machinery or other fixtures, is not affected by a subsequent mortgage of such articles as chattels.<sup>2</sup> A mortgage of a farm covers hop-poles used upon the land for raising hops, whether they were upon the land when the mortgage was made or were subsequently put upon it; and the lien of such mortgage is superior to the title acquired by one who, with knowledge of the prior mortgage and of the mortgagor's insolvency, takes a chattel mortgage upon the poles immediately after their removal from the farm.<sup>3</sup>

1748. Chattels attached to the realty after the execution of a mortgage of it become a part of the mortgage security, if they are attached for the permanent improvement of the estate and not for a temporary purpose;<sup>4</sup> or if they are such as are regarded as permanent in their nature;<sup>5</sup> or if they are so fastened or attached to the realty that the removal of them would be an injury to it.<sup>6</sup> A mortgagor left in possession, who improves the premises by the erection of new works, or by the introduction

<sup>1</sup> *Hunt v. Bay State Iron Co.* 97 Mass. 279; *Burnside v. Twitchell*, 43 N. H. 390. And see *Voorhees v. McGinnis*, 48 N. Y. 278.

<sup>2</sup> *Smith v. Waggoner*, 50 Wis. 155, 6 N. W. Rep. 568; *Frankland v. Moulton*, 5 Wis. 1.

<sup>3</sup> *Sullivan v. Toole*, 26 Hun, 203.

<sup>4</sup> *Ex parte Belcher*, 4 Dea. & Chit. 703; *Hubbard v. Bagshaw*, 4 Sim. 326; *Ex parte Reynal*, 2 Mont., Dea. & De G. 443; *Holland v. Hodgson*, L. R. 7 C. P. 328; *Walmsley v. Milne*, 7 C. B. N. S. 115, 135; *Winslow v. Merchants' Ins. Co.* 4 Met. 306, 38 Am. Dec. 368; *Hopewell Mills v. Taunton Sav. Bank*, 150 Mass. 519, 23 N. E. Rep. 327; *Gardner v. Finley*, 19 Barb. 317; *Rice v. Dewey*, 54 Barb. 455, 472; *Sullivan v. Toole*, 26 Hun, 203; *Phoenix Mills v. Miller*, 4 N. Y. St. Rep. 787; *McFadden v. Allen*, 134 N. Y. 489, 32 N. E. Rep. 21, affirming 3 N. Y. Supp. 356; *Snedeker v. Warring*, 12 N. Y. 170; *Cooper v. Harvey*, 16 N. Y. Supp. 660; *McRea v. Central Nat. Bank*, 66 N. Y. 489; *Delaware, L. & W. R. Co. v. Oxford*

*Iron Co.* 36 N. J. Eq. 452; *Roberts v. Dauphin Deposit Bank*, 19 Pa. St. 71; *Bond v. Coke*, 71 N. C. 97; *Wood v. Whelen*, 93 Ill. 153; *Foote v. Gooch*, 96 N. C. 265, 1 S. E. Rep. 525, 60 Am. Rep. 411; *Bank of Louisville v. Baumierster*, 87 Ky. 6, 7 S. W. Rep. 170; *Wight v. Gray*, 73 Me. 297; *Dutro v. Kennedy*, 9 Mont. 101, 22 Pac. Rep. 763; *Seedhouse v. Broward*, 34 Fla. 509, 16 So. Rep. 425; *Chase v. Tacoma Box Co.* 11 Wash. 377, 39 Pac. Rep. 639; *Case Manuf. Co. v. Garven*, 45 Ohio St. 289, 13 N. E. Rep. 493; *Cunningham v. Cureton (Ga.)*, 23 S. E. Rep. 420.

In a few cases considerable stress has been placed upon the fact that the personal chattels had already been mortgaged as personal before they were attached to the realty. *Eaves v. Estes*, 10 Kans. 314, 15 Am. Rep. 345; *Tibbetts v. Moore*, 23 Cal. 208; *Davenport v. Shants*, 43 Vt. 546.

<sup>5</sup> *Coleman v. Stearns Manuf. Co.* 38 Mich. 30.

<sup>6</sup> *Clore v. Lambert*, 78 Ky. 224.

of new machinery intended to be permanent, is not at liberty to impair the increased security by removing them.<sup>1</sup> The same rule applies to articles annexed to the premises by a subsequent grantee or vendee in possession under an executory contract to purchase.<sup>2</sup> The question whether fixtures annexed to the realty after a mortgage of it has already been executed become a part of it, and thus become also subject to the mortgage, is a different one in some respects from that which arises when the same fixtures are already attached to the realty when the mortgage is made. As to those articles which in their nature are such as to render it doubtful whether they should be properly classed as fixtures or not, the tendency of the decisions seems to be to require stronger evidence of intention that things annexed to the realty after the making of the mortgage are actually fixtures, and therefore form with the land one security, than is required when they are affixed before the making of the mortgage.<sup>3</sup> The reason of this apparently is, that, when the personal articles are already attached to the realty when the mortgage is taken, it is more likely that they entered into the consideration of the parties, in estimating the value of the security, than it is when they are not attached to the realty and may never be.<sup>4</sup> It is true that there may be, in the taking of a mortgage before the fixtures are annexed, an expectation of an increased value to arise from their being subsequently attached to the realty, as when a building has been erected for a certain purpose, and it is contemplated that the machinery or other articles adapted to be used in it will be placed in it; but it is evident that less reliance would be placed upon this expectation than upon the actual fact of the existence of the things upon the mortgaged estate. It does not follow, however, from the fact that the fixtures constituted no part of the mortgage security when it was taken, that they may therefore be removed without any wrong to the mortgagee. He is entitled to the benefit of any improvement of the property from whatever

<sup>1</sup> *Foote v. Gooch*, 96 N. C. 265, 1 S. E. Rep. 525, 60 Am. Rep. 411.

<sup>2</sup> *Eastman v. Foster*, 8 Metc. 19; *Lynde v. Rowe*, 12 Allen, 100; *Glidden v. Bennett*, 43 N. H. 306; *Cooper v. Adams*, 6 Cush. 87; *Ogden v. Stock*, 34 Ill. 522, 85 Am. Dec. 332; *Poor v. Oakman*, 104 Mass. 309, 318; *McFadden v. Allen*, 134 N. Y.

489, 32 N. E. Rep. 21, affirming 3 N. Y. Supp. 356.

<sup>3</sup> *Tillman v. De Lacy*, 80 Ala. 103; *Gardner v. Finley*, 19 Barb. 317; *Buzzell v. Cummings*, 61 Vt. 213, 18 Atl. Rep. 93.

<sup>4</sup> *Clore v. Lambert*, 78 Ky. 224, approving text.

cause it may arise, just as he may suffer from a depreciation of it arising from accident or neglect, or from fluctuations in value due to general causes.<sup>1</sup>

The track of a railroad laid upon mortgaged lands under an arrangement with the mortgagor, without condemnation under the right of eminent domain, is subject to the mortgage lien, and may be sold with the land under foreclosure proceedings.<sup>2</sup> Rails necessarily become an actual part of the permanent structure of a railroad, and are inseparable from it without destruction to the road. In that respect they are like the stones and brick of a house. The same rule applies to other permanent structures of a railroad, such as bridges.<sup>3</sup>

A mortgage by a gas company of its real estate with all the appurtenances thereto, its gas-mains, sewer-pipes, and meters, covers an enlargement of its works, and an extension of its mains and pipes.<sup>4</sup> A mortgage by such company of its office furniture and fixtures covers additions made thereto from time to time as the necessities of the works required.<sup>5</sup>

1749. An equitable mortgagee has the same right to hold fixtures as part of his security that a legal mortgagee has.<sup>6</sup> A woollen manufacturer mortgaged, by deposit of the title-deeds, a piece of land, with a building upon it, and then built a mill upon the land and fitted it with a steam-engine and machinery necessary for his trade. Subsequently he assigned to another all the machinery and fixtures in the mill, and after this executed to the equitable mortgagee a legal mortgage of the estate. The Court of Queen's Bench held that all the machines which were fixed in a *quasi* permanent manner to the floor, roof, or side-walls passed to the equitable mortgagee, but that those which were merely removable articles passed to the assignee under the bill of sale.<sup>7</sup>

1750. By agreement of the mortgagee of the realty, chattels

<sup>1</sup> See *Roberts v. Dauphin Deposit Bank*, 19 Pa. St. 71.

<sup>2</sup> *Price v. Weehawken Ferry Co.* 31 N. J. Eq. 31; *Hunt v. Bay State Iron Co.* 97 Mass. 279; *Meriam v. Brown*, 128 Mass. 391; *Detroit & B. C. R. Co. v. Busch*, 43 Mich. 571, 6 N. W. Rep. 90.

<sup>3</sup> *Porter v. Pittsburgh Bessemer Steel Co.* 122 U. S. 267, 7 Sup. Ct. Rep. 1206.

<sup>4</sup> *Wood v. Whelen*, 93 Ill. 153.

<sup>5</sup> *Wood v. Whelen*, 93 Ill. 153.

<sup>6</sup> *Meux v. Jacobs*, L. R. 7 H. L. 481; *Williams v. Evans*, 23 Beav. 239; *Ex parte Astbury*, L. R. 4 Ch. App. 630.

<sup>7</sup> *Longbottom v. Berry*, L. R. 5 Q. B. 123, 39 L. J. N. S. Q. B. 37. See, also, *Tebb v. Hodge*, 39 L. J. N. S. C. P. 56.

may retain their character as personalty after their annexation to the mortgaged land, though in the absence of such agreement they would become fixtures to the land and subject to an existing mortgage.<sup>1</sup> Such an agreement binds the holder of an existing mortgage of the realty if he is a party to it. If he is not a party to it, ordinary chattels annexed to the realty for the permanent repair or improvement of it become a part of the realty and subject to the existing mortgage. But the chattels may be of such a character, and their annexation to the realty such, that they will keep their character as personalty if they are annexed with the intention of the owner of the equity and of the person interested in the chattels that they should retain their original character. Thus, telegraph or telephone wires strung upon poles may by such agreement remain personalty.<sup>2</sup>

1751. If the mortgagee assent to an arrangement between the mortgagor and a mechanic, whereby the latter builds and sets up a machine upon the mortgaged premises, under a contract that the machine shall remain his property until paid for, or if the mortgagee, being in possession, treats it as personal property and consents to its removal, a subsequent assignee of the mortgage cannot insist that under it he became the owner of the machine, as property annexed to the realty by the mortgagor. Such an agreement supersedes the general law as to fixtures between the mortgagor and mortgagee.<sup>3</sup> And such is the case, also, where a person sets up a steam-engine and boiler upon land owned by another, under an agreement that he may remove them at any time, and afterwards takes a mortgage of the land from the owner of it. The engine and boiler never become the property of the mortgagor, or fixtures to the land, and therefore are not included in the mortgage.<sup>4</sup>

A mortgagee waives his claim that certain machinery and tools in a mill are covered by his mortgage by requesting the mortgagor, after he had removed such machinery and tools, to repay to him the amount he had paid upon them as taxes, and by

<sup>1</sup> *Ford v. Cobb*, 20 N. Y. 344; *Sisson v. Hibbard*, 75 N. Y. 542; *Tyson v. Post*, 108 N. Y. 217, 15 N. E. Rep. 316; *San Antonio Brewing Asso. v. Arctic Ice Mach. Manuf. Co.* 81 Tex. 99, 16 S. W. Rep. 797; *Harkey v. Cain*, 69 Tex. 146, 6 S. W. Rep. 637.

<sup>2</sup> *Boston Safe Deposit & T. Co. v. Bankers' & Mechanics' Telegraph Co.* 36 Fed. Rep. 288.

<sup>3</sup> *Bartholomew v. Hamilton*, 105 Mass. 239; *Frederick v. Devol*, 15 Ind. 357. And see *Wight v. Gray*, 73 Me. 297.

<sup>4</sup> *Taft v. Stetson*, 117 Mass. 471.

accepting and retaining the money so demanded, with full knowledge of the facts and situation of the property.<sup>1</sup>

1752. An agreement made by the mortgagor of the realty with his mortgagee, at the time of giving the mortgage, to purchase machinery and place it upon the land as fixtures, may be shown as bearing upon the intent with which such machinery was subsequently placed upon the mortgaged land. Of course the mortgagee cannot enlarge the scope of his mortgage by proof of a contemporaneous agreement, not included in the mortgage itself, to the effect that a thing not a fixture in law or in fact should be considered and treated as such. Such agreement of its own force does not make that a fixture that otherwise would not be, but it is an important element in determining whether the machinery is or is not a fixture.<sup>2</sup>

1753. The fact that a chattel has been mortgaged before, or at the time, it was attached to the realty, has weight in leading to the determination that such mortgage carries the fixture as against a mortgage of the realty already existing;<sup>3</sup> and an agreement made by the mortgagor with a third person to whom the chattels belonged, that they should remain his after they are affixed to the realty until paid for, or that they should be subject until paid for to his right to remove them, has been held to have the same effect. In a case before the Court of Appeals of New York,<sup>4</sup> it was held that such an agreement preserved the character of the chattels as personal property when

<sup>1</sup> *Foster v. Prentiss*, 75 Me. 279.

<sup>2</sup> *Seedhouse v. Broward*, 34 Fla. 509, 16 So. Rep. 425, citing *Taylor v. Collins*, 51 Wis. 123, 8 N. W. Rep. 22; *Walker v. Schindel*, 58 Md. 360.

<sup>3</sup> *Eaves v. Estes*, 10 Kans. 314, 15 Am. Rep. 345; *Tibbetts v. Moore*, 23 Cal. 208; *Ford v. Cobb*, 20 N. Y. 344; *Sheldon v. Edwards*, 35 N. Y. 279; *United States v. New Orleans R. Co.* 12 Wall. 362; *First Nat. Bank v. Elmore*, 52 Iowa, 541, 3 N. W. Rep. 547; *Henry v. Von Brandenstein*, 12 Daly, 480; *Sword v. Low*, 122 Ill. 487, 13 N. E. Rep. 826; *Ellison v. Salem Coal & M. Co.* 43 Ill. App. 120; *Miller v. Wilson*, 71 Iowa, 610, 33 N. W. Rep. 128; *Hart v. Sheldon*, 34 Hun, 38; *Brand v. McMahon*, 15 N. Y. Supp. 39; *Case Manuf. Co. v. Garven*, 45 Ohio St. 289, 13

N. E. Rep. 493; *Carpenter v. Allen*, 150 Mass. 281, 22 N. E. Rep. 900; *Carpenter v. Walker*, 140 Mass. 416, 5 N. E. Rep. 160.

See *Bass Foundry v. Gallentine*, 99 Ind. 525, where it was held a mortgage of the realty attaches to machinery attached to it under an agreement that the title to the machinery should not pass until it was paid for.

<sup>4</sup> *Tift v. Horton*, 53 N. Y. 377, 13 Am. Rep. 537. This case is not entirely in accord with the case of *Voorhees v. McGinnis*, 48 N. Y. 278, which related to an engine and boilers which were covered by a chattel mortgage. It seems, however, that part of the articles had been attached to the realty before the execution of the chattel mortgage.

they would otherwise have become fixtures so as to pass by a mortgage of the realty. But it was said that, while there was no doubt that the owner of the land intended that the articles, which were an engine and boilers, should ultimately become a part of the realty, and be permanently affixed to it, yet this intention was subordinate to the prior intention, expressed by the agreement, that the act of annexing them should not change their character as chattels until the price should be fully paid.

If a person who takes a mortgage upon real property has actual notice of a mortgage upon chattels which are afterwards annexed to the mortgaged realty, he cannot hold such annexed chattels under his mortgage as against the holder of the chattel mortgage.<sup>1</sup>

**1754.** In those States in which a mortgage is regarded merely as a security, and not as a transfer of the legal title, there is a tendency to repudiate the old rule, and to hold, as to fixtures placed upon land already subject to a mortgage, that there is no absolute presumption that they were annexed for the benefit of the realty, and that if the mortgagor in possession either expressly or impliedly agrees that such fixtures shall remain the personal property of a third person who has placed them upon the land with the mortgagor's consent, the absence of an agreement to that effect on the part of the prior mortgagee will not of itself make the annexation a part of the mortgage security. "This would seem just, for, the annexation not having been made when he took his mortgage, he has not been misled, nor has he advanced anything on the faith of it, and hence ought not to be permitted to avail himself of it as a part of his security, contrary to the intention of the party making the annexation."<sup>2</sup>

**1755.** In some States, annexations to the realty made after

<sup>1</sup> Rowland v. West, 17 N. Y. Supp. 330. "On the question of notice, it is undoubtedly true that, so far as the plaintiff was dealing with real estate in taking her mortgage, she was not affected with notice by the filing of the chattel mortgage. As the court said at the circuit, as a purchaser of real estate she need only to inquire at the county clerk's office for liens on real estate, and was not required to extend her inquiry to the town clerk's office in search

of chattel mortgages. . . . Upon the facts in this case the filing of the defendant's chattel mortgage was notice to the plaintiff that the lien existed."

<sup>2</sup> Merchants' Nat. Bank v. Stanton, 55 Minn. 211, 220, 56 N. W. Rep. 821, per Mitchell, J., citing Crippen v. Morrison, 13 Mich. 23; Davenport v. Shants, 43 Vt. 546; Tift v. Horton, 53 N. Y. 380. And see Ellison v. Salem Coal & M. Co. 43 Ill. App. 120.

a mortgage of it are different in effect from such annexations made before such mortgage. One already holding a mortgage of the realty has no equitable claim to chattels subsequently annexed to it. He has parted with nothing on the faith of such chattels. Therefore the title of a conditional vendor of such chattels, or of a mortgagee of them before or at the time they were attached to the realty, is just as good against the mortgagee of the realty as it is against the mortgagor. For this reason, even a water-wheel and necessary shafting and gearing put into a saw-mill, under an agreement which amounted to a conditional sale, retain their identity and character as chattels as against a mortgagee whose mortgage rested on the mill when these things were attached.<sup>1</sup> This distinction is fully illustrated in a recent important decision in New Jersey, where a vendor of an engine boiler and machinery, knowing that they were to be annexed to the purchaser's realty, took a chattel mortgage from him for a part of the price, but failed to register it. The purchaser afterwards annexed these chattels to the real estate, upon which he had already given a mortgage. It was held that the lien of the chattel mortgage should be protected so far as it could be without diminishing the security which the mortgagee of the real estate would have had if the annexation had not been made.<sup>2</sup> The court say that the mortgagee of chattels, who consents to have them transmuted into a shape by which subsequent purchasers and mortgagees are liable to be subjected to deceptive dealings, seems to have no equitable ground upon which his lien should be recognized as against *bona fide* subsequent purchasers and mortgagees for value. "The entire spirit of our registry acts is opposed to the notion that, in such a juncture of affairs, the real estate purchaser would not be regarded as a *bona fide* purchaser against whom the chattel mortgage would be void." But as to a mortgagee of the real estate whose lien exists at the time the chattels are attached to the realty, such chattels would become subject to the lien of the real estate mortgage unless the chattel mortgage intervenes. Any property belonging to the mortgagor which he might choose to annex to the mortgaged premises would

<sup>1</sup> Page v. Edwards, 64 Vt. 124, 23 Atl. Rep. 917; Davenport v. Shants, 43 Vt. 546; Buzzell v. Cummings, 61 Vt. 213, 18 Atl. Rep. 93. See, in connection, Tibbetts v. Horne, 65 N. H. 242, 23 Atl. Rep. 145; Cochran v. Flint, 57 N. H. 514.  
<sup>2</sup> Campbell v. Roddy, 44 N. J. Eq. 244, 14 Atl. Rep. 279.



become realty. "But it is difficult to perceive," continue the court, "any equitable ground upon which the property of another which the mortgagor annexes to the mortgaged premises should inure to the benefit of a prior mortgage of the realty. The real estate mortgagee had no assurance, at the time he took his mortgage, that there would be any accession to the mortgaged property. He may have believed that there would be such an accession; but he obtained no rights, by the terms of his mortgage, to a lien upon anything but the property as it was conditioned at the time of its execution."

**1756.** *Hired fixtures are not generally subject to an existing mortgage.* Two boilers put into a steam-mill after the execution of a mortgage upon the mill, under an agreement with the mortgagor that he should have the use of them at a certain rental, and that they should remain the property of the person who put them in, and who should have the privilege of removing them at his pleasure, were not subject to the mortgage.<sup>1</sup>

In like manner machinery put into a mill subject to a mortgage, merely to exhibit it to the public by one not a party to the mortgage, is not covered by the mortgage.<sup>2</sup> Although such machinery be afterwards bought by one of the mortgagors, if this be not done with the intent to use it in connection with the business carried on upon the premises, it does not then come within the operation of the mortgage.<sup>3</sup>

**1757.** *The intention of the parties to a purchase-money mortgage, as regards fixtures, may be gathered from their intention in the other part of the transaction, namely, the sale of the property by the mortgagee to the mortgagor.* Thus the owner of a twine factory, the land upon which it was situated, and the machinery in the mill, contracted to sell the whole for a gross sum, and executed a conveyance describing the land only, and took back a mortgage with the same description. This was held to cover the machinery of the mill, on the ground that the parties manifestly intended the mortgage to cover the same property that passed by the deed.<sup>4</sup>

But where, upon the sale of a brewery, a deed was given of the real estate and a separate bill of sale of the fixtures, and the

<sup>1</sup> *Hill v. Sewald*, 53 Pa. St. 271, 91 Am. Dec. 209.

<sup>2</sup> *Stell v. Paschal*, 41 Tex. 640.

<sup>3</sup> *McRea v. Central Nat. Bank*, 66 N. Y. 489.

<sup>4</sup> *Stell v. Paschal*, 41 Tex. 640.

vendor took a mortgage for a part of the purchase-money, containing a description of the land alone, and the purchaser afterwards gave a mortgage of the fixtures mentioned in the bill of sale, it was held that the fixtures were not included in the mortgage of the land.<sup>1</sup> But if it appears that a manufacturing establishment was sold as a whole for a gross sum, the mere fact that a bill of sale was made of part of the fixtures does not change their character; but a mortgage of the land and improvements for the purchase-money will cover whatever was a fixture to the realty.<sup>2</sup>

The fact that in the sale of a mill property a bill of sale of machinery adapted to the use of the mill was given, and a chattel mortgage of it taken, does not change the character of the machinery from real to personal property, or estop the vendor from claiming that the machinery was part of the realty and passed by a deed of the realty and a mortgage back of the realty as security for the purchase-price.<sup>3</sup>

1758. A mortgage of fixtures as against the mortgagor's assignee in bankruptcy is a valid lien, although as against a prior mortgagee of the realty the fixtures would be real estate. If there be a prior mortgage of the land, and the prior mortgagee makes no claim to the fixtures, or his mortgage be fully satisfied out of the land without resorting to the fixtures, the mortgagee of the fixtures has a valid security upon them.<sup>4</sup> Judge Lowell, delivering a decision to this effect, said: "It is argued on behalf of the assignees that a contract to treat fixtures as chattels, whether it be express or implied, must be made before they are actually affixed to the realty. And for this some remarks of Dewey, J., delivering the opinion of the court in *Gibbs v. Estey*,<sup>5</sup> are quoted. But those remarks appear to be intended only for parol agreements concerning buildings and fixtures annexed by a stranger, and to mean that such a parol agreement or license cannot change real into personal estate after its character has been once established. So, if the question here were between the petitioner and the savings bank (the mortgagee of the land), no mere oral license of the latter, given after the engines were set up, could be shown. Growing wood or crops may be sold by

<sup>1</sup> Fortman v. Goepper, 14 Ohio St. 558;  
Zeller v. Adam, 30 N. J. Eq. 421.

<sup>2</sup> Morris's App. 88 Pa. St. 368.

<sup>3</sup> Cooper v. Harvey, 16 N. Y. Supp.  
660.

<sup>4</sup> *Ex parte Ames*, 1 Lowell, 561, 567.

<sup>5</sup> 15 Gray, 587.

parol, with a parol license to sever them, and I am inclined to think that trade fixtures might be. At all events, there can be no doubt that the owner can, in writing and for a valuable consideration, convey severable chattels in such a way as to bind himself and his assignee in bankruptcy by estoppel at least."

### VIII. *Mortgagee's Remedies for Removal of Fixtures.*

1759. The mortgagee may follow and take fixtures covered by a mortgage of the realty, and improperly removed, wherever he can find them.<sup>1</sup> The mortgagor himself can of course gain no right to hold them as against the mortgagee. A purchaser from the mortgagor has no such right, because he is affected with knowledge of the existing lien, and as against the mortgagee his purchase is therefore fraudulent and void. "Even without knowledge of the mortgage," says Chief Justice Lowrie, of Pennsylvania,<sup>2</sup> "it is hard to see how a purchaser could be relieved from this responsibility; for all purchasers, hirers, and renters are bound to ascertain, or take the risk of assuming, the title of their vendors and lessors. But may not a mortgagor sell in the usual way the lumber, firewood, coal, ore, or grain found growing on the land, without violating the rights of the mortgagee? Yes, he may, until the mortgagee stops him by ejectment or estrepement, for those things are usually intended for consumption and sale, and the sale of them is the usual means of raising the money to pay the mortgage. But in the case of a factory or other building it is from the use of it as it is, and not by its consumption or its sale by piecemeal, that all its profits are to be derived."

The mortgagee's right of action is based upon his general legal ownership under his mortgage, or upon his actual or constructive possession at the time of severance.<sup>3</sup> The mortgagee, having the legal title to the property, may maintain replevin for fixtures removed from the realty.<sup>4</sup> If after the foreclosure of a mortgage

<sup>1</sup> See Jones on Mortgages, §§ 687, 688.

<sup>2</sup> Hoskin v. Woodward, 45 Pa. St. 42.

<sup>3</sup> Jones on Mortgages, §§ 144, 688; Gooding v. Shea, 103 Mass. 360; Verner v. Betz, 46 N. J. Eq. 256, 19 Atl. Rep. 206. In Stowell v. Waddingham, 100 Cal. 7, 34 Pac. Rep. 436, it was held that the

removal of a house from the mortgaged land effectually removes it from the operation of the mortgage lien.

<sup>4</sup> Dutro v. Kennedy, 9 Mont. 101, 22 Pac. Rep. 763. See this case, also, on the question of damages in such suit for the removal of the fixtures.

the mortgagor wrongfully removes a house from the land, the purchaser having the legal title may maintain replevin for it.<sup>1</sup>

1760. The remedy of the mortgagee, in States where a mortgage is regarded as merely a lien for security, is not at law but in equity; not replevin to recover the property severed, but generally injunction to restrain the commission of waste.<sup>2</sup> When a fixture, as, for instance, a house, annexed to the real estate by the mortgagor, is afterwards, before the foreclosure of the mortgage, by him removed from the premises and sold, although it was part of the mortgaged premises, the mortgagee cannot recover it from the purchaser. By the removal he has lost his right to the property, though he might still have a cause of action for the waste.<sup>3</sup> But justice would seem to demand, and authority supports this position, that one purchasing what he either actually or constructively knows to be mortgaged to another shall not be allowed to shelter himself behind his wrongful act, and say that thereby the nature of the property was changed.

Even in New Jersey, where the mortgagee is regarded as having the legal title for the purpose of asserting and maintaining his possession, he is not allowed to maintain replevin for fixtures wrongfully removed;<sup>4</sup> but he may maintain an action on the case for the injury to the security.<sup>5</sup> Where a mortgagor in possession removed a building to another lot of land, to make room for part of a larger building and improvements, and sold the lot, and building affixed to it, to a *bona fide* purchaser, it was held, on a bill for foreclosure of the mortgage, that the building could not be returned to the mortgaged land, and the remedy of the mortgagee was at law for the removal of the building.<sup>6</sup>

If the owner of the equity of redemption moves a house from the mortgaged premises to another tract of land not covered by the mortgage, the lien on the house is not thereby impaired. The court may decree a sale of the house in its new *situs*, under the

<sup>1</sup> *Matzon v. Griffin*, 78 Ill. 477; *Jones on Mortgages*, § 688. 301, 1 N. W. Rep. 329, 50 N. W. Rep. 1099, 8 Cent. L. J. 325.

<sup>2</sup> *Vanderslice v. Knapp*, 20 Kans. 647; *Verner v. Betz*, 46 N. J. Eq. 256, 19 Atl. Rep. 206. <sup>4</sup> *Kircher v. Schalk*, 39 N. J. L. 335. See *Jones on Mortgages*, § 688.

<sup>3</sup> *Clark v. Reyburn*, 1 Kans. 281; *Harris v. Bannon*, 78 Ky. 568. To like effect, see *Citizens' Bank v. Knapp*, 22 La. Ann. 117; *Buckout v. Swift*, 27 Cal. 433, 87 Am. Dec. 90; *Woehler v. Endter*, 46 Wis. Rep. 206. <sup>5</sup> *Jackson v. Turrell*, 39 N. J. L. 329; *Verner v. Betz*, 46 N. J. Eq. 256, 19 Atl. Rep. 206.

<sup>6</sup> *Verner v. Betz*, 46 N. J. Eq. 256, 19 Atl. Rep. 206.

mortgage, with leave to the purchaser to remove or roll the building off again.<sup>1</sup> The mortgage lien may be enforced as against one who has purchased the house without knowledge that it had been removed from the mortgaged land.<sup>2</sup>

1761. The mortgagee, by virtue of his interest in the property, may maintain an action against the mortgagor for removing fixtures, and thereby causing substantial and permanent injury and depreciation to the mortgaged estate. The owner of the equity has no more right than a stranger to impair the security of the mortgage. The damages are measured by the extent of the injury, and not by the insufficiency of the remaining security. The mortgagee is not obliged to apply in the first place the property that remains at any valuation whatever. "He is entitled to the full benefit of the entire mortgaged estate for the full payment of his entire debt."<sup>3</sup>

But a different rule of damages prevails in States where a mortgage is regarded as merely an equitable conveyance to secure the debt. In those States it necessarily follows that an action by a mortgagee for any injury to the premises must be based, not upon the injury to the premises, in which he has only an equitable interest, but upon the loss occasioned to him by impairing his security. The measure of his damages is therefore limited to the loss he may sustain upon his security.<sup>4</sup> Under this rule the action must rest upon proof that, before the alleged injury, the mortgaged premises were of sufficient value to pay the plaintiff's mortgage, or a part of it, and that, by reason of such injury, they became inadequate for that purpose.<sup>5</sup> This is the rule in New York and New Jersey.<sup>6</sup>

<sup>1</sup> *Turner v. Mebane*, 110 N. C. 413, 14 S. E. Rep. 974.

<sup>2</sup> *Partridge v. Hemenway*, 89 Mich. 454, 50 N. W. Rep. 1084.

<sup>3</sup> *Byrom v. Chapin*, 113 Mass. 308. Otherwise where a mortgage is regarded as a mere lien and not a title to the land. There the insufficiency of the security must be shown. *Gardner v. Heartt*, 3 Denio, 232; *Lane v. Hitchcock*, 14 Johns. 213.

<sup>4</sup> *Van Pelt v. McGraw*, 4 N. Y. 110; *Schalk v. Kingsley*, 42 N. J. L. 32.

In the New York case the court said: "This action is not based upon the as-

sumption that the plaintiff's land has been injured, but that his mortgage as a security has been impaired. His damages, therefore, would be limited to the amount of injury to the mortgage, however great the injury to the land might be."

<sup>5</sup> *Schalk v. Kingsley*, 42 N. J. L. 32, 36, per Van Syckel, J.

<sup>6</sup> In *Schalk v. Kingsley*, 42 N. J. L. 32, 34, the Supreme Court, discussing these different rules of damages, their adaptation to the nature of the mortgagee's estate, and the practical results produced by each, say: "There is much force in the Massachusetts view, that the mort-

1762. When such injury has been done, there can be but one recovery for it, and a reasonable satisfaction made in good

gagee is entitled to be protected in the enjoyment of the security for which he contracted, however ample it may be, and the wrong-doer himself ought not to complain if he is compelled to restore what he unlawfully removed. Especially would this be so in the case of a mortgage maturing at a remote future period, when the real value of the premises would depend upon contingencies which might not be foreseen. But, while injustice may in some cases be done by rejecting this rule, it is not in harmony with the nature of the mortgagee's estate, and its adoption in practice would lead to many difficulties. In Massachusetts, by force and effect of the mortgage, and as between the parties to the mortgage, the right of possession also passes immediately to the mortgagee, and carries with it the incidents of a right to sue in trespass for any injury to the freehold. There it may be a necessary logical sequence that, in an action at law, the damages, which represent the injury to the premises, must go to the owner of the legal estate. . . .

"The objections to the Massachusetts rule are obvious, and are not met, in my judgment, by the court in *Gooding v. Shea*, before cited. Such litigation would frequently result to the benefit of the mortgagor, by whose consent the wrong was committed, by operating as a satisfaction of the mortgage when the premises were still ample to satisfy the mortgage debt. A more serious objection would exist in the fact that the action would be maintainable for every slight injury to the freehold. The person who purchased and removed a stick of timber or a cord of wood, or the mechanic who tore down an old building preparatory to the erection of a new one, or who made any alteration in the structures upon the premises which might be deemed in any degree detrimental to their value, would be amenable to suit. But, admitting that the third mortgagee may sue and recover for the

entire injury to the premises, how shall the damages be appropriated, and how would the wrong-doer be shielded from further recovery by the first and second mortgagees? The prior mortgagees could not be made parties to such suit, and they would not be bound by the verdict as to the amount of damages found in favor of the third mortgagee; and in our practice there is no method in which the injury to each mortgagee could be ascertained, and the distribution properly made. In fact, the rule repels the idea of distribution, for it is based upon the notion that the mortgagee plaintiff is entitled to the entire damage done to the lands. A rule which would subject a defendant to pay to each of several mortgagees the full amount of damage which he had committed upon the premises\* would unhesitatingly be condemned.

"It is therefore suggested, in the Massachusetts cases, that but one recovery would be allowed, and that would afterwards be appropriated under the direction of the court. Aside from the entire absence of any recognized procedure in our courts of law by which the several parties in interest could be bound by the verdict, and by which an appropriation could be made, such a course would manifestly be mere circumlocution, leading to the practical adoption of the other rule; for, in the end, the distribution would necessarily be made upon the basis of the actual loss to each mortgagee.

"All these difficulties will be obviated by adopting the injury to the security as the basis of damages. Under that rule, no suit can be maintained unless the plaintiff sustains a substantial injury; and each mortgagee in turn may, without reference to the other, recover such damage as he can show he has sustained on his part.

"The action must rest upon proof that, before the alleged injury, the mortgaged premises were of sufficient value to pay the plaintiff's mortgage, or a part of it,

faith to a prior mortgagee bars an action by a subsequent mortgagee.<sup>1</sup> If after the removal of the fixtures, and before the mortgagee brings an action of trespass to recover their value, he sells the mortgaged premises under a power of sale, and receives therefrom more than enough to pay his claim and all prior incumbrances, this fact may be shown in mitigation of his claim for damages.<sup>2</sup> But upon the question whether the injury had been settled and satisfied by payment to the first mortgagee, evidence is admissible to show that the articles removed were of greater value than the sum so paid, and that the damage done to the premises by their removal was greater than the value of the articles so removed.<sup>3</sup>

In Wisconsin it is held that the mortgagee after a decree of foreclosure may maintain an action for an injury done the mortgaged premises, either by the mortgagor or by a stranger, provided the security be thereby impaired and the mortgagor be insolvent.<sup>4</sup>

A mortgagee may recover the value of fixtures wrongfully removed from the mortgaged premises, although since such removal of them the property has been sold under a power in his mortgage, and he has himself purchased it at a price sufficient to satisfy his claim. His title is sufficient to sustain a cause of action.<sup>5</sup>

**1763. A mortgagee not having possession, or the right of possession, cannot maintain an action of tort in the nature of trespass *quare clausum fregit* against a stranger for breaking and entering the mortgaged premises and removing fixtures. But the right to recover damages for the value of the fixtures is separable from that to recover for "breach to the close."<sup>6</sup> The right of present possession only affects the form of action. The right to recover depends upon the title, and not upon possession or the right of possession. In an action of tort for forcibly entering the house and removing fixtures, the mortgagee, even before condition broken, may recover the full amount of damage done to the estate**

and that, by reason of such injury, they became inadequate for that purpose. In that view the extent of the loss can be approximately computed. This, in my opinion, is the better rule, and one which, in its practical application, will not be attended with any serious difficulty."

<sup>1</sup> Byrom v. Chapin, 113 Mass. 308.

<sup>2</sup> King v. Bangs, 120 Mass. 514.

<sup>3</sup> Byrom v. Chapin, 113 Mass. 308.

<sup>4</sup> Jones v. Costigan, 12 Wis. 677, 78 Am. Dec. 771.

<sup>5</sup> Laffin v. Griffiths, 35 Barb. 58.

<sup>6</sup> Gooding v. Shea, 103 Mass. 360, 4 Am. Rep. 563; Page v. Robinson, 10 Cush. 99; Woodman v. Francis, 14 Allen, 198.

by the removal, without regard to the sufficiency of his security. Until the whole debt be paid, he cannot be deprived of any substantial part of his entire security without full redress therefor. "As the injury affects the estate, it may be sued for directly by any one in whom the legal interest is vested. A second or third mortgagee, though not in possession, has a sufficient interest in the estate to maintain an action for such an injury. Although it is true that a stranger may thus be liable to either of the several mortgagees, as well as to the mortgagor, it does not follow that he is liable to all successively. The superior right is in the party having superiority of title. But the defendant can resist neither by merely showing that another may also sue or has sued. If he would defeat the claim of either, he must show that another having a superior right has appropriated the avails of the claim to himself. The demand is not personal to either mortgagee, but arises out of and pertains to the estate; and, when recovered, applies in payment, *pro tanto*, of the mortgage debt, and thus ultimately for the benefit of the mortgagor, if he redeems."<sup>1</sup>

1764. The mortgagee, even before entering into possession, can maintain an action against the mortgagor or any other person who severs and removes from the mortgaged estate any articles which have been annexed to and made part of it. It makes no difference as against the mortgagee that the fixtures are severed by accident. Therefore, if a building be partly destroyed by fire, the mortgagor has no right to sell such parts of it as are saved; and he cannot maintain an action for the price of such articles if the value of the land is less than the amount of the mortgage debt, and the mortgagee has entered for breach of the condition and forbidden the payment to the mortgagor.<sup>2</sup>

Where the mortgagee has no right to enter and the mortgagor can be deprived of possession only by a foreclosure and sale, he may retain possession after the sale until the delivery of the deed to the purchaser; but if he remove fixtures in the mean time, the purchaser may recover them by an action of replevin. The purchaser's deed takes effect by relation at the date of the mortgage, and passes fixtures subsequently annexed by the mortgagor.<sup>3</sup>

<sup>1</sup> Per Wells, J., in *Gooding v. Shea*, 103 Mass. 360, 4 Am. Rep. 563. In New Jersey the action is upon the case. *Jackson v. Turrell*, 39 N. J. L. 329.

<sup>2</sup> *Wilmarth v. Bancroft*, 10 Allen, 348.

<sup>3</sup> *Sands v. Pfeiffer*, 10 Cal. 258. See, however, § 1759; *Jones on Mortgages*, § 684; *Alexander v. Shonyo*, 20 Kans.



A mortgagee not in actual possession and who has not entered to foreclose cannot maintain trespass against the owner of the equity of redemption for cutting grass on the land, as the owner has a right to take every annual crop.<sup>1</sup> But if the property detached from the realty be fixtures subject as part of the realty to a mortgage, the mortgagee, whether in possession of the premises or not, may sue for the recovery of the things themselves in an action of replevin,<sup>2</sup> or may sue in trespass for damage done the freehold; or he may, in an action of trover, recover their value.<sup>3</sup> A tort-feasor has no right to complain of the form of the remedy.

#### IX. *Tenant's Fixtures.*<sup>4</sup>

1765. It is a settled rule of law that fixtures annexed to the freehold by a tenant for the purposes of trade or manufacture may be removed by him at the expiration of his term, whenever the removal of them is not contrary to any prevailing practice, and the articles can be removed without causing material injury to the freehold.<sup>5</sup> In a recent case before the Supreme Court of the United States the rule is stated thus: "As between landlord and tenant, or one in temporary possession of lands under any agreement whatever for the use of the same, the law is extremely indulgent to the latter with respect to the fixtures annexed for a purpose connected with such temporary possession."<sup>6</sup> The rule does not apply when the fixture is so annexed to the freehold that it cannot be removed without substantial injury both to the fixture and the freehold.<sup>7</sup> The purpose of this rule is to encourage the putting up of works beneficial to the public by persons whose tenure of the property is so short or so uncertain that they would not make the improvements, or put in the machinery necessary for the profitable pursuit of their busi-

705; *Vanderslice v. Knapp*, 20 Kans. 647

<sup>1</sup> *Woodward v. Pickett*, 8 Gray, 617.

<sup>2</sup> *Lafin v. Griffiths*, 35 Barb. 58.

<sup>3</sup> *Hitchman v. Walton*, 4 M. & W. 409; *Holland v. Hodgson*, L. R. 7 C. P. 328.

<sup>4</sup> Under this title no full statement of the law is intended, but only a brief reference to the subject, chiefly in its relation to mortgages.

<sup>5</sup> *Tyler on Fixtures*, p. 267; *Trappes*

*v. Harter*, 3 Tyrw. 603; *Coombs v. Beaumont*, 5 B. & Ad. 72; *Holbrook v. Chamberlin*, 116 Mass. 155, 17 Am. Rep. 146; *Guthrie v. Jones*, 108 Mass. 191; *McConnell v. Blood*, 123 Mass. 47, 25 Am. Rep. 12.

<sup>6</sup> *Wiggins Ferry Co. v. Ohio & M. Ry. Co.* 142 U. S. 396, 415, 12 Sup. Ct. Rep. 188, per Brown, J.

<sup>7</sup> *Collamore v. Gillis*, 149 Mass. 578, 22 N. E. Rep. 46.

ness, unless they had the right of removing these things at the termination of their tenancy. The reason of this rule does not apply when the fixtures are annexed by one who has, instead of the limited interest of a tenant, an unlimited ownership in fee; or an ownership which is qualified only by the condition of a mortgage upon the land which it is presumed he intends to fulfil, and which at any rate he would be estopped to say he did not intend to meet, and thus to keep the ownership of the land. Even after a forfeiture of the condition, he is allowed a considerable time within which to redeem, or else obtain the full value of the land, and of all the personal articles he has affixed to it, by a sale of the whole interest upon foreclosure. In a recent case before the Court of Exchequer,<sup>1</sup> the question of the application of this rule to the removal of a steam-engine and boiler, used in a sawmill upon the mortgaged premises before the execution of the mortgage, was fully discussed. It was found by the jury that these things were put up by the mortgagor, not to improve the inheritance, but for the better use of the property, and that they could be removed without any appreciable damage to the freehold; but the court held that these findings were immaterial, because the right of the mortgagee attached by reason of the annexation to the land, and therefore that the intention of the mortgagor in respect of them could not prevail against the legal effect of the deed.

This case was carried by appeal to the Exchequer Chamber,<sup>2</sup> where the judgment of the court below and the law there declared

<sup>1</sup> *Climie v. Wood*, L. R. 3 Exch. 257, 260. Kelly, C. B., delivering the judgment of the court, said: "It is a case between mortgagor and mortgagee, and no authority has been cited to show that a mortgagor is entitled to remove such trade fixtures. There have been several cases where the courts have decided that, upon the true construction of the mortgage deeds, trade fixtures were removable by the mortgagor, but not one to show that such right exists without a special provision. A mortgage is a security or pledge for a debt, and it is not unreasonable, if a fixture be annexed to land at the time of the mortgage, or if the mortgagor in possession afterward annexes a fixture to

it, that the fixtures shall be deemed an additional security for the debt, whether it be a trade fixture or a fixture of any other kind. It has already been observed that no authority has been cited to show that trade fixtures may be removed by the mortgagor, but there are several to the contrary; and, unless we are prepared to overrule them, our judgment must be adverse to the plaintiff."

To like effect see *Cullwick v. Swindell*, L. R. 3 Eq. Cas. 249, per Lord Romilly; *Ex parte Cotton*, 2 Mont., D. & De G. 725; *Hawtry v. Butlin*, L. R. 8 Q. B. 290, 21 W. R. 633; *Day v. Perkins*, 2 Sandf. Ch. 359; *Maples v. Millon*, 31 Conn. 598.

<sup>2</sup> *Climie v. Wood*, L. R. 4 Exch. 328.

were affirmed. Mr. Justice Willes, speaking of the reason why the engine and boiler, though they might have been removed by a tenant at the expiration of his term, yet could not be removed by a mortgagor, said: "And we are of opinion that the decisions which establish a tenant's right to remove trade fixtures do not apply as between mortgagor and mortgagee any more than between heir at law and executor. The irrelevancy of these decisions to cases where the conflicting parties are mortgagor and mortgagee was pointed out in *Walmsley v. Milne*,<sup>1</sup> and we concur with the observations made in that case by the Court of Common Pleas." As illustrating this distinction and the reason of it, the learned judge quotes the language of Lord Cottenham, in a case before the House of Lords, where it was sought to extend the rule in regard to trade fixtures to a case arising between an heir at law and executor.<sup>2</sup>

**1766.** If the premises are mortgaged by the lessor during the existence of a tenancy, the mortgagee, or any one deriving title to the premises under the mortgage, occupies the position of the lessor towards the lessee; and the latter may remove in that case fixtures erected by him whenever he could do so as against his lessor.<sup>3</sup>

**1767.** If fixtures be added to the property by a tenant at

<sup>1</sup> 7 C. B. N. S. 115.

<sup>2</sup> *Fisher v. Dixon*, 12 Cl. & F. 312, 328.

"The principle upon which a departure has been made from the old rule of law in favor of trade appears to me to have no application to the present case. The individual who erected the machinery was the owner of the land, and of the personal property which he erected and employed in carrying on the works: he might have done what he liked with it; he might have disposed of the land; he might have disposed of the machinery; he might have separated them again. It was therefore not at all necessary, in order to encourage him to erect those new works which are supposed to be beneficial to the public, that any rule of that kind should be established, because he was master of his own land. It was quite unnecessary, therefore, to seek to establish any such rule in favor of trade as applicable here, the whole be-

ing entirely under the control of the person who erected this machinery." To like effect Chief Justice Shaw, in a case before the Supreme Court of Massachusetts, *Winslow v. Merchants' Insurance Co.* 4 Met. 306, 38 Am. Dec. 368, said: "The mortgagor, to most purposes, is regarded as the owner of the estate; indeed, he is so regarded to all purposes, except so far as it is necessary to recognize the mortgagee as legal owner for the purposes of his security. The improvements, therefore, which the mortgagor, remaining in the possession and enjoyment of the mortgaged premises, makes upon them, in contemplation of law he makes for himself, and to enhance the general value of the estate, and not for its temporary enjoyment."

<sup>3</sup> *Globe Marble Mills Co. v. Quinn*, 76 N. Y. 23, 32 Am. Rep. 259.

will of the mortgagor after the mortgage, the right to remove them is determined by the rule which prevails as between mortgagor and mortgagee, and not that which prevails as between landlord and tenant; and they cannot be removed without the consent of the mortgagee.<sup>1</sup> It does not avail the tenant that he annexed the fixtures under a special contract with the mortgagor,<sup>2</sup> or that the holder of the mortgage, who seeks to enforce his claim to the fixtures, took the assignment of the mortgage with notice of the tenant's claim.<sup>3</sup> Where, during the pendency of a suit to foreclose a mortgage, a stranger, by permission of the mortgagor, erected a barn on the mortgaged premises, it was held that as against the mortgagee he had no right to remove it.<sup>4</sup>

A lessee who has erected a building upon mortgaged land, under an arrangement with the mortgagor, by leasing the building of the mortgagee after the latter has purchased the mortgaged premises upon foreclosure sale, is estopped from setting up title thereto in himself.<sup>5</sup>

When permanent structures are erected by a lessee upon the mortgaged estate, the mortgagee's consent is necessary for their removal;<sup>6</sup> but if they are erected for a temporary purpose, and

<sup>1</sup> *Lynde v. Rowe*, 12 Allen, 100; *Clary v. Owen*, 15 Gray, 522; *Hunt v. Bay State Iron Co.* 97 Mass. 279; *Tarbell v. Page*, 155 Mass. 256, 29 N. E. Rep. 585; *Day v. Perkins*, 2 Sandf. Ch. 359.

<sup>2</sup> *Clary v. Owen*, 15 Gray, 522.

The mortgage will even attach to machinery put into a mill by the maker for trial, and to be purchased upon its proving satisfactory. *Hamilton v. Huntley*, 68 Ind. 521, 41 Am. Rep. 593. In this case the person who ordered the machinery was not the owner, but a tenant of the mill. The machinery was attached to the mill only in a temporary manner, so that it could be removed without injury to the mill. It was to become the property of the tenant of the mill upon his giving his notes for the price of the machinery after sixty days' trial of it. The tenant refused to accept the machinery and give his notes as agreed, and he subsequently quit possession of the mill, leaving the machinery in it, and another tenant took possession

of it. It was held that, as between the makers of the machinery and the mortgagee, the machinery was part of the realty. See *Bass Foundry v. Gallentine*, 99 Ind. 525.

There is a tendency in some cases to hold that where the fixtures are erected by a tenant of the mortgagor, under an agreement that they shall remain the property of the tenant, the mortgagee cannot interpose, before taking possession of the premises, to prevent the carrying out of such agreement. *Tift v. Horton*, 53 N. Y. 377, 380, 13 Am. Rep. 537.

<sup>3</sup> *Clary v. Owen*, 15 Gray, 522.

<sup>4</sup> *Preston v. Briggs*, 16 Vt. 124.

<sup>5</sup> *Betts v. Wurth*, 32 N. J. Eq. 82.

<sup>6</sup> *First Nat. Bank v. Adam*, 138 Ill. 483, 28 N. E. Rep. 955. Chancellor Cooper, in *Cannon v. Hare*, 1 Tenn. Ch. 22, stated, in regard to fixtures in the form of actual buildings, the following conclusions: "(1) That the general rule is, that everything affixed to the freehold passes

with the intention of removing them, the lessee may remove them at any time during his term.<sup>1</sup>

1768. A tenant's right to remove fixtures is limited to the time of his occupancy, and his mortgagee has no greater rights.<sup>2</sup>

A lessee loses his right to remove his fixtures by renewing his lease without reserving the fixtures then on the premises,<sup>3</sup> though in a Michigan case it was held that a tenant's fixtures were not brought within a subsequent mortgage of the premises by his neglect to remove them on a renewal of his lease by a new landlord.<sup>4</sup> Where one who has leased land to a firm buys out the right of one of the partners and afterwards gives a mortgage on the premises, the possession of the new firm is notice to the mortgagee that erections put up by the former firm are not covered by the mortgage, because the other partner's rights cannot be taken away.<sup>5</sup>

If a lessee subsequently purchases the reversion of the premises, machinery and other fixtures set up by him become subject to an existing mortgage of the realty.<sup>6</sup>

If a lessee mortgages his leasehold estate, the same rules in relation to fixtures upon the estate apply as between him and his mortgagee that would apply if he owned the estate in fee.<sup>7</sup>

with the freehold, and that the rigor of this rule is only relaxed in exceptional cases; (2) that this general rule will prevail, even between landlord and tenant for years, unless the circumstances are such as to create an exception; (3) that an exception does exist, in favor of tenant for years, in the case of buildings erected principally for the purpose of trade, or in the nature of trade, or out-buildings not attached to the soil; (4) that no exception exists in favor of such tenant where the buildings are erected for use principally as dwelling-houses, or with a view of adding to the yearly income; (5) that it is doubtful how far a tenant for life is entitled to the exceptions in favor of a tenant for years, but it is certain that the rule of exception as to him is of more limited range; (6) that the decisions of late years lay little stress upon the mode of attachment to the soil, and more upon the relations of the par-

ties, the intention with which the buildings are erected, and the uses to which they are put. See *McDavid v. Wood*, 5 Heisk. 95."

<sup>1</sup> *Kelly v. Austin*, 46 Ill. 156, 92 Am. Dec. 243; *Early v. Burtis*, 40 N. J. Eq. 501.

\* *Morey v. Hoyt*, 62 Conn. 542, 26 Atl. Rep. 127, 19 L. R. A. 611; *Free v. Stuart*, 39 Neb. 220, 57 N. W. Rep. 991; *Smith v. Park*, 31 Minn. 70, 16 N. W. Rep. 490.

<sup>2</sup> *Carlin v. Ritter*, 68 Md. 478, 13 Atl. Rep. 370, 16 Atl. Rep. 301, where the authorities are collected.

<sup>4</sup> *Kerr v. Kingsbury*, 39 Mich. 150, 33 Am. Rep. 362.

<sup>5</sup> *Kerr v. Kingsbury*, 39 Mich. 150, 33 Am. Rep. 362.

<sup>6</sup> *Jones v. Detroit Chair Co.* 38 Mich. 92, 31 Am. Rep. 314.

<sup>7</sup> *Ex parte Bentley*, 2 M., D. & De G. 591; *Ex parte Wilson*, 4 Dea. & Chitty,

Trade fixtures set up by a partnership upon land owned by the individual partners, which the partnership has no interest in beyond the use, do not become part of the realty, and may be removed by the partnership when its occupation of the premises ceases.<sup>1</sup>

1769. If a lessee mortgages tenant's fixtures, and afterwards surrenders his lease, the mortgagee has a right to enter and sever them. The surrender of the term does not operate to extinguish the right or interest already granted, but is subject to that interest, for the support of which the original term still continues. The mortgagee's right to sever the fixtures from the freehold is an interest of a peculiar nature, in many respects rather partaking of the character of a chattel than of an interest in real estate. "But we think," said Mr. Justice Williams, in a case before the English Court of Common Pleas,<sup>2</sup> "that it is so far connected with the land that it may be considered a right or interest in it, which, if the tenant grants away, he shall not be allowed to defeat his grant by a subsequent voluntary act of surrender."

If a tenant mortgages as personal property a building which he has erected under a lease which provides that the building shall not be removed without the consent of the lessor, and afterwards mortgages his interest in the land and building as real property to one who has no actual notice of the chattel mortgage, though it was recorded as such, the real estate mortgage is superior to the chattel mortgage, for the building, by virtue of the terms of the lease, was a part of the realty.<sup>3</sup>

143, 2 Mont. & Ayr. 61; *Shuart v. Taylor*, 7 How. Pr. 251; *San Francisco Breweries v. Schurtz*, 104 Cal. 420, 38 Pac. Rep. 92.

<sup>1</sup> *Robertson v. Corsett*, 39 Mich. 777.

<sup>2</sup> *London & Westminster Loan and Discount Co. v. Drake*, 6 C. B. N. S. 798.

<sup>3</sup> *Fletcher v. Kelly*, 88 Iowa, 475, 55 N. W. Rep. 474.

## BOOK IV.

### CONCURRENT OWNERSHIP.

CHAPTER

XXXVIII. JOINT TENANCY.

XXXIX. TENANCY BY ENTIRETIES.

XL. TENANCY IN COMMON.

XLI. RELATIONS OF COTENANTS TO EACH OTHER.

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# BOOK IV.

## CONCURRENT OWNERSHIP.

### CHAPTER XXXVIII.

#### JOINT TENANCY.

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|------------------------------------------|----------------------------------------------------|
| I. Creation and incidents of, 1770-1780. | II. Statutes abolishing or restricting, 1781-1789. |
|------------------------------------------|----------------------------------------------------|

#### *I. Creation and Incidents of.*

1770. By the common law, an estate acquired in any way except by inheritance, by two or more persons not husband and wife, created a joint tenancy in them, the principal incident of which is the right of survivorship, by which the entire tenancy, on the decease of one tenant, remains to the survivors, and ultimately to the last survivor.<sup>1</sup> To create a tenancy in common, it was necessary to add restrictive or explanatory words, so as to expressly limit the estate to the grantees, to hold as tenants in common and not as joint tenants.<sup>2</sup> The feudal system was opposed to a division of tenures, and consequently favored joint estates. Until the policy of the law was changed by statute, it was essential to the creation of an estate in common that there should be something to show an intent that the grantees or devisees should hold by several and distinct titles, or that, instead of a survivorship to one, there should be an inheritance from both or all.<sup>3</sup>

1771. In recent times the doctrine of survivorship, except in a few cases, that of a grant or devise to trustees being the principal, is generally declared to be contrary to public policy.

<sup>1</sup> Washburn R. P. 5th ed. p. 406\*; 148 Ill. 357, 36 N. E. Rep. 81; Barclay Freeman on Cotenancy, § 10; Simons v. Hendrick, 3 Dana, 378.

McLain, 51 Kans. 153, 32 Pac. Rep. 919, <sup>3</sup> Bambaugh v. Bambaugh, 11 S. & R. 192; Galbraith v. Galbraith, 3 S. & R. 391; Webster v. Vandeventer, 6 Gray, 428; Gilbert v. Richards, 7 Vt. 203, 208.

<sup>2</sup> Bl. Com. 180, 193; Mette v. Feltgen,

Lord Hardwicke, in 1747, used these words:<sup>1</sup> "It is true that, in this court, joint tenancies are not favored, because they are a kind of estates that do not make provision for posterity; neither do I take it that courts of law do at this day favor them, although Lord Coke says that joint tenancy is favored because the law is against the division of tenures; but as tenures are many of them taken away, and in a great measure abolished, that reason ceases, and courts of law incline the same way with this court."

Title by joint tenancy has been destroyed by legislation except in a few instances, and now, with these exceptions, "the law itself never creates joint tenancy. It never comes through the steps of descent or distribution. Parties alone can create the tenancy. The law in this respect allows parties to do what the law declines to do itself. The principle is emasculated by the privilege extended by the law to either joint tenant to terminate the tenancy by a conveyance to a third person."<sup>2</sup>

**1772. The four unities.** — "The properties of a joint estate," says Blackstone, "are derived from its unity, which is fourfold, — the unity of interest, the unity of title, the unity of time, and the unity of possession; or, in other words, joint tenants have one and the same interest, accruing by one and the same conveyance, commencing at one and the same time, and held by one and the same undivided possession."<sup>3</sup>

Unity of interest requires that the shares of the joint tenants, whatever be their number, shall be equal, and that the duration of their estates shall be the same.<sup>4</sup> One having an estate for life cannot hold in joint tenancy with one having an estate in fee. One having an estate in fee cannot hold in joint tenancy with one having an estate in tail.

All natural persons may be joint tenants if their estates are the same, either in fee, for life, or for years; but a natural person cannot hold jointly with a corporation, nor can two or more corporations hold as joint tenants.<sup>5</sup>

<sup>1</sup> *Hawes v. Hawes*, 1 Wils. 165; *Caines v. Grant*, 5 Binn. 119; *Hoffman v. Stigers*, 28 Iowa, 302. *Farr v. Trustees*, 83 Wis. 446, 53 N. W. Rep. 738; *De Witt v. San Francisco*, 2 Cal. 289.

<sup>2</sup> *Stetson v. Eastman*, 84 Me. 366, 24 Atl. Rep. 868, per Peters, C. J. <sup>4</sup> 2 Black. Com. 181.

<sup>3</sup> 2 Black. Com. 179, 180; *Case v. Owen*, 139 Ind. 22, 38 N. E. Rep. 395; <sup>5</sup> *Co. Litt.* 190 a; *De Witt v. San Francisco*, 2 Cal. 289.

Unity of title requires that the joint estate shall arise by one and the same act, or by one and the same deed, one and the same devise, or one and the same disseisin. Joint tenants cannot acquire under different titles.<sup>1</sup>

Unity of time requires that the estate of each joint tenant shall have arisen at the same moment, or shall have vested at one and the same time. "But by means of limitations operating by way of springing or shifting use or executory devise, the interests of joint tenants may be made to arise at different times."<sup>2</sup> Under devises this unity is not requisite.

Unity of possession is an essential feature of a joint estate. Each joint tenant is seised of an undivided share of the whole parcel, and not merely of the whole of an undivided moiety or other share of the whole.<sup>3</sup> Each is entitled to an equal undivided share of the whole, but each is in possession of the whole. The possession of one is the possession of all.<sup>4</sup> This incident applies to all cotenants, whether joint tenants, coparceners, or tenants in common.

**1773.** The distinguishing incident of title by joint tenancy is the doctrine of survivorship,<sup>5</sup> by force of which, upon the death of one joint tenant, the joint estate remains unimpaired with the survivors, and ultimately with the last survivor, instead of passing to the heirs of the deceased tenant.

Neither can a joint tenant devise his interest in the joint estate; for upon his death, another joint tenant surviving, there is no estate or interest in the joint estate left for his will to take effect upon.<sup>6</sup>

There can be neither dower nor curtesy in an estate held in joint tenancy, as the right of survivorship takes precedence.<sup>7</sup>

**1774.** Partition could not be enforced by joint tenants at common law, though it generally may be under the statutes

<sup>1</sup> 2 Black. Com. 181.

<sup>2</sup> Edwards' Property in Lands, 155.

<sup>3</sup> Co. Litt. 218.

<sup>4</sup> Farr v. Trustees, 83 Wis. 446, 53 N. W. Rep. 738; Thornton v. Thornton, 3 Rand. (Va.) 179.

<sup>5</sup> Case v. Owen, 139 Ind. 22, 38 N. E. Rep. 395; Simons v. McLain, 51 Kans. 153, 32 Pac. Rep. 919, per Horton, C. J.; Morris v. McCarty, 158 Mass. 11, 32 N. E. Rep. 938; Mette v. Feltgen, 148 Ill.

357, 36 N. E. Rep. 81; Spencer v. Austin, 38 Vt. 258.

<sup>6</sup> 2 Black. Com. 186; Nichols v. Denny, 37 Miss. 59; Duncan v. Forrer, 6 Binn. 193.

<sup>7</sup> Mayburry v. Brien, 15 Pet. 21; Midgley v. Walker, 101 Mich. 583, 60 N. W. Rep. 296, per McGrath, C. J.; Babbitt v. Day, 41 N. J. Eq. 392, 5 Atl. Rep. 275; Caines v. Grant, 5 Binn. 119.

relating to partition.<sup>1</sup> A joint tenancy at common law might, however, be destroyed by a voluntary partition by the joint tenants by deed. By statute, joint tenants may be compelled to make partition.<sup>2</sup>

1775. It is settled in law that a joint tenant may alienate or convey to a stranger his part of interest in the realty, and thereby defeat the right of the survivor.<sup>3</sup> The unity of title is then destroyed, and the joint tenancy is at an end. The grantee and the remaining joint tenant hold by several titles and as tenants in common.<sup>4</sup> But if there were more than two joint tenants, a conveyance by one does not destroy the right of survivorship between the others, who will still hold their shares in joint tenancy.<sup>5</sup>

1776. One joint tenant may make a lease of the joint property, but this will bind only his share of it. Such lease is a severance of the joint tenancy *pro tanto*, and to the extent of the lessor's interest the lease is binding upon the survivor. An effectual lease of the joint estate can only be made by all the joint tenants. Then, upon the death of one joint tenant, the tenant holds the whole as a tenant of the survivors, who are entitled to the whole rent.<sup>6</sup>

1777. One joint tenant may mortgage his interest in the joint estate.<sup>7</sup> Any interest in real estate which a person may sell and convey he may also mortgage.<sup>8</sup> The joint tenancy is severed by the mortgage, at any rate for the time being, and until it is paid or redeemed.<sup>9</sup>

1778. The individual interest of one joint tenant is subject to levy and sale upon execution against him.<sup>10</sup> The levy and sale operate as a severance of the joint tenancy.

<sup>1</sup> Wilken v. Young (Ind.), 41 N. E. Rep. 68.

<sup>2</sup> The earliest statutes were those of 31st & 32d Hen. VIII., and the statutes of the several States regarding partition apply to joint tenants.

<sup>3</sup> 1 Prest. Est. 136; Midgley v. Walker, 101 Mich. 583, 60 N. W. Rep. 296, per McGrath, C. J.; Wilken v. Young (Ind.), 41 N. E. Rep. 68; Bevins v. Cline, 21 Ind. 37, 40; Duncan v. Forrer, 6 Binn. 193.

<sup>4</sup> Edwards v. Champion, 1 De G. & Sm.

75; Robison v. Codman, 1 Sumner, 121; Sneed v. Waring, 2 B. Mon. 522.

<sup>5</sup> 2 Bl. Com. p. 186; Midgley v. Walker, 101 Mich. 583, 60 N. W. Rep. 296.

<sup>6</sup> Doe v. Summersett, 1 B. & Ad. 135, 140.

<sup>7</sup> York v. Stone, 1 Salk. 158; Simpson v. Ammons, 1 Binn. 175; Wilken v. Young (Ind.), 41 N. E. Rep. 68.

<sup>8</sup> Jones on Mortgages, § 136.

<sup>9</sup> Re Pollard's Estate, 3 De G., J. & Sm. 541; Simpson v. Ammons, 1 Binn. 175.

<sup>10</sup> Thompson v. Mawhinney, 17 Ala.

**1779.** No charge upon the interest of one cotenant, such as a rent or a right of way, binds the estate in the hands of the survivor, unless the charge be created by the one who becomes such survivor, in which case the charge becomes binding upon the whole estate in his hands. And so, in case he assigns his interest and is the survivor, the charge binds the whole estate in the hands of the assignee.<sup>1</sup>

**1780. Tenancy in coparcenary.** — A joint estate can only be created by purchase, that is, it must arise either by conveyance, by devise, or by disseisin,<sup>2</sup> or by any mode of acquiring an estate except inheritance. Two or more persons taking an estate by descent from the same ancestor are coparceners.<sup>3</sup> By the common law, by reason of the rule of primogeniture, coparceners must be either females or males who are the heirs of a female coparcener.

Coparceners, or parceners, are so called, says Littleton,<sup>4</sup> because they may be constrained to make partition. In this respect a tenancy in coparcenary differs from a joint tenancy under the early common law before the statute of Henry VIII., for a partition could be had between joint tenants only with their consent and by their joint act.

The general properties of an estate in coparcenary are in most respects the same as those of an estate in joint tenancy. They have the same unities of interest, of title, and of possession. But no unity of time is necessary. "For if a man hath two daughters, to whom his estate descends in coparcenary, and one dies before the other, the surviving daughter and the heir of the other, or, when both are dead, their two heirs, are still parceners, the estates vesting in each of them at different times, though it be the same quantity of interest and held by the same title."<sup>5</sup> A tenancy in coparcenary lacks the chief characteristic of a joint

362; *Baker v. Shepherd*, 37 Ga. 12; *Wilken v. Young* (Ind.), 41 N. E. Rep. 68; *Thornburg v. Wiggins*, 135 Ind. 178, 34 N. E. Rep. 999; *Midgley v. Walker*, 101 Mich. 583, 60 N. W. Rep. 296; *Blevins v. Baker*, 11 Ired. 291; *Bigelow v. Toppliff*, 25 Vt. 273; *Galusha v. Sinclear*, 3 Vt. 394.

<sup>1</sup> 1 Washburn, Real Prop. 411\*; *Midgley v. Walker*, 101 Mich. 583, 585, 60 N. W. Rep. 296, per McGrath, C. J.

<sup>2</sup> Littleton says, § 278: "If two or three disseise another of any lands or tenements to their own use, then the disseisors are joint tenants." And see *Putney v. Dresser*, 2 Met. 583.

<sup>3</sup> *Campbell v. Wallace*, 12 N. H. 362, 37 Am. Dec. 219.

<sup>4</sup> § 241.

<sup>5</sup> 2 Black. Com. 188.

tenancy, the right of survivorship. Upon the death of one tenant his share descends severally to his heirs, though the unity of possession continues. "And so long as the lands continue in a course of descent and united in possession, so long are the tenants therein, whether male or female, called parceners."<sup>1</sup> Coparceners are not seised, as are joint tenants, of the entirety of the estate, but only of undivided shares.

With respect to the use and enjoyment of the estate the rights and duties of coparceners are, in general, similar to those of joint tenants.<sup>2</sup>

A coparcener may convey his interest by deed or devise it. His grantee or devisee will hold as tenant in common with the other coparcener or coparceners, while the remaining coparceners, if there are two or more, will continue to hold in coparcenary as regards their shares.<sup>3</sup>

Estates in coparcenary are in this country quite generally turned into estates in common, and they are so seldom referred to that it seems unnecessary to say more in regard to their characteristics.

## II. *Statutes abolishing or restricting.*

1781. In nearly all the States the common law concerning estates in joint tenancy continued until the rule was changed by statute. In a few States, however, the judiciary, regarding the policy of the law as opposed to the notion of survivorship, declared that estates in joint tenancy did not exist. Thus in Connecticut at an early day the courts entirely ignored what they styled "the odious and unjust doctrine of survivorship."<sup>4</sup> In Ohio it was held that joint tenancy did not exist, on account of the statute of distribution. The Supreme Court in an early case say: "The reasons which gave rise to this description of estate in England never existed with us. The *jus accrescendi* is not founded in principles of natural justice, nor in any reasons of policy applicable to our society or institutions. But, on the contrary, it is adverse to the understandings, habits, and feelings of our people."<sup>5</sup>

<sup>1</sup> 2 Black. Com. 188.

<sup>2</sup> Edwards' Property in Land, 164.

<sup>3</sup> Edwards' Property in Land, 164.

<sup>4</sup> Phelps v. Jepson, 1 Root, 48, 1 Am. Dec. 33; Whittlesy v. Fuller, 11 Conn. 337, 340.

<sup>5</sup> Sergeant v. Steinberger, 2 Ohio, 305, 15 Am. Dec. 553, followed in Wilson v. Fleming, 13 Ohio, 68; Penn v. Cox, 16 Ohio, 30; Miles v. Fisher, 10 Ohio, 1.

**1782.** In nearly all the States joint tenancies are by statute turned into tenancies in common, unless the instrument creating the estate expressly states that it is to be held in joint tenancy;<sup>1</sup> or unless it manifestly appears from the tenor of the instrument that it was intended to create a joint tenancy.<sup>2</sup>

Survivorship is destroyed by a different form of enactment in several States, the statute declaring that a joint tenancy is severed by the death of one of the joint tenants, whereupon the estate descends or vests and is subject to debts, curtesy, dower, or distribution, as if it were held in common.<sup>3</sup>

In two States the legislation upon this subject follows neither of the two prevailing forms, but abolishes joint tenancy in general terms.<sup>4</sup>

<sup>1</sup> **Arkansas:** Dig. of Stats. 1894, § 704. **California:** Civ. Code, §§ 683, 686. **Colorado:** Annot. Stats. 1891, § 429. **Delaware:** R. Code 1893, p. 656, §§ 1, 2. **Idaho:** R. S. 1887, § 2907. **Illinois:** R. S. 1889, ch. 30, § 5, in force since 1827. *Bradford v. Bennett*, 48 Ill. App. 145. **Indiana:** R. S. 1894, § 3341. **Iowa:** R. S. 1888, § 3110. **Maine:** R. S. 1883, ch. 73, § 7. **Maryland:** Pub. G. L. 1888, art. 50, § 13. **Massachusetts:** Acts 1885, ch. 237; R. S. Supp. 1888, ch. 237, §§ 1, 2. **Michigan:** Annot. Stats. 1882, § 5560. **Minnesota:** G. S. 1894, § 4405. **Missouri:** R. S. 1889, § 8844. **Montana:** Comp. Stats. 1887, p. 664, § 277. **Nevada:** G. S. 1885, § 2610. **New Hampshire:** P. S. 1891, ch. 137, § 14. **New Jersey:** R. S. 1877; Conveyances, § 78; *Babbitt v. Day*, 41 N. J. Eq. 392. **New Mexico:** Comp. Laws 1884, § 2764. **New York:** 4 R. S. 1889, p. 2435, § 44. **North Dakota:** Dak. Comp. L. 1887, § 2695. **Oklahoma:** R. S. 1893, § 1637. **Rhode Island:** P. S. 1882, ch. 172, § 1; G. L. 1896, ch. 201, § 1; *Church v. Church*, 15 R. I. 138, 23 Atl. Rep. 302. **South Dakota:** Dak. Comp. L. 1887, § 2695. **Vermont:** R. S. 1894, § 2202, statute of 1797. **Wisconsin:** Annot. Stats. 1889, § 2068.

<sup>2</sup> **Indiana:** R. S. 1894, § 3341. **Massachusetts:** Acts 1885, ch. 237; P. S. Supp. ch. 237, §§ 1, 2. **Mississippi:** Annot. Code 1892, § 2441, act 1822; *Day v. Davis*,

64 Miss. 253, 8 So. Rep. 203. **New Hampshire:** P. S. 1891, ch. 137, § 14. **Rhode Island:** P. S. 1882, ch. 172, § 1; G. L. 1896, ch. 201, § 1. **Vermont:** R. S. 1894, § 2202.

<sup>3</sup> **Alabama:** Code 1886, § 1837, does not apply to trustees. *Parsons v. Boyd*, 20 Ala. 112. **Arizona T.:** R. S. 1887, § 1469. **Colorado:** Annot. Stats. 1891, § 2526. **Florida:** R. S. 1892, § 1819. **Illinois:** R. S. 1892, ch. 76, § 1. In force since Jan. 13, 1821. *Mette v. Feltgen* (Ill.), 27 N. E. Rep. 911. Applies to personalty as well as realty. *Hay v. Bennett*, 153 Ill. 271, 38 N. E. Rep. 645. **Kansas:** Laws 1891, ch. 203, act of March 10, 1891; *Simons v. McLain* (Kans.), 32 Pac. Rep. 919. **Kentucky:** G. S. 1894, § 2348, act of 1796. **North Carolina:** Code 1883, § 1326, act of 1784, ch. 204, applicable only to estates in fee, and not to joint estates for life. *Rowland v. Rowland*, 93 N. C. 214. **Pennsylvania:** 1 Brightly's Purdon's Dig. 1894, p. 1089, act of 1812; *Jones v. Cable*, 114 Pa. St. 586, 7 Atl. Rep. 791. **South Carolina:** G. S. 1882, § 1851. Since the act of 1791. *Varn v. Varn*, 32 S. C. 77, 10 S. E. Rep. 829. **Tennessee:** Code 1884, § 2817. **Texas:** R. S. 1879, art. 1655, act of March 18, 1848. **Virginia:** Code 1887, § 2430. **Washington:** G. S. 1891, § 1483. **West Virginia:** Code 1891, ch. 71, § 18.

<sup>4</sup> **Georgia:** Joint tenancy does not exist

**1783.** Important exceptions are made in the statutes which convert joint tenancies into tenancies in common. In many States these statutes do not apply in case of conveyances to trustees, who continue to hold the legal estate in joint tenancy;<sup>1</sup> nor do they apply in case of estates held by executors.<sup>2</sup>

The statutes of several States are declared not to apply to conveyances in mortgage,<sup>3</sup> or to conveyances to husband and

in this State, and all such estates, under the English law, will be held to be tenancies in common. Wherever two or more persons, from any cause, are entitled to the possession, simultaneously, of any property in this State, a tenancy in common is created. Tenants in common may have unequal shares: they will be held to be equal unless the contrary appears. The fact of inequality does not give the person holding the greater interest any privileges, as to possession, superior to the person owning a lesser interest, so long as the tenancy continues. Code 1882, §§ 2300, 2301. **Oregon:** Joint tenancy is abolished, and all persons having an undivided interest in real property are to be deemed and considered tenants in common. Annot. Laws 1892, § 2991.

<sup>1</sup> **Arkansas:** Dig. of Stats. 1884, § 647. **California:** Civ. Code, § 686. When granted or devised to them as joint tenants. **Colorado:** Annot. Stats. 1891, § 429. **Delaware:** R. Code 1893, p. 656, § 1. **Idaho:** R. S. 1887, § 2907. **Illinois:** R. S. 1889, ch. 30, § 5. **Indiana:** R. S. 1894, § 3342. **Kansas:** Laws 1891, ch. 203. **Kentucky:** G. S. 1894, § 2349. **Maine:** R. S. 1883, ch. 73, § 13. **Massachusetts:** P. S. Supp. 1888, Acts 1885, ch. 237, §§ 1, 2. **Michigan:** Annot. Stats. 1882, § 5561. **Minnesota:** G. S. 1894, § 4406. **Mississippi:** Annot. Code 1892, § 2441. This proviso was adopted in the Code of 1857. *Day v. Davis*, 64 Miss. 253. **Missouri:** R. S. 1889, § 8844. **Montana:** Comp. Stats. 1887, p. 664, § 277. **Nevada:** G. S. 1885, § 2610. **New Jersey:** R. S. 1877,

p. 1224, pl. 1, act of April 1, 1868; *Boston Franklinite Co. v. Condit*, 19 N. J. Eq. 394. **New York:** 4 R. S. 1889, p. 2435, § 44. **North Carolina:** Code 1883, § 1326. **North Dakota:** Dak. Comp. L. 1887, § 2692. **Oklahoma:** R. S. 1893, § 1637. **Rhode Island:** G. L. 1896, ch. 201, § 1. **Vermont:** R. S. 1894, § 2202. **Virginia:** Code 1887, § 2431. **West Virginia:** Code 1891, ch. 71, § 19. **Wisconsin:** Annot. Stats. 1889, § 2069.

<sup>2</sup> **California:** When granted or devised to them as joint tenants. Civ. Code, § 683. **Colorado:** Annot. Stats. 1891, § 429. **Delaware:** R. Code 1893, p. 656, § 1. **Idaho:** R. S. 1887, § 2907. **Illinois:** R. S. 1889, ch. 30, § 5. **Indiana:** R. S. 1894, § 3342. **Kentucky:** G. S. 1894, § 2349. **Michigan:** Annot. Stats. 1882, § 5561. **Minnesota:** G. S. 1894, § 4406. **Missouri:** R. S. 1889, § 8844. **Montana:** Comp. Stats. 1887, p. 664, § 277. **New York:** 4 R. S. 1889, p. 2435, § 44. **Nevada:** G. S. 1885, § 2610. **North Carolina:** Code 1883, § 1502. **Rhode Island:** G. L. 1896, ch. 201, § 1. **South Dakota:** Dak. Comp. L. 1887, § 2692. **Oklahoma:** R. S. 1893, § 1637. **Virginia:** Code 1887, § 2431. **West Virginia:** Code 1891, ch. 71, § 19. **Wisconsin:** Annot. Stats. 1889, § 2069.

<sup>3</sup> **Indiana:** R. S. 1894, § 3342. **Maine:** R. S. 1883, ch. 73, § 7. **Massachusetts:** P. S. Supp. 1888, ch. 237, § 2, Acts 1885, ch. 237. **Michigan:** Annot. Stats. 1882, § 5561. **Minnesota:** G. S. 1894, § 4406. **Mississippi:** Annot. Code 1892, § 2441. **Wisconsin:** Annot. Stats. 1889, § 2069.



wife,<sup>1</sup> or in case of property held in partnership,<sup>2</sup> or in case of property acquired as community property.<sup>3</sup>

**1784.** Whether the acts converting joint estates into tenancies in common or abolishing survivorship are retrospective in their operation is a question upon which the courts are divided in opinion. On the one hand it is said that such legislation does not impair estates in joint tenancy which had vested at the time of its passage, but on the contrary enlarge and make more valuable the estates or interests of the owners.<sup>4</sup> On the other hand, such acts, if given a retrospective force, are regarded as impairing the obligation of a contract, and therefore unconstitutional.<sup>5</sup>

**1785.** The legislation converting joint tenancies into tenancies in common merely meets and reverses the presumption at common law that conveyances and devises to two or more persons create joint tenancies, the presumption under the statutes being that they create tenancies in common.<sup>6</sup> Joint tenancies may be created by express limitation notwithstanding the statutes.

**1786.** Manifest intention to create an estate in joint tenancy.— Under a statute which provides that a conveyance to two or more persons shall be construed to create a tenancy in common unless it shall manifestly appear from the tenor of the instrument that it was intended to create an estate in joint tenancy, a conveyance to the grantees “jointly” sufficiently indicates an intention to create a joint estate in them, without adding words negating an estate in common.<sup>7</sup> “As tenants in common

<sup>1</sup> **Indiana** : R. S. 1894, § 3342. **North Carolina** : Phillips v. Hodges, 109 N. C. 248, 13 S. E. Rep. 769; Motley v. Whitmore, 2 Dev. & B. 537; Simonton v. Cornelius, 98 N. C. 433, 4 S. E. Rep. 38. **Michigan** : Annot. Stats. 1882, § 5561. **Missouri** : R. S. 1889, § 8844. **Vermont** : R. S. 1894, § 2202. **Wisconsin** : Annot. Stats. 1889, § 2069.

<sup>2</sup> **California** : Civ. Code, § 686. **North Carolina** : Code 1883, § 1326. **North Dakota** : Dak. Comp. L. 1887, § 2695. **South Dakota** : Dak. Comp. L. 1887, § 2695. **Tennessee** : Code 1884, § 2818.

<sup>3</sup> **California** : Civ. Code, § 686. **North Dakota and South Dakota** : Comp. L. 1887, § 2695.

<sup>4</sup> **Massachusetts** : Miller v. Miller, 16 Mass. 59, per Parker, C. J.; Annable v. Patch, 3 Pick. 360. **New Hampshire** : Miller v. Dennett, 6 N. H. 109. **Pennsylvania** : Bambaugh v. Bambaugh, 11 S. & R. 191, per Tilghman, C. J.

<sup>5</sup> **California** : Greer v. Blanchard, 40 Cal. 194. **New Jersey** : Den v. Van Riper, 16 N. J. L. 7.

<sup>6</sup> Jones v. Cable, 114 Pa. St. 586, 7 Atl. Rep. 791; Arnold v. Jack, 24 Pa. St. 57, 1 Grant, 405; Stuckey v. Keefe, 26 Pa. St. 397; Taylor v. Smith, 116 N. C. 531, 21 S. E. Rep. 202; Weir v. Humphries, 4 Ired. Eq. 264; Butler v. Butler, 2 Mackey, 96.

<sup>7</sup> Case v. Owen, 139 Ind. 22, 38 N. E.

are two or more persons who hold possession of any subject of property by several and distinct titles, the word 'jointly' can find no place in describing an estate to be held by them."<sup>1</sup>

There is no substantial difference between deeding or devising land to two persons and the survivor of them, and deeding or devising land to two persons to be held in joint tenancy.

A devise to "children and the survivor or survivors of them" is in apt words to create an estate in joint tenancy.<sup>2</sup> A conveyance to a man and his wife and "the survivor of them, in his or her own right," creates a joint tenancy.<sup>3</sup>

Under a statute abolishing survivorship, tenants in common may vest each other with this right by express provision by deed, but they cannot by any provision bar the right of partition.<sup>4</sup>

1787. Under a statute allowing a joint tenancy to be created by express declaration, the common-law incident of survivorship follows, though another provision of the same statute declares that, if partition be not made between joint tenants, the shares of those who die first shall not accrue to the survivor, but shall be considered as if such joint tenants had been tenants in common. The two provisions are to be construed so as to harmonize and not to contradict each other, and this is done by regarding the first-named provision as intended to limit the application of the last-named provision to cases where the grant or devise does not in express terms create an estate in joint tenancy. The enactment of the two provisions indicates an intention on the part of the law-making power that they should stand together, and that the one should not operate as a repeal of the other. "The distinguishing feature of joint tenancy is the right of the survivor to take the whole estate. If the statute does not prohibit the conveyance or devise of land to two persons, and the survivor of them, so as to give the survivor the right to take the whole estate, it is difficult to see why the statute should be construed as prohibiting land from being held in joint tenancy, so far as the right of the survivorship is involved in joint tenancy, if the deed or devise expressly declares that such land shall be held

Rep. 395; *Barden v. Overmeyer*, 134 Ind.

660; *Morris v. McCarty*, 158 Mass. 11, 32

N. E. Rep. 938; *Coudert v. Earl*, 45 N.

J. Eq. 654, 18 Atl. Rep. 220.

<sup>1</sup> *Case v. Owen*, 139 Ind. 22, 38 N. E.

Rep. 395, per Coffey, J.

<sup>2</sup> *Stimpson v. Batterman*, 5 Cush. 153.

<sup>3</sup> *Mittel v. Karl*, 133 Ill. 65, 24 N. E. Rep. 553.

<sup>4</sup> *Truesdell v. White*, 13 Bush, 616.

in joint tenancy, and not in tenancy in common. Evidently the statute does not prevent parties from conveying or devising their lands so as to enforce the right of survivorship, provided they indicate their intentions by clear and express declarations in the deed or will.”<sup>1</sup>

A conveyance to two persons described as husband and wife, “as tenants by the entirety and not as tenants in common,” when they were not in fact husband and wife, creates an estate in joint tenancy in them. As they could not take as tenants by the entirety, effect must be given to the manifest intent to create an estate in joint tenancy. “An estate in entirety is an estate in joint tenancy, but with the limitation that during their joint lives neither the husband nor the wife can destroy the right of survivorship without the assent of the other party. The doctrine of survivorship is the distinguishing incident of title by joint tenancy. On looking at the deed under which the tenant claims, it is quite plain that the grantors intended to create an estate in joint tenancy, as distinguished from an estate in common. The particular form of estate in joint tenancy which they contemplated fails; but they took great pains to exclude the idea of an estate in common, and the effect of the deed is to create an estate in joint tenancy, without the special features of an estate in entirety.”<sup>2</sup>

**1788.** The exception of trustees from the operation of the statutes abolishing joint tenancy is in recognition of the invariable rule of practice in conveyancing that estates to be vested in trustees shall be limited to them in joint tenancy, on account of the practical convenience resulting from the incident of survivorship; for upon the decease of one of the trustees the whole estate vests in the survivor or survivors to the exclusion of the heirs of the deceased trustee, and the legal possession of the trust estate will continue without change so long as any one of the trustees survives. Even where estates in trust are not expressly excepted from the operation of statutes abolishing joint tenancy, or converting such tenancy into a tenancy in com-

<sup>1</sup> *Mette v. Feltgen*, 148 Ill. 357, 36 N. E. Rep. 81, per Magruder, J., reversing on rehearing 27 N. E. Rep. 911. The court say: “If, in any decisions heretofore made, expressions have been made

use of which are seemingly at variance with these views, such expressions cannot be regarded otherwise than as mere dicta.”

<sup>2</sup> *Morris v. McCarty*, 158 Mass. 11, 12, 32 N. E. Rep. 938, per Allen, J.

mon, the courts, having regard to the presumed intention in the creation of the trust estate, are inclined to make the same exception.<sup>1</sup>

1789. Where exceptions are made in statutes abolishing joint tenancies, as regards conveyances to trustees, mortgagees, or to husband and wife, the fact that the grantees are such need not appear by the deed. Thus, if a grant is made to two persons who are in fact husband and wife, it creates a tenancy by the entirety in them, though the deed does not describe them as such.<sup>2</sup>

A conveyance to trustees jointly creates a joint tenancy with the right of survivorship.<sup>3</sup> A conveyance to trustees will always, if possible, be construed to create a joint tenancy. "Slighter indications will suffice in a trust deed than in other deeds to amount to a 'manifest showing,' because the courts are inclined to hold that trustees are joint tenants, on account of the inconvenience resulting from their holding as tenants in common."<sup>4</sup>

<sup>1</sup> Philadelphia & Reading R. Co. v. Lehigh Nav. Co. 36 Pa. St. 204; Franklin Inst. for Sav. v. People's Sav. Bank, 14 R. I. 632. See, however, Boston Franklinite Co. v. Condit, 19 N. J. Eq. 394; Lamb v. Clark, 29 Vt. 273.

N. W. Rep. 225, disapproving of Jacobs v. Miller, 50 Mich. 119, 15 N. W. Rep. 42.

<sup>3</sup> McAllister v. Plant, 54 Miss. 106.

<sup>4</sup> Franklin Inst. for Sav. v. People's Sav. Bank, 14 R. I. 632, per Durfree, C. J.

<sup>2</sup> Dowling v. Salliotte, 83 Mich. 131, 47

## CHAPTER XXXIX.

### TENANCY BY ENTIRETIES.

1790. A conveyance or devise to two persons, who are husband and wife at the time property vests in them, creates an estate by entireties. By reason of their legal unity by marriage, they together take the whole estate as one person. Neither has a separate estate or interest in the land, but each has the whole estate. Upon the death of one the entire estate and interest belongs to the other, not by virtue of survivorship, but by virtue of the title that vested under the original limitation. "It is a sole and not a joint tenancy. They have no moieties. Each holds the entirety. They are one in law, and their estate one and indivisible. If the husband alien, if he suffer a recovery, if he be attainted, none of these will affect the right of the wife if she survive him. Nor is this by the *jus accrescendi*. There is no such thing between them. That takes place where, by the death of one joint tenant, the survivor receives an accession, something which he had not before, — the right of the deceased. But husband and wife have the whole from the moment of the conveyance to them, and the death of either cannot give the survivor more."<sup>1</sup>

By reason of the unity of husband and wife, a conveyance or devise to them and to another vests one moiety of the land in such other, and only one moiety in the husband and wife together.<sup>2</sup>

A tenancy by entireties arises upon the vesting of any kind of estate in husband and wife, whether it be in fee, in tail, for life, or for years; whether it be in possession, reversion, or remainder. Such a tenancy may exist in respect to any kind of personal property.<sup>3</sup>

1791. A tenancy by entirety resembles a joint tenancy in that the right of survivorship is attached to it. But it is not a joint tenancy, either in substance or form. "It originated in

<sup>1</sup> Thornton v. Thornton, 3 Rand. (Va.) 179, per Carr, J.

<sup>2</sup> Johnson v. Hart, 6 Watts & S. 319.

<sup>3</sup> Freeman on Cotenancy, §§ 67, 68.

the marital relation, and, although the survivorship presents the greatest formal resemblance to joint tenancy, instead of founding the estate by the entirety upon the notion of joint tenancy, all the authorities refer it to the established effect of a conveyance to husband and wife pretty much independent of any principles which govern other cases. At common law, husband and wife were regarded as one person, and a conveyance to them by name was a conveyance in law to but one person. These two real individuals, by reason of this relationship, took the whole of the estate between them, and each was seised of the whole, and not of any undivided portion. They were thus seised of the whole because they were legally but one person.”<sup>1</sup> Upon the death of either during coverture the survivor does not take by right of survivorship, as in the case of joint tenants, but continues to hold the whole by virtue of the original title.

Of course there can be neither curtesy nor dower in an estate held by the entirety,<sup>2</sup> as the estate vests absolutely in the one upon the death of the other. For the same reason the homestead right which attaches to the land during the life of the husband does not survive to his widow; the whole estate vests in her absolutely.<sup>3</sup>

**1792.** At common law a husband and wife are tenants by entirety, unless the conveyance to them indicates an intention to create a different estate. This remains the law in those States where it has not been changed by statute.<sup>4</sup>

<sup>1</sup> *Stelz v. Shreck*, 128 N. Y. 263, 28 N. E. Rep. 510, per Peckham, J. And see *Barber v. Harris*, 15 Wend. 615; *Jackson v. McConnell*, 19 Wend. 175; *Bertles v. Nunan*, 92 N. Y. 152; *Fogleman v. Shively*, 4 Ind. App. 197, 30 N. E. Rep. 909; *Gibson v. Zimmerman*, 12 Mo. 381, 51 Am. Dec. 168; *Stuckey v. Keefe*, 26 Pa. St. 397, 399.

<sup>2</sup> *Ames v. Norman*, 4 Sneed, 683, 70 Am. Dec. 269.

<sup>3</sup> *Chambers v. Chambers*, 92 Tenn. 707, 23 S. W. Rep. 67; *Jackson v. Shelton*, 89 Tenn. 82, 16 S. W. Rep. 142; *McRoberts v. Copeland*, 85 Tenn. 211, 2 S. W. Rep. 33.

<sup>4</sup> *The common-law rule prevails in Arkansas*: *Hunt v. Blackburn*, 128 U. S. 464,

9 Sup. Ct. Rep. 125; *Robinson v. Eagle*, 29 Ark. 202; *Kline v. Ragland*, 47 Ark. 111, 14 S. W. Rep. 474. **Indiana**: Since Territorial Act of 1807. *Wilken v. Young* (Ind.), 41 N. E. Rep. 68; *Hadlock v. Gray*, 104 Ind. 596, 4 N. E. Rep. 167; *Thornburg v. Wiggins*, 135 Ind. 178, 34 N. E. Rep. 999; *Enyeart v. Kepler*, 118 Ind. 34, 20 N. E. Rep. 539, 10 Am. St. Rep. 94; *Carver v. Smith*, 90 Ind. 222, 46 Am. Rep. 210; *Jones v. Chandler*, 40 Ind. 588; *Arnold v. Arnold*, 30 Ind. 305. **Maryland**: *Marburg v. Cole*, 49 Md. 402, 33 Am. Rep. 266; *Fladung v. Rose*, 58 Md. 13. **Michigan**: *Fisher v. Provin*, 25 Mich. 347; *Speier v. Opfer*, 73 Mich. 35, 40 N. W. Rep. 909; *Manwaring v. Powell*, 40 Mich. 371; *Jacobs v. Miller*, 50

1793. This estate, however, has been destroyed in the

Mich. 119, 15 N. W. Rep. 42; Vinton v. Beamer, 55 Mich. 559, 561, 22 N. W. Rep. 40; Newlove v. Callaghan, 86 Mich. 297, 48 N. W. Rep. 1096, 24 Am. St. Rep. 123. It was said, however, by Cahill, J., in Dowling v. Salliotte, 83 Mich. 131, 47 N. W. Rep. 225, that estates in entirety were, strictly speaking, abolished by the statute of 1846, which declared that "estates, in respect to the number and connection of their owners, are divided into estates in severalty, in joint tenancy, and in common." **Missouri:** Bains v. Bullock (Mo.), 31 S. W. Rep. 342; Garner v. Jones, 52 Mo. 68; Hall v. Stephens, 65 Mo. 670, 678, 27 Am. Rep. 302; Gibson v. Zimmerman, 12 Mo. 381, 51 Am. Dec. 168; Corrigan v. Tierney, 100 Mo. 276, 13 S. W. Rep. 401; Russell v. Russell, 122 Mo. 235, 26 S. W. Rep. 677; Shroyer v. Nickell, 55 Mo. 264. **New Jersey:** Den v. Hardenburgh, 10 N. J. L. 42, 18 Am. Dec. 371; Buttlar v. Rosenblath, 42 N. J. Eq. 651, 9 Atl. Rep. 695, 59 Am. Rep. 52. **New York:** Hiles v. Fisher, 144 N. Y. 306, 39 N. E. Rep. 337; Wright v. Sadler, 20 N. Y. 320; Bertles v. Nunan, 92 N. Y. 152, 44 Am. Rep. 361; Zornlein v. Bram, 100 N. Y. 12, 2 N. E. Rep. 388; Torrey v. Torrey, 14 N. Y. 430; Stelz v. Shreck, 128 N. Y. 263, 28 N. E. Rep. 510; Sutliff v. Forgey, 1 Cow. 89; Doe v. Howland, 8 Cow. 277, 18 Am. Dec. 445; Barber v. Harris, 15 Wend. 615; Jackson v. Stevens, 16 Johns. 110; Snyder v. Sponable, 1 Hill, 567; Dias v. Glover, 1 Hoff. Ch. 71; Beach v. Hollister, 3 Hun, 519; Goelet v. Gori, 31 Barb. 314; Freeman v. Barber, 3 Thomp. & C. 574; Farmers' and Mechanics' Nat. Bank v. Gregory, 49 Barb. 155. All the authorities in this State, with the exception of Hicks v. Cochran, 4 Edw. Ch. 107, are to the same effect, and in that case the facts were peculiar. Jooss v. Fey, 129 N. Y. 17, 29 N. E. Rep. 136; Cloos v. Cloos, 55 Hun, 450, 24 Abb. N. C. 219, 8 N. Y. Supp. 660; Gardenier v. Furey, 50 Hun, 82, 4 N. Y. Supp. 512; *In re Fox's Est.* 30 N. Y. Supp. 835, 9 Misc. 661; Reynolds v. Strong, 82 Hun, 202, 31 N. Y. Supp. 329. But tenants by entirety may make partition or division between themselves. Laws 1880, ch. 472, § 11; 4 R. S. 1889, 8th ed. p. 2605. **North Carolina:** Johnson v. Edwards, 109 N. C. 466, 14 S. E. Rep. 91, 26 Am. St. Rep. 580; Bruce v. Nicholson, 109 N. C. 202, 13 S. E. Rep. 790, 26 Am. St. Rep. 562; Harrison v. Ray, 108 N. C. 215, 12 S. E. Rep. 993; Jones v. Potter, 89 N. C. 220; Lang v. Barnes, 87 N. C. 329; Simonton v. Cornelius, 98 N. C. 433, 4 S. E. Rep. 38. **Oregon:** Hough v. Hough (Oreg.), 35 Pac. Rep. 249; Noblitt v. Beebe, 23 Oreg. 4, 35 Pac. Rep. 248; Myers v. Reed, 9 Sawyer, 132, 17 Fed. Rep. 401. **Pennsylvania:** Bramberry's Est. 156 Pa. St. 628, 27 Atl. Rep. 405, 36 Am. St. Rep. 64, 22 L. R. A. 594; Gillan v. Dixon, 65 Pa. St. 395; Fleek v. Zillhaver, 117 Pa. St. 213, 12 Atl. Rep. 420; McCurdy v. Canning, 64 Pa. St. 39; Stuckey v. Keefe, 26 Pa. St. 392; Martin v. Jackson, 27 Pa. St. 504, 67 Am. Dec. 489; French v. Mehan, 56 Pa. St. 286; Fairchild v. Chastelleux, 1 Pa. St. 176, 44 Am. Dec. 117. **South Carolina:** McLeod v. Tarrant, 39 S. C. 271, 17 S. E. Rep. 773; Georgia C. & N. R. Co. v. Scott, 38 S. C. 34, 16 S. E. Rep. 185; Bomar v. Mullins, 4 Rich. Eq. 80. **Tennessee:** Cole Manuf. Co. v. Collier (Tenn.), 31 S. W. Rep. 1000; Chambers v. Chambers, 92 Tenn. 707, 23 S. W. Rep. 67; Ames v. Norman, 4 Sneed, 683, 70 Am. Dec. 269; Berrigan v. Fleming, 2 Lea, 271. **Vermont:** Corinth v. Emery, 63 Vt. 505, 22 Atl. Rep. 618, 25 Am. St. Rep. 780; Brownson v. Hull, 16 Vt. 309, 42 Am. Dec. 517; Davis v. Davis, 30 Vt. 440; Park v. Pratt, 38 Vt. 545. **Wisconsin:** Smith v. Smith, 23 Wis. 176, 99 Am. Dec. 153; Ketchum v. Walsworth, 5 Wis. 95, 68 Am. Dec. 49; Bennett v. Child, 19 Wis. 362, 88 Am. Dec. 692.

greater number of States through legislation,<sup>1</sup> either directly by legislation that turns tenancies by the entirety into tenancies

**1 Alabama:** Under the statutes creating and regulating the separate estates of married women, the common-law estate by the entirety is regarded as abrogated, and a conveyance or devise to husband and wife creates the same estate as if it had been made to them before coverture. Code 1886, § 2341; *Walthall v. Goree*, 36 Ala. 728; *Donegan v. Donegan* (Ala.), 15 So. Rep. 823. **Connecticut:** The common law upon this subject was never adopted, but husband and wife hold land conveyed to them during coverture as joint tenants. *Whittlesey v. Fuller*, 11 Conn. 337. **Florida:** No estate by entirety in this State. **Georgia:** A conveyance to husband and wife makes them tenants in common. *Hathorn v. Maynard*, 65 Ga. 168; *Lott v. Wilson*, 95 Ga. 12, 21 S. E. Rep. 992. **Illinois:** The common law prevailed prior to 1861, when the Married Woman's Law was adopted, the effect of which was held to be to make husband and wife tenants in common of land conveyed to them during coverture. *Mittel v. Karl*, 133 Ill. 65, 24 N. E. Rep. 553, 8 L. R. A. 655; *Cooper v. Cooper*, 76 Ill. 57. **Iowa:** Under the statute of 1843, by which conveyances to two or more create tenancies in common, the estate by entirety is destroyed, and husband and wife hold as tenants in common. R. S. 1888, § 3110; *Hoffman v. Stigers*, 28 Iowa, 302. **Kansas:** Estates in entirety are turned into tenancies in common by the act of March 10, 1891, Laws 1891, ch. 203. They previously existed. *Shinn v. Shinn*, 42 Kans. 1, 21 Pac. Rep. 813; *Baker v. Stewart*, 40 Kans. 442, 19 Pac. Rep. 904, 10 Am. St. Rep. 213, 2 L. R. A. 434. **Kentucky:** Tenancy by the entirety, as at common law, was recognized before the act of 1851, G. S. ch. 52, art. 4, § 13, G. S. 1894, § 2143, which provided that there should be no right to the entirety by survivorship unless expressly provided for. This change of the common-law rule is not retrospective. *Elliott v. Nichols*, 4 Bush, 502.

**Maine:** Robinson's App. (Me.) 33 Atl. Rep. 652. Changes the common law by reason of Act 1844, ch. 117. **Massachusetts:** Conveyances and devises to husband and wife create estates in common unless it is otherwise expressly provided. Acts 1885, ch. 237. The common law prevailed before this act. *Pierce v. Chace*, 108 Mass. 254; *Pray v. Stebbins*, 141 Mass. 219, 4 N. E. Rep. 824, 55 Am. Rep. 462; *Webster v. Vandeverter*, 6 Gray, 428. **Minnesota:** The statute changing joint tenancies into tenancies in common is now construed as making husband and wife tenants in common of land conveyed to them, unless the instrument expressly creates a joint tenancy. *Wilson v. Wilson*, 43 Minn. 398, 45 N. W. Rep. 710; G. S. 1894, § 4405. The statute as originally enacted excepted from its operation grants and devises to husband and wife. These words were omitted in the revision of 1866 and the subsequent revisions. **Mississippi:** By statute, since the Code of 1880, all conveyances and devises to husband and wife must be construed to create estates in common, unless manifestly intended to create an estate in entirety with the right of survivorship. Annot. Code 1892, § 2441. The common law on the subject prevailed before this statute. *Hemingway v. Scales*, 42 Miss. 1, 97 Am. Dec. 425, 2 Am. Rep. 586; *Oglesby v. Bingham*, 69 Miss. 795, 13 So. Rep. 852. The statute is not retroactive in effect. *Gresham v. King*, 65 Miss. 387, 4 So. Rep. 120. **Nevada:** A husband and wife may hold real or personal property as joint tenants, tenants in common, or as community property. G. S. 1885, § 506. **New Hampshire:** Husband and wife take as tenants in common since the Married Woman's Act of 1860. Acts 1860, ch. 2342; P. S. 1891, ch. 176, § 1; *Clark v. Clark*, 56 N. H. 105. This act is not applicable to property acquired by husband and wife before the act took effect. *Stilphen v. Stilphen*, 65 N. H. 126, 23 Atl. Rep. 79. **North Dakota and**



in common, or indirectly by legislation securing to married women the full control and enjoyment of their separate property; for though in general such legislation is held not to destroy the common-law estate by the entirety, yet in a few States it is held that the effect of such legislation is to change this estate into a tenancy in common. The common-law estate by the entirety was predicated upon the principle that in law husband and wife are but one person, but it is declared that the married women's acts put an end to this legal unity as regards property, and therefore that the reason for the common-law rule has ceased to exist.

**1794.** An estate by the entirety can only exist between husband and wife. Thus a conveyance to a man and woman who are not husband and wife, which expressly provides that they shall take "as tenants by the entirety and not as tenants in common," does not have the effect to create such an estate; and, though they afterwards intermarry, the estate remains either a joint tenancy or a tenancy in common, as it was before marriage.<sup>1</sup> An estate by the entirety can only be created by a conveyance or devise to persons who are husband and wife when the estate vests in them.<sup>2</sup>

**South Dakota:** A husband and wife may hold real or personal property together as joint tenants or tenants in common. Dak. Comp. L. 1887, § 2593. **Ohio:** A conveyance or devise to a husband and wife makes them tenants in common, and not by entireties. *Sergeant v. Steinberger*, 2 Ohio, 305, 15 Am. Dec. 553; *Farmers' & M. Nat. Bank v. Wallace*, 45 Ohio St. 152, 12 N. E. Rep. 439; *Penn v. Cox*, 16 Ohio, 30; *Wilson v. Fleming*, 13 Ohio, 68.

**Rhode Island:** Devises and conveyances of land to husband and wife are declared by statute to create tenancies in common unless otherwise expressly limited. G. S. 1896, ch. 201, § 1. **Virginia:** Land conveyed or devised to husband and wife is held by them by moieties in like manner as if a distinct moiety had been given to each by a separate conveyance. Code 1887, § 2430; R. Code 1849, p. 608, § 18. The common law will prevail before this statute. *Norman v. Cunningham*, 5 Gratt. 63. **West Virginia:** If an estate is conveyed or devised to a husband and wife,

one moiety, upon the death of either, descends to his or her heirs, subject to debts, curtesy, or dower, unless otherwise manifestly intended. Code 1891, ch. 71, §§ 18, 19. The estate by the entirety existed previous to July, 1850, when the Code of 1849 took effect. *Bank v. Corder*, 32 W. Va. 232, 9 S. E. Rep. 220. In **Arizona, California, Idaho, Louisiana, Nevada, Texas, and Washington**, property acquired by husband and wife, or either, during marriage, when not acquired as the separate property of either, is community property.

See, on the subject of this note, 1 Ballard's Annual, 1892, §§ 207-242.

<sup>1</sup> *Morris v. McCarty*, 158 Mass. 11, 32 N. E. Rep. 938; *Wood v. Warner*, 15 N. J. Eq. 81; *McDermott v. French*, 15 N. J. Eq. 78; *Banzer v. Banzer*, 30 N. Y. Supp. 803; *Moody v. Moody*, 2 Amb. 649.

<sup>2</sup> *Stelz v. Shreck*, 128 N. Y. 263, 28 N. E. Rep. 510; *Miner v. Brown*, 133 N. Y. 308, 31 N. E. Rep. 24; *Wright v. Saddler*, 20 N. Y. 320, 323; *Banzer v. Banzer*, 30 N. Y. Supp. 803, 10 Misc.

It is not essential, however, that the fact of such relationship should be stated or recited in the conveyance to them. It may be shown by parol testimony.<sup>1</sup> On the other hand, though the grantees in a deed are described as husband and wife, if they are not so this fact may be shown by parol evidence, and the conveyance will not create an estate by the entirety.<sup>2</sup>

**1795.** A joint tenancy is created between husband and wife when the estate is so limited by the terms of the conveyance. Thus a conveyance to them "in joint tenancy," or "as joint tenants," creates such a tenancy.<sup>3</sup> To create a joint tenancy in them it is only necessary that it should plainly appear that the intent of the grantor as shown by the terms of his deed was to convey a joint estate, and not that peculiar estate which results from the unity of husband and wife, the estate by the entirety.<sup>4</sup>

**1796.** A grant to a husband and wife and the survivor of them, in his or her own right, gives to each an estate for life, with a contingent remainder in fee to the survivor.<sup>5</sup> It does not create a joint tenancy under a statute which declares that no estate in joint tenancy shall be held or claimed unless the premises shall expressly be thereby declared to pass, not in tenancy in common, but in joint tenancy. "The deed in question contains no such declaration. It provides for a survivorship, it is true, which is

Rep. 24; *Pittsburg C. C. & St. L. Ry. Co. v. O'Brien* (Ind.), 41 N. E. Rep. 528; *Arnold v. Arnold*, 30 Ind. 305; *Chandler v. Cheney*, 37 Ind. 391; *Jones v. Chandler*, 40 Ind. 588; *Carver v. Smith*, 90 Ind. 222, 46 Am. Dec. 210; *Thornburg v. Wiggins*, 135 Ind. 178, 34 N. E. Rep. 999.

<sup>1</sup> *Dowling v. Salliotte*, 83 Mich. 131, 47 N. W. Rep. 225; *Chandler v. Cheney*, 37 Ind. 391.

<sup>2</sup> *Chandler v. Cheney*, 37 Ind. 391.

<sup>3</sup> *Wilken v. Young* (Ind.), 41 N. E. Rep. 68; *Thornburg v. Wiggins*, 135 Ind. 178, 34 N. E. Rep. 999; *Barden v. Overmeyer*, 134 Ind. 660, 34 N. E. Rep. 439; *Case v. Owen* (Ind.), 38 N. E. Rep. 395; *Brown v. Brown*, 133 Ind. 476, 32 N. E. Rep. 1128, 33 N. E. Rep. 615; *Jooss v. Fey*, 129 N. Y. 17, 29 N. E. Rep. 136, reversing 9 N. Y. Supp. 275; *Cloos v. Cloos*, 8 N. Y. Supp. 660, 55 Hun, 450, 24 Abb. N. C. 219.

<sup>4</sup> *Jooss v. Fey*, 129 N. Y. 17, 29 N. E. Rep. 136.

<sup>5</sup> *Mittel v. Karl*, 133 Ill. 65, 24 N. E. Rep. 553, 8 L. R. A. 655, citing *Ewing v. Savary*, 3 Bibb, 235. The court held that the grant conveyed an estate for life, and a contingent remainder in fee to the survivor. It is there said: "Although there is no express limitation of the fee to the survivor necessarily implies it. Nor can there be any doubt that the contingent remainder is good, for there was a particular estate of freehold to support it, and, *eo instante* that the particular estate determined, the estate in remainder commenced." See *Phelps v. Simons*, 159 Mass. 415, 34 N. E. Rep. 657, citing *In re Harrison*, 3 Aust. 836; *Vick v. Edwards*, 3 P. Wms. 372; *Hannon v. Christopher*, 34 N. J. Eq. 459; *Thornburg v. Wiggins*, 135 Ind. 178, 34 N. E. Rep. 999; *Georgia, &c. Ry. Co. v. Scott*, 38 S. C. 34, 16 S. E. Rep. 185, 839.

regarded as one characteristic of a joint tenancy; but the declaration which the statute requires to establish the estate is nowhere found in the deed, and, in the absence of such a declaration, we are inclined to hold that the estate was not created."<sup>1</sup>

**1797.** A tenancy in common may be created by a conveyance to husband and wife which manifests an intent that they shall hold in this manner.<sup>2</sup> "No particular form of words is necessary to make them tenants in common. It is sufficient if expressions are used which cannot be operative unless the wife is admitted to an equal present enjoyment of the estate with her husband, and which indicate an intention that her possession shall not be subservient to his exclusive control."

**1798.** An estate in severalty may be created in the husband and wife by proper words in the conveyance. Words which in a conveyance to unmarried persons create a joint tenancy or a tenancy in common, create, where the grantees are husband and wife and are so described in the conveyance, a tenancy by the entireties. "The converse of this proposition is equally true, namely, that where the deed would create neither a tenancy in common nor a joint tenancy in married persons, it will not create

<sup>1</sup> *Mittel v. Karl*, 133 Ill. 65, 24 N. E. Rep. 553.

<sup>2</sup> 1 Prest. Est. 132; 4 Kent Com. 363; *Hunt v. Blackburn*, 131 U. S. 403, 9 Sup. Ct. Rep. 793; *Miner v. Brown*, 133 N. Y. 308, 31 N. E. Rep. 24; *Kaufman v. Schoeffel*, 46 Hun, 571; *Hicks v. Cochran*, 4 Edw. Ch. 107; *Barber v. Harris*, 15 Wend. 615, to the contrary, is overruled; *McDermott v. French*, 15 N. J. Eq. 78, in effect overruling *Thomas v. De Baum*, 14 N. J. Eq. 37; *Hadlock v. Gray*, 104 Ind. 596, 4 N. E. Rep. 167; *Dowling v. Salliotte*, 83 Mich. 131, 47 N. W. Rep. 225; *Hoffman v. Stigers*, 28 Iowa, 302; *Baker v. Stewart*, 40 Kans. 442, 19 Pac. Rep. 904, 10 Am. St. Rep. 213, 2 L. R. A. 434; *Fladung v. Rose*, 58 Md. 13; *Marburg v. Cole*, 49 Md. 402, 33 Am. Rep. 266.

In **Pennsylvania**, however, it is held that husband and wife cannot be made joint tenants or tenants in common by any express declaration that they are to hold in this way. *French v. Mehan*, 56 Pa.

St. 286; *Stuckey v. Keefe*, 26 Pa. St. 392; *McCurdy v. Canning*, 64 Pa. St. 39. "In *Johnson v. Hart*, 6 W. & S. 319, the conveyance was in express words to the husband and wife as tenants in common; but we held, in accordance with the rule just stated, that they were tenants by entireties. Being one person in law, a conveyance to them as husband and wife was necessarily a conveyance to the survivor. . . . The whole line of cases from *Lodge v. Hamilton*, 2 S. & R. 491, down to *Bramberry's Appeal*, 156 Pa. St. 628, is fairly within the rule as laid down by *Blackstone*. Perhaps the most frequently cited case is that of *Stuckey v. Keefe's Executors*, and we fully approve, and are ready in any proper case to follow, the doctrine there stated." *Young's Est.* 166 Pa. St. 645, 649, 31 Atl. Rep. 373, per Mr. Justice Williams.

Such, also, seems to be the law in **Missouri**: *Russell v. Russell*, 122 Mo. 235, 237, 26 S. W. Rep. 677.

a tenancy by the entireties, though the grantees may be described as husband and wife.”<sup>1</sup>

A conveyance may be made to husband and wife as individuals. “Nobody ever doubted that the husband was competent to take in severalty; and under recent legislation the competency of the wife to take and hold real estate as her own is just as clear as that of the husband. . . . In other words, the nature of the thing granted, and the words of the grant, are to be taken into consideration as well as the existence of the marriage relation between the grantees.”<sup>2</sup>

1799. No estate by the entirety is created by a deed in partition which, by direction of a coparcener, is made to himself and wife, for no title passes by a partition deed.<sup>3</sup> The title is already in the part owner, and the partition deed merely designates his share by metes and bounds, and allots it to be held by him in severalty. The deed confers no new title or additional estate in the land. It is an estoppel between the part owners to the extent of the shares set apart and allotted in severalty.

1800. Estates by entireties are not generally destroyed or affected by statutes abolishing survivorship in joint tenancies,<sup>4</sup> or by statutes turning joint tenancies into tenancies in

<sup>1</sup> *Young's Estate*, 166 Pa. St. 645, 650, 31 Atl. Rep. 373, per Williams, J.

<sup>2</sup> *Young's Est.* 166 Pa. St. 645, 649, 650, 31 Atl. Rep. 373, per Williams, J.

<sup>3</sup> *Harrison v. Ray*, 108 N. C. 215, 12 S. E. Rep. 993; *Yancey v. Radford*, 86 Va. 638, 10 S. E. Rep. 972; *Dooley v. Baynes*, 86 Va. 644, 10 S. E. Rep. 974; *Taylor v. Birmingham*, 29 Pa. St. 306.

<sup>4</sup> **Arkansas**: *Robinson v. Eagle*, 29 Ark. 202. **Indiana**: The statute expressly excepts conveyances to husband and wife. R. S. 1894, § 3342. **Kentucky**: *Elliott v. Nichols*, 4 Bush, 502; *Croan v. Joyce*, 3 Bush, 454. **Maryland**: *Marburg v. Cole*, 49 Md. 402, 33 Am. Rep. 266; *Craft v. Wilcox*, 4 Gill, 504. **Mississippi**: *Hemingway v. Scales*, 42 Mis. 1, 97 Am. Dec. 425, 2 Am. Rep. 586. **Missouri**: *Gibson v. Zimmerman*, 12 Mo. 385, 51 Am. Dec. 168. **New Jersey**: *Buttler v. Rosenblath*, 42 N. J. Eq. 651, 654, 9 Atl. Rep. 695, 59 Am. Rep. 52; *Thomas v. De Baum*, 14

N. J. Eq. 37; *McDermott v. French*, 15 N. J. Eq. 78; *Hardenbergh v. Hardenbergh*, 10 N. J. L. 42, 18 Am. Dec. 371; *Wood v. Warner*, 15 N. J. Eq. 81. **New York**: *Bertles v. Nunan*, 92 N. Y. 152, 157, 44 Am. Rep. 361; *Wright v. Saddler*, 20 N. Y. 320, 326; *Rogers v. Benson*, 5 Johns. Ch. 437. **North Carolina**: *Phillips v. Hodges*, 109 N. C. 248, 13 S. E. Rep. 769; *Harrison v. Ray*, 108 N. C. 215, 12 S. E. Rep. 993; *Woodford v. Higly*, 1 Winst. 237; *Motley v. Whitmore*, 2 Dev. & B. 537; *Todd v. Zachary*, Bush. Eq. 286. **Pennsylvania**: *Bramberry's Est.* 156 Pa. St. 628, 27 Atl. Rep. 405, 36 Am. St. Rep. 64, 22 L. R. A. 594; *McCurdy v. Canning*, 64 Pa. St. 39; *Diver v. Diver*, 56 Pa. St. 106. **Tennessee**: *Taul v. Campbell*, 7 Yerg. 319, 27 Am. Dec. 508. **Vermont**: R. S. 1894, § '2202; *Brownson v. Hull*, 16 Vt. 309, 42 Am. Dec. 517. **Virginia**: *Thornton v. Thornton*, 3 Rand. 179. **Wisconsin**: *Ketchum v. Walsworth*, 5 Wis. 95, 68 Am. Dec. 49. The statute

common; for estates by entireties do not rest upon the principle of survivorship, but upon the unity of the marital relation.

1801. This tenancy being founded on the marital relation, it is terminated by a divorce a vinculo, which puts an end to this relation, and they hold thereafter as tenants in common.<sup>1</sup> In a recent decision to this effect of the Court of Appeals of New York Mr. Justice Peckham said: "Anything that terminates the legal fiction of the unity of two separate persons ought to have an effect upon the estate whose creation depended upon such unity. It would seem as if the continued existence of the estate would naturally depend upon the continued legal unity of the two persons to whom the conveyance was actually made. The survivor takes the whole in case of death, because that event has terminated the marriage, and the consequent unity of person. An absolute divorce terminates the marriage and unity of person just as completely as does death itself, only instead of one, as in the case of death, there are in the case of divorce two survivors of the marriage, and there are from the time of such divorce two living persons in whom the title still remains. It seems to me the logical and natural outcome from such a state of facts is, that the tenancy by the entirety is severed, and, a severance having taken place, each takes his or her proportionate share of the property as a tenant in common, without survivorship. It is said that in such case it ought to be a joint tenancy, but I see no reason for that claim. . . . Upon what principle should the termination of the former species of tenancy, resulting from an absolute

expressly excepts conveyances to husband and wife. Annot. Stats. 1889, § 2069.

Otherwise in Iowa, by reason of peculiarity of statute. *Hoffman v. Stigers*, 28 Iowa, 302. **Minnesota:** The statute originally excepting conveyances and devises to husband and wife, and the revisions since 1866, omitting this exception. *Wilson v. Wilson*, 43 Minn. 398, 45 N. W. Rep. 710.

<sup>1</sup> *Donegan v. Donegan* (Ala.), 15 So. Rep. 823; *Hinson v. Bush*, 84 Ala. 368, 4 So. Rep. 410; *Stelz v. Shreck*, 128 N. Y. 263, 28 N. E. Rep. 510, affirming 10 N. Y. Supp. 790 and 14 N. Y. Supp. 106, 26 Am. St. Rep. 475, 13 L. R. A. 325; *Jooss v. Fey*, 129 N. Y. 17, 29 N. E.

Rep. 136; *Harrer v. Wallner*, 80 Ill. 197; *Enyeart v. Kepler*, 118 Ind. 34, 36, 20 N. E. Rep. 539; *Lash v. Lash*, 58 Ind. 526; *Davis v. Clark*, 26 Ind. 424; *Arnold v. Arnold*, 30 Ind. 305; *Simpson v. Pearson*, 31 Ind. 1; *Fogleman v. Shively*, 4 Ind. App. 197, 30 N. E. Rep. 909, per Black, J.; *Baker v. Stewart*, 40 Kans. 442, 19 Pac. Rep. 904, 10 Am. St. Rep. 213; *Russell v. Russell*, 122 Mo. 235, 26 S. W. Rep. 677; *Depas v. Mayo*, 11 Mo. 314, 316, 49 Am. Dec. 88; *Ames v. Norman*, 4 Sneed, 683, 70 Am. Dec. 269; *Hopson v. Fowlkes*, 92 Tenn. 697, 23 S. W. Rep. 55, 56 Am. St. Rep. 120; *Kirkwood v. Domnau*, 80 Tex. 645, 16 S. W. Rep. 428, 26 Am. St. Rep. 770.

divorce, be changed into the latter, in the face of our statute relating to joint tenancies? The conveyance did not expressly declare that the tenancy was to be a joint tenancy, and therefore, when the original character of the tenancy by the entirety is changed, it cannot be transformed into that of a joint tenancy without a clear violation of our statute."<sup>1</sup>

Contrary to these authorities is a recent decision of the Supreme Court of Michigan,<sup>2</sup> in which it is held that the estate of tenants by entirety, and the attendant right of survivorship, are not affected by a decree of divorce, the court, by Grant, J., saying: "We see no reason in holding that a husband or wife can, by a violation of the marital relations, obtain an interest in the land which she or he does not possess while filling such obligations. The common law should not, and in our judgment does not, permit a person thus to profit by his own gross wrong and a violation of the most sacred obligation."<sup>3</sup>

1802. The tenancy by the entirety arising from a conveyance to husband and wife is not destroyed by the legislation which secures to the wife the enjoyment of her separate property.<sup>4</sup> Such legislation is "intended to protect the property of the wife from the dominion or control of the husband, but not

<sup>1</sup> *Stelz v. Shreck*, 128 N. Y. 263, 28 N. E. Rep. 510.

<sup>2</sup> *In re Lewis*, 85 Mich. 340, 48 N. W. Rep. 580, overruling *Dowling v. Salliotte*, 83 Mich. 131, 47 N. W. Rep. 225.

<sup>3</sup> There is a dictum to like effect in *Corinth v. Emery*, 63 Vt. 505, 22 Atl. Rep. 618, 25 Am. St. Rep. 780.

<sup>4</sup> **Arkansas**: *Robinson v. Eagle*, 29 Ark. 202. **Indiana**: *Carver v. Smith*, 90 Ind. 222, 46 Am. Rep. 210; *Chandler v. Cheney*, 37 Ind. 391; *Fogleman v. Shively*, 4 Ind. App. 197, 30 N. E. Rep. 909; *Hulett v. Inlow*, 57 Ind. 412, 26 Am. Rep. 64. **Kansas**: *Baker v. Stewart*, 40 Kans. 442, 19 Pac. Rep. 904, 2 L. R. A. 434, 10 Am. St. Rep. 213. **Kentucky**: *Rogers v. Grider*, 1 Dana, 242. **Maryland**: *Marburg v. Cole*, 49 Md. 402, 33 Am. Rep. 266. **Massachusetts**: *Pray v. Stebbins*, 141 Mass. 219, 4 N. E. Rep. 424, 55 Am. Rep. 462. **Michigan**: *Fisher v. Proven*, 25 Mich. 347. **Mississippi**: *Hemingway*

*v. Scales*, 42 Miss. 1, 2 Am. Rep. 586, 97 Am. Dec. 425; *McDuff v. Beauchamp*, 50 Miss. 531. **Missouri**: *Garner v. Jones*, 52 Mo. 68. **New Jersey**: *Buttler v. Rosenblath*, 42 N. J. Eq. 651, 9 Atl. Rep. 695, 59 Am. Rep. 52; *Washburn v. Burns*, 34 N. J. L. 18; *Den v. Hardenburgh*, 10 N. J. L. 42, 18 Am. Dec. 371. **New York**: *Jooss v. Fey*, 129 N. Y. 17, 29 N. E. Rep. 136; *Zorntlein v. Bram*, 100 N. Y. 12; *Bertles v. Nunan*, 92 N. Y. 152, 44 Am. Rep. 361, overruling *Meeker v. Wright*, 76 N. Y. 262. **North Carolina**: *Long v. Barnes*, 87 N. C. 329. **Pennsylvania**: *Bramberry's Est.* 156 Pa. St. 628, 27 Atl. Rep. 405, 36 Am. St. Rep. 64, 22 L. R. A. 594; *Diver v. Diver*, 56 Pa. St. 106; *Gillan v. Dixon*, 65 Pa. St. 395; *French v. Mahan*, 56 Pa. St. 286; *Bates v. Seely*, 46 Pa. St. 248; *McCurdy v. Canning*, 64 Pa. St. 39. **West Virginia**: *Farmers' Bank v. Corder*, 32 W. Va. 233, 9 S. E. Rep. 220. **Wisconsin**: *Bennett v. Child*, 19 Wis. 362, 88 Am. Dec. 692.

to change the nature of her estate, or to destroy the legal unity of person which characterizes their relations to each other.”<sup>1</sup> Mr. Justice Strong, delivering the opinion in the earliest case in Pennsylvania upon this point, said:<sup>2</sup> “To hold it as operating upon the deed conveying land to a wife, making such deed assure a different estate from what it would have assured without the act, is to lose sight of the legislative purpose. Were we to do so, it would become in many cases a means of divesting her of her property, instead of an instrument of protection. . . . The legal unity of husband and wife still remains.”

But in some States it is held that the statutes enabling married women to hold separate property as if they were sole have had the effect to abrogate estates by entireties.<sup>3</sup> Such statutes do not affect estates by the entireties already existing, but prevent the creation of such estates afterwards.<sup>4</sup>

**1803.** Neither husband nor wife can sever this title so as to defeat or prejudice the right of survivorship in the other. Neither can alone make a valid conveyance to a third person.<sup>5</sup>

<sup>1</sup> *Gillan v. Dixon*, 65 Pa. St. 395. To like effect, see *Jooss v. Fey*, 129 N. Y. 17, 29 N. E. Rep. 136, per Gray, J.

<sup>2</sup> *Diver v. Diver*, 56 Pa. St. 106.

<sup>3</sup> **Alabama**: *Donegan v. Donegan* (Ala.), 15 So. Rep. 823; *Houston v. Williamson*, 81 Ala. 482, 1 So. Rep. 193; *Whitlow v. Echols*, 78 Ala. 206; *Holt v. Wilson*, 75 Ala. 58, 66; *Sloan v. Frothingham*, 72 Ala. 589; *Walthall v. Goree*, 36 Ala. 728. **Illinois**: *Cooper v. Cooper*, 76 Ill. 57; *Mittel v. Karl*, 133 Ill. 65, 24 N. E. Rep. 553, 8 L. R. A. 655. **Iowa**: *Hoffman v. Stigers*, 28 Iowa, 302. **New Hampshire**: *Clark v. Clark*, 56 N. H. 105.

<sup>4</sup> *Stilphen v. Stilphen*, 65 N. H. 126, 23 Atl. Rep. 79; *Almond v. Bonnell*, 76 Ill. 536.

<sup>5</sup> 2 Black. Com. 182; Cruise Dig. tit. 18, ch. 1, §§ 44–49; Prest. Est. 131; 2 Kent Com. 132; 4 Kent Com. 362; 1 Washb. Real Prop. (3d ed.) 577. **Indiana**: *Dyer v. Eldridge*, 136 Ind. 654, 36 N. E. Rep. 522; *Hulett v. Inlow*, 57 Ind. 412, 26 Am. Rep. 64; *Chandler v. Cheney*, 37 Ind. 391; *Enyeart v. Kepler*, 118 Ind. 34, 10 Am. St. Rep. 94; *Carver v. Smith*, 90

Ind. 222, 46 Am. Rep. 210; *Arnold v. Arnold*, 30 Ind. 305; *Jones v. Chandler*, 40 Ind. 588; *Thornburg v. Wiggins*, 135 Ind. 178, 34 N. E. Rep. 999. **Kansas**: *Baker v. Stewart*, 40 Kans. 442, 19 Pac. Rep. 904. **Maine**: *Harding v. Springer*, 14 Me. 407, 31 Am. Dec. 61. **Massachusetts**: *Pray v. Stebbins*, 141 Mass. 219, 4 N. E. Rep. 824; *Donahue v. Hubbard*, 154 Mass. 537, 28 N. E. Rep. 909; *Pierce v. Chace*, 108 Mass. 254; *Wales v. Coffin*, 13 Allen, 213; *Shaw v. Hearsey*, 5 Mass. 521. **Michigan**: *Naylor v. Minoek* (Mich.), 55 N. W. Rep. 664, 35 Am. St. Rep. 595; *Fisher v. Provin*, 25 Mich. 347; *Ætna Ins. Co. v. Resh*, 40 Mich. 241; *Manwaring v. Powell*, 40 Mich. 371; *Allen v. Allen*, 47 Mich. 74, 10 N. W. Rep. 113; *Vinton v. Beamer*, 55 Mich. 559, 22 N. W. Rep. 40; *Lewis' Appeal*, 85 Mich. 340, 48 N. W. Rep. 580. **Mississippi**: *Hemingway v. Scales*, 42 Miss. 1, 2 Am. Rep. 586, 97 Am. Dec. 425. **New Jersey**: *Den v. Hardenberg*, 10 N. J. L. 42, 18 Am. Dec. 371; *Wyckoff v. Gardner*, 20 N. J. L. 556, 45 Am. Dec. 388. **New York**: *Jooss v. Fey*, 129 N. Y. 17, 29 N. E. Rep. 136; *Zornlein v. Bram*, 100 N.

So an agreement by one alone, affecting a change of the boundaries of the land, is not binding.<sup>1</sup> Neither the husband nor the wife can convey the entire estate without the other joining in the conveyance.<sup>2</sup>

At common law the husband was entitled to the use of the estate during his life, and his deed or mortgage therefore had the effect of passing to his grantee an estate for the life of the husband, with the possibility of an estate in fee, depending upon his surviving his wife.<sup>3</sup> Such conveyance did not sever the estate, and under the married women's acts it does not even let the grantee into possession without the consent of the wife. "If a purchaser of the husband's interest may be put into possession with her, what follows? This: First, you have destroyed her estate and turned her entirety into a joint tenancy, or tenancy in common; second, you have deprived her altogether of possession, because it is not in the nature of things that she can enjoy actual possession with a stranger as she did with her husband; third, you have taken away her property without her consent, and destroyed her rights which were protected by the married woman's act. . . . These considerations lead us to the conclusion that one who, without the consent of the wife, purchases the husband's interest in real estate, in which both husband and wife are seised of the entirety, and to the possession of the whole of which she is entitled equally with him, does not acquire during the wife's life any right to the possession, either jointly with her or to her entire exclusion."<sup>4</sup>

**1804.** In some States the effect of the legislation in behalf of the property rights of married women is to make them

Y. 12, 2 N. E. Rep. 388; O'Connor v. McMahan, 7 N. Y. Supp. 225; Jackson v. 1 Dyer v. Eldridge, 136 Ind. 654, 36 N. E. Rep. 522.

McConnell, 19 Wend. 175, 32 Am. Dec. 439. **North Carolina:** Bruce v. Nicholson, 109 N. C. 202, 13 S. E. Rep. 790; Phillips v. Hodges, 109 N. C. 248, 13 S. E. Rep. 769; Simonton v. Cornelius, 98 N. C. 433, 4 S. E. Rep. 38; Needham v. Bronson, 5 Ired. L. 426, 44 Am. Dec. 45. **Pennsylvania:** French v. Mehan, 56 Pa. St. 286; Fairchild v. Chastelleux, 1 Pa. St. 176, 44 Am. Dec. 117. **Wisconsin:** Smith v. Smith, 23 Wis. 176, 99 Am. Dec. 153; Bennett v. Child, 19 Wis. 362, 88 Am. Dec. 692.

2 Co. Litt. 187; Arnold v. Arnold, 30 Ind. 305; Hemingway v. Scales, 42 Miss. 1; 2 Am. Rep. 586, 97 Am. Dec. 425; Thomas v. De Baum, 14 N. J. Eq. 37; McCurdy v. Canning, 64 Pa. St. 39.

3 Doe v. Howland, 8 Cow. 277; Barber v. Harris, 15 Wend. 615; Jackson v. Cairns, 20 Johns. 301; Wyckoff v. Gardner, 20 N. J. L. 556; McCurdy v. Canning, 64 Pa. St. 39.

4 McCurdy v. Canning, 64 Pa. St. 39, per Thayer, J.



tenants in common with their husbands of the use of estates by entirety, each being entitled to one half of the rents and profits during their joint lives. If, therefore, the husband executes a mortgage of land held by them as tenants by the entirety, the mortgage is effectual to cover his interest, which is a right to the use of an undivided half of the estate during the joint lives of himself and his wife, and to the fee in case he survives her. Upon a sale of the mortgaged property under a foreclosure, the purchaser acquires the husband's interest, and he becomes a tenant in common with the wife, subject to her right of survivorship.<sup>1</sup>

1805. The husband may, however, convey his title in such an estate to his wife through a third person ;<sup>2</sup> and where a husband may convey directly to his wife, his deed of land held by entireties to his wife is valid.<sup>3</sup>

1806. A husband and wife by their joint conveyance may destroy this estate. But if the wife merely joins in a deed of such estate with her husband, in token of her release of dower "and of her free consent thereto," without being named in the granting part of the deed, such conveyance does not defeat her estate in the land if she survives her husband, nor preclude her from asserting her title thereto after his death.<sup>4</sup>

If, on a sale of the land so held, they take in their joint names a mortgage or other obligation for the purchase-money, the presumption is that they intended to hold the latter as they did the former; and, on the death of either, the survivor becomes the sole owner, and the administrator of the deceased has no right therein.<sup>5</sup>

1807. A husband and wife may mortgage their estate by the entirety to secure the purchase-money of the land,<sup>6</sup> or to secure a loan to the husband.<sup>7</sup>

But where a mortgage by a wife of her separate property as

<sup>1</sup> *Hiles v. Fisher*, 144 N. Y. 306, 39 N. E. Rep. 337.

<sup>2</sup> *Donahue v. Hubbard*, 154 Mass. 537, 28 N. E. Rep. 909, 14 L. R. A. 123, 26 Am. St. Rep. 271; *Meeker v. Wright*, 76 N. Y. 262, 272. Not questioned on this point in *Bertles v. Nunan*, 92 N. Y. 152, 44 Am. Rep. 361; or in *Zornlein v. Bram*, 100 N. Y. 12, 2 N. E. Rep. 388.

<sup>3</sup> *Enyeart v. Kepler*, 118 Ind. 34, 20 N. E. Rep. 539, 10 Am. St. Rep. 94.

<sup>4</sup> *Wales v. Coffin*, 13 Allen, 213.

<sup>5</sup> *In re Bramberry's Est.* 156 Pa. St. 628, 27 Atl. Rep. 405, 36 Am. St. Rep. 64, 22 L. R. A. 594.

<sup>6</sup> *McCoy v. Barns*, 136 Ind. 378, 36 N. E. Rep. 134.

<sup>7</sup> *People's Building & Loan Asso. v. Billing* (Mich.), 62 N. W. Rep. 373.

surety only for the debt of her husband is void, a mortgage by a husband and wife of land held by them as tenants by the entirety is void and cannot be enforced.<sup>1</sup>

1808. But when such estate has been sold by husband and wife, the proceeds thereof in money belong to them in equal parts. By such sale they cease to have any estate in the land, "and it is not necessary to treat the proceeds of the sale as being held by them in the same manner and subject to the same law in order to secure to either of them the enjoyment of the land. Neither is entitled longer to enjoy the land as such. Having lost their estate in the land, not involuntarily or by any proceeding *in invitum*, but by their voluntary conveyance, the personalty received therefor must be regarded, not as land, but as personal property."<sup>2</sup>

By the common law the wife's personal property in possession became the property of the husband absolutely. By statute she is generally given the use and control of her separate personal property as fully as if she were not married. It follows, therefore, that the proceeds of a sale of real estate acquired by them under the same conveyance belong one half to each.<sup>3</sup>

1809. Upon the foreclosure of a mortgage made by husband and wife upon land held by them as tenants by the entirety, the surplus proceeds are constructively real estate, and belong to them by the same title; but the moneys should be invested under the court's direction until the right of possession thereto is determined by the death of either the husband or the wife, the income in the mean time being paid to the husband.<sup>4</sup>

If a mortgage for purchase-money be taken by husband and wife in their joint names upon a sale of land held by them as tenants by the entirety, the presumption is that they intend to hold the mortgage as they did the land, and therefore that, upon the subse-

<sup>1</sup> *Wilson v. Logue*, 131 Ind. 191, 30 N. E. Rep. 1079, 31 Am. St. Rep. 426; *Dodge v. Kinzy*, 101 Ind. 102; *Crooks v. Kennett*, 111 Ind. 347, 12 N. E. Rep. 715; *McCormick Harvesting Mach. Co. v. Scovell*, 111 Ind. 551, 13 N. E. Rep. 58; *Dyer v. Eldridge*, 136 Ind. 654, 36 N. E. Rep. 522.

<sup>2</sup> *Fogleman v. Shively*, 4 Ind. App. 197, 202, 30 N. E. Rep. 909, per Black, J.

<sup>3</sup> *Fogleman v. Shively*, 4 Ind. App. 197, 30 N. E. Rep. 909; *Matter of Albrecht*, 136 N. Y. 91, 32 N. E. Rep. 632, 32 Am. St. Rep. 700, 18 L. R. A. 329.

<sup>4</sup> *Germania Sav. Bank v. Jung*, 18 N. Y. Supp. 709, 28 Abb. N. C. 81, citing *Dunning v. Ocean Nat. Bank*, 61 N. Y. 497, 503, 19 Am. Rep. 293.

quent death of one of them, the whole mortgage belongs to the other.<sup>1</sup>

**1810.** A mechanic's lien may be enforced upon such estate for labor and materials used in the construction of a building upon the land with the knowledge and consent of both husband and wife.<sup>2</sup>

**1811.** The husband may lease the estate during his life. At common law the husband is entitled to the possession and use of the entire estate during the joint lives of himself and wife,<sup>3</sup> in the same way that he is at common law entitled to the possession and use of land of which his wife is seised in her own right. He cannot defeat the right of the survivor to the whole estate, "but, subject to this limitation, the husband has the rights in it which are incident to his own property, and the rights which by the common law he acquires in the real property of his wife. He has, during coverture, the usufruct of all the real estate which his wife has in fee simple, fee tail, or for life. By the great weight of authority he has the right to make a lease of an estate conveyed to him and his wife, which will be good against the wife during coverture, and will fail only in the event of his wife surviving him."<sup>4</sup>

**1812.** In some States, however, the right of the husband

<sup>1</sup> Bramberry's Estate, 156 Pa. St. 628, 27 Atl. Rep. 405, 36 Am. St. Rep. 64, 22 L. R. A. 594.

<sup>2</sup> Wilson v. Logue, 131 Ind. 191, 30 N. E. Rep. 1079, 31 Am. St. Rep. 426.

<sup>3</sup> Pray v. Stebbins, 141 Mass. 219, 4 N. E. Rep. 824, 55 Am. Rep. 462; French v. Mehan, 56 Pa. St. 286; Bolles v. State Trust Co. 27 N. J. Eq. 308; Bennett v. Child, 19 Wis. 362, 88 Am. Dec. 692; Hall v. Stephens, 65 Mo. 670, 49 Am. Rep. 824; Cole Manuf. Co. v. Collier (Tenn.), 31 S. W. Rep. 1000, per Beard, J. "This right necessarily resulted from the common-law view of the effect of marriage upon the wife's property rights. Marriage conferred upon the husband the dominion of the wife's real estate. The rents and profits belonged to him *jure mariti*. They were not only under his personal control, but they could be seized by his creditors."

<sup>4</sup> Pray v. Stebbins, 141 Mass. 219, 4 N. E. Rep. 824, 55 Am. Rep. 462, per Field, J.

*That the husband may lease the estate, see Ward v. Ward, 14 Ch. D. 506; Godfrey v. Bryan, 14 Ch. D. 516. Massachusetts: Pray v. Stebbins, 141 Mass. 219, 4 N. E. Rep. 824, 55 Am. Rep. 462, per Field, J. New Jersey: Wyckoff v. Gardner, 20 N. J. L. 556, 45 Am. Dec. 388; Washburn v. Burns, 34 N. J. L. 18; Bolles v. State Trust Co. 27 N. J. Eq. 308. New York: Bertles v. Nunan, 92 N. Y. 152, 44 Am. Rep. 361; Barber v. Harris, 15 Wend. 615; Jackson v. McConnell, 19 Wend. 175, 32 Am. Dec. 439. Otherwise now by reason of the Married Woman's Act. See § 1812. North Carolina: Topping v. Sadler, 5 Jones, 357. Pennsylvania: Fairchild v. Chastelleux, 1 Pa. St. 176, 44 Am. Dec. 117. Tennessee: Ames v. Norman, 4 Sneed, 683, 70 Am. Dec. 269.*

to the use and control of estates by entireties during the joint lives of himself and wife is denied, in consequence of the statutes which give to married women the control and enjoyment of their separate real estate.<sup>1</sup> Under the legislation which gives the wife the full control and enjoyment of her separate property, it is held by some leading courts that the common-law rule on this subject is changed. Having regard to the spirit of such legislation, as well as to the letter of it, it is held that the husband's right, *jure uxoris*, in his wife's property is extinguished, and instead of that the husband and wife each has an equal right to the use and enjoyment of the estate during their joint lives. They in fact become tenants in common or joint tenants of the use of the estate, and each is entitled to one half of the rents and profits of it during their joint lives, with power to each to dispose of or to charge his or her moiety during the same period.<sup>2</sup>

1813. This view of the subject is stated with great clearness and cogency of reasoning in a recent decision of the Court of Appeals of New York by Chief Justice Andrews: "If the right of the husband to the use, during the joint lives, of lands held under this tenure, was a right growing out of and incident

<sup>1</sup> *Shinn v. Shinn*, 42 Kans. 1, 21 Pac. Rep. 813; *Dodge v. Kinzy*, 101 Ind. 102; *Barren Creek Ditching Co. v. Beck*, 99 Ind. 247; *Carver v. Smith*, 90 Ind. 222, 46 Am. Rep. 210; *Patton v. Rankin*, 68 Ind. 245, 34 Am. Rep. 254; *Simpson v. Pearson*, 31 Ind. 1, 99 Am. Dec. 577; *Davis v. Clark*, 26 Ind. 424, 89 Am. Dec. 471; *Chandler v. Cheney*, 37 Ind. 391; *Buttler v. Rosenblath*, 42 N. J. Eq. 651, 9 Atl. Rep. 695, 59 Am. Rep. 52; *Hiles v. Fisher*, 144 N. Y. 306, 39 N. E. Rep. 337; *Bruce v. Nicholson*, 109 N. C. 202, 13 S. E. Rep. 790; *McCurdy v. Canning*, 64 Pa. St. 39, 41; *Cole Manuf. Co. v. Collier* (Tenn.), 31 S. W. Rep. 1000, in which a dictum in *Ames v. Norman*, 4 Sneed, 683, to the contrary is declared not to be controlling as authority.

<sup>2</sup> *Buttler v. Rosenblath*, 42 N. J. Eq. 651, 9 Atl. Rep. 695; *Hiles v. Fisher*, 144 N. Y. 306, 39 N. E. Rep. 337; *State v. Brady*, 53 Mo. App. 202. See, also, *Phelps v. Simons*, 159 Mass. 415, 34 N.

E. Rep. 657, which is a case relating to a bequest to husband and wife. It was decided by a divided court that the purchaser from the husband of shares of stock so held was entitled to the dividends on the stock during the joint lives of the husband and wife, and to the shares in the contingency of the husband surviving his wife; and that, if the wife survived her husband, she was entitled to the shares absolutely. Three of the justices believed that, under the statute relating to the separate property of married women, the husband had no power to alienate his wife's interest in the shares. Three other justices thought that the husband and wife had title to the shares by entireties, and that the statute above referred to did not apply; that the husband, having reduced the shares to possession, became the absolute owner of them; that he conveyed the whole title to the purchaser, and extinguished the wife's right of survivorship.

to this particular species of tenancy, — in other words, if it was one of its specific and essential characteristics, — then it would be difficult to segregate this right from the other rights incident to and flowing from the tenancy, and to say that, while the estate by entireties continues, this feature of it was intended to be taken away. But the taking away from the husband the usufruct, during the joint lives, of lands conveyed to husband and wife would not be inconsistent with the continuance of tenancies by entireties, provided the common-law right to the usufruct was not an incident of the tenancy, but of the marital right operating upon property so held, as upon all other real property of the wife. . . . He acquired no such right by force of the conveyance itself, and it was not an incident thereto. It was a right which followed the conveyance, and inured to the husband from the general principle of the common law which vested in the husband *jure uxoris* the rents and profits of his wife's lands during their joint lives. The husband took the rents and profits of lands held in entirety upon the same right that he took the rents and profits of her other real estate, whether held by a sole or joint title, namely, his right as husband. In none of the definitions of tenancies by entireties have we found any suggestion that this was one of the incidents or characteristics of such estates; and we think it is plain, both upon reason and analogy, that it had its origin in those harsh principles of common law which destroyed for most purposes the legal identity of the wife, and subjected her person and property to the control of her husband.”<sup>1</sup>

1814. At common law an estate by the entirety is during coverture subject to sale on execution against the husband.<sup>2</sup> But such sale cannot affect or divest the seisin or use of the wife in the estate, and if she survives her husband the whole estate

<sup>1</sup> *Hiles v. Fisher*, 144 N. Y. 306, 310, 313, 39 N. E. Rep. 337.

<sup>2</sup> *Litchfield v. Cudworth*, 15 Pick. 23; *Brown v. Gale*, 5 N. H. 416; *Cochran v. Kerney*, 9 Bush, 199; *Bennett v. Child*, 19 Wis. 362, 88 Am. Dec. 692; *Washburn v. Burns*, 34 N. J. L. 18; *Barber v. Harris*, 15 Wend. 615; *Hall v. Stephens*, 65 Mo. 670; *Stoebler v. Knerr*, 5 Watts, 181; *French v. Mehan*, 56 Pa. St. 286; *McCurdy v. Canning*, 64 Pa. St. 39, 41.

*for the debts of either*: *Thornburg v. Wiggins*, 135 Ind. 178, 183, 34 N. E. Rep. 999; *Chandler v. Cheney*, 37 Ind. 391; *Hulett v. Inlow*, 57 Ind. 412, 26 Am. Rep. 64; *Davis v. Clark*, 26 Ind. 424, 89 Am. Dec. 471; *Patton v. Rankin*, 68 Ind. 245; *Bruce v. Nicholson*, 109 N. C. 202, 13 S. E. Rep. 790, 26 Am. St. Rep. 562; *Shinn v. Shinn*, 42 Kans. 1, 21 Pac. Rep. 813; *Cole Manuf. Co. v. Collier (Tenn.)*, 31 S. W. Rep. 1000.

*Not subject to levy or sale upon execution*

goes to her.<sup>1</sup> The purchaser upon execution of the husband's interest acquires only a right to use his interest during his lifetime, in case his wife survives him, for the entire estate then goes to her.<sup>2</sup>

In some States, however, the husband's interest in an estate held by entirety is not subject to execution for his sole debts, by reason of statutes which exempt a wife's land from attachment and execution for the debts of the husband. "Such an estate is the real estate of a married woman, although her husband is joined with her in the title. It is the real estate of each. If the claim of the plaintiff is upheld, then the interest of the husband in his wife's right to her real estate is taken upon the sole debt of the husband. This would annul the statute. The estate of the wife, and her husband's interest therein in her right in the property in question, is protected from the husband's sole creditors by the spirit and letter of the statute."<sup>3</sup>

A crop raised by a husband on land held by him and his wife as tenants by entireties is not subject to sale on execution against the husband. The wife is entitled to the enjoyment of the land while it is held by her and her husband as such tenants, and the taking of the crop without her consent for her husband's debt would be an invasion of such right.<sup>4</sup>

**1815.** Estates in entirety cannot be created at the expense of the husband's creditors and held in fraud of their rights; and in case such fraud is manifest the husband's interest, which is such part of the estate as he has paid for with his own property, may be subjected to his creditors' claims.<sup>5</sup>

**1816.** At common law the husband is the only proper and necessary party to an action to recover possession of land held

<sup>1</sup> *Davis v. Clark*, 26 Ind. 424, 89 Am. Dec. 471; *Martin v. Jackson*, 27 Pa. St. 504, 67 Am. Dec. 489; *Brownson v. Hull*, 16 Vt. 309, 42 Am. Dec. 517; *Ames v. Norman*, 4 Sneed, 683, 70 Am. Dec. 269.

<sup>2</sup> *Bennett v. Child*, 19 Wis. 362, 88 Am. Dec. 692; *Hall v. Stephens*, 65 Mo. 670, 27 Am. Rep. 302.

<sup>3</sup> *Corinth v. Emery*, 63 Vt. 505, 22 Atl. Rep. 618, 25 Am. St. Rep. 780. A like decision was made under a similar statute in **Indiana**: *Davis v. Clark*, 26 Ind. 424, 89 Am. Dec. 471; *Barren Creek Ditch-*

*ing Co. v. Beck*, 99 Ind. 247; *Thornburg v. Wiggins*, 135 Ind. 178, 34 N. E. Rep. 999; *Orthwein v. Thomas (Ill.)*, 13 N. E. Rep. 564. **Kentucky**: *Cochran v. Kerney*, 9 Bush, 199. **Tennessee**: *Cole Manuf. Co. v. Collier (Tenn.)*, 31 S. W. Rep. 1000.

<sup>4</sup> *Patton v. Rankin*, 68 Ind. 245, 34 Am. Rep. 254; *Fogleman v. Shively*, 4 Ind. App. 197, 30 N. E. Rep. 909.

<sup>5</sup> *Newlove v. Callaghan*, 86 Mich. 297, 301, 48 N. W. Rep. 1096, 49 N. W. Rep. 214, 24 Am. St. Rep. 123.

by the entirety. But, under the acts giving married women full control and enjoyment of their separate property, the wife may alone maintain an action to recover land conveyed to her and her husband. Such conveyance vests each of them with the entire estate. "Each is entitled to possession as against every person except the other. It is true the estate is entire, and cannot, by partition or otherwise, be segregated while the marital relation exists, so as to give each grantee either an undivided interest in the land or a right in severalty to a particular part of it.<sup>1</sup> But it is also true that the grant vests in each grantee the entire estate. The statute abolishes the legal unity between husband and wife, which gave rise to estates by the entirety, but the estate itself has not been abolished. The marital control by the husband over the real estate of the wife is removed, and she is given the power to sue at law or in equity, with or without her husband being joined with her as a party. The right to sue in her own name seems to be unlimited."<sup>2</sup>

1817. At common law the husband could alone maintain an action for an injury to the estate, as he had the absolute control of the property during the joint lives of himself and his wife;<sup>3</sup> but, under statutes enabling married women to hold separate property as if not married, it is held that the husband and wife must join in such suit.<sup>4</sup>

<sup>1</sup> *Russell v. Russell*, 122 Mo. 235, 26 S. W. Rep. 677.

<sup>2</sup> *Bains v. Bullock* (Mo.), 31 S. W. Rep. 342, 343, per Macfarlane, J.

<sup>3</sup> *Hall v. Stephens*, 65 Mo. 278, 27 Am.

Rep. 302; *Bains v. Bullock* (Mo.), 31 S. W. Rep. 342.

<sup>4</sup> *Vunk v. Raritan Riv. R. Co.* 56 N. J. L. 395, 28 Atl. Rep. 593.

## CHAPTER XL.

### TENANCY IN COMMON.

I. In general, 1818-1825.

| II. Partnership realty, 1826-1834.

#### I. *In General.*

1818. Unity of possession, or of right of possession, is alone sufficient to constitute two or more persons tenants in common of land. They may have acquired their titles at different times and in different modes, their shares in the property may be different, and the quantities of their estates may be different.<sup>1</sup>

Unity of possession alone is therefore the distinguishing feature of a tenancy in common. Each tenant is seised of an undivided part of the whole estate, and each is entitled to the possession of every part of it; and consequently right of possession is a right of a joint possession of every part, and not an exclusive possession of any part or of the whole.

1819. A tenancy in common is always created, without the aid of a statute, by words that look to a division of the land conveyed or devised, such as the words "to be equally divided," or "share and share alike," or any words indicating a division,<sup>2</sup> even if the grant is to them "jointly."<sup>3</sup>

A deed or devise of land to two persons, "to be equally divided between them," but one of them named "to have the part next the brook," creates an estate in common in them, and not an estate in severalty in each. "If an estate is given to a plurality of persons, without any restrictive, exclusive, and explana-

<sup>1</sup> 1 Washburn Real Prop. 4th ed. 652; 2 Black. Com. 191; Fenton v. Miller, 94 Mich. 204, 53 N. W. Rep. 957; Spencer v. Austin, 38 Vt. 258; Young v. De Bruhl, 11 Rich. 638, 73 Am. Dec. 127.

<sup>2</sup> Martin v. Smith, 5 Binn. 16, 6 Am. Dec. 395, per Tilghman, C. J.; Irwin v. Dunwoody, 17 S. & R. 61; Evans v. Brit-

tain, 3 S. & R. 135; Bambaugh v. Bambaugh, 11 S. & R. 191; Griswold v. Johnson, 5 Conn. 363; Emerson v. Cutler, 14 Pick. 108; Child v. Wells, 13 Pick. 121; Presbrey v. Presbrey, 13 Allen, 281; Gilpin v. Hollingsworth, 3 Md. 190, 56 Am. Dec. 737; Preston v. Robinson, 24 Vt. 583.

<sup>3</sup> Burghardt v. Turner, 12 Pick. 534, 538.



tory words, from the nature of the case they are tenants in common. If the grant superadds that the property 'is to be equally divided between them,' the estate is held in common, because these words are inapplicable to a severed estate." They merely indicate a future division of the property. The statement that a particular one is "to have the part next the brook" denotes merely that, when a future division of the property shall be made, that person shall have his portion assigned to him in the place named. It has no possible effect on the tenancy in common necessarily arising from the unity of possession, nor can it operate to produce such estate.<sup>1</sup>

**1820.** A tenancy in common can exist only where two or more persons have titles to parts of the same estate or interest. Thus the owner of the surface of the land, who has conveyed to another a stratum of coal underlying it, is not a tenant in common with his grantee. Each has a separate estate, and an exclusive right to the possession of his own estate. They are not tenants in common of the coal, or of the surface land, but each is the sole owner of a separate estate, and not of parts of an undivided whole of the same estate. And so if the owner of land sells the timber upon it, the vendor and purchaser do not sustain the relation of tenants in common, but each is a sole tenant of his own separate estate, — the one in the land, the other in the timber.<sup>2</sup> If one tenant in common sells his interest in the timber on the common land, he does not thereby make his cotenants tenants in common with the purchaser of the timber.

If one tenant in common sells his interest in the timber upon the common land, the only interest which the purchaser takes is such interest in the timber as in partition proceedings shall be set off to his grantor. The partition is made of the entirety of the estate, and when this is done the purchaser of the timber is entitled to all the rights secured by his conveyance.<sup>3</sup>

**1821.** There is a presumption that tenants in common hold equal shares or interests in the common property, in case the instrument creating the estate does not make their shares or

<sup>1</sup> *Griswold v. Johnson*, 5 Conn. 363, per Hosmer, C. J.      20 Atl. Rep. 545. See *Wheeler v. Carpenter*, 107 Pa. St. 271.

<sup>2</sup> *Dexter v. Lothrop*, 136 Pa. St. 565,      <sup>3</sup> *Benedict v. Torrent*, 83 Mich. 181, 47 N. W. Rep. 129.

interests unequal.<sup>1</sup> They may hold in unequal shares; but, as declared in the Georgia Code, "the fact of inequality does not give the person holding the greater interest any privileges, as to possession, superior to the person owning a lesser interest, so long as the tenancy continues."<sup>2</sup>

1822. A purchaser of an undivided interest, from one tenant in common, himself becomes a tenant in common with the other part owners.<sup>3</sup> A conveyance by one tenant in common of a certain number of acres of land out of that held in common, not exceeding the grantor's interest, to be selected by the purchaser, is not void. Upon the purchaser's waiving his right to select the land, he becomes a tenant in common in the entire tract; his share being in the proportion that the number of acres conveyed to him bears to the whole number of acres in the entire tract.<sup>4</sup>

1823. *Cestuis que trust* of land held by a trustee are equitable tenants in common, and one of them cannot destroy that relation by setting up an adverse possession under a subsequent deed from the same person who made the conveyance in trust. The *cestui que trust* in actual possession is a tenant at will of the trustee, and the statute of limitations does not apply.<sup>5</sup>

1824. A mortgage to two or more persons to secure several debts creates the mortgagees tenants in common and not joint tenants.<sup>6</sup> Such a mortgage is presumed to be for the benefit of the mortgagees in equal shares; but if specific debts to each be secured, the mortgagees are tenants in common *pro rata* to such debts.<sup>7</sup> The fact, therefore, that the mortgage is void as to one of the mortgagees, as against creditors of the mortgagor, does not affect its validity as to the others. Two mortgagees of the same land, each holding a separate mortgage to secure a separate debt,

<sup>1</sup> Nippel v. Hammond, 4 Colo. 211, 219; Georgia Code 1882, § 2301; Baker v. Shepherd, 37 Ga. 12; Shiels v. Stark, 14 Ga. 429; Campau v. Campau, 44 Mich. 31, 5 N. W. Rep. 1062; Beardsley v. Knight, 10 Vt. 185, 33 Am. Dec. 193.

<sup>2</sup> Code 1882, § 2301.

<sup>3</sup> Herbert v. Odlin, 40 N. H. 267.

<sup>4</sup> Dohoney v. Womack, 1 Tex. Civ. App. 354, 19 S. W. Rep. 883, 20 S. W. Rep. 950; Nye v. Moody, 70 Tex. 434, 8 S. W. Rep. 606; Gibbs v. Swift, 12 Cush. 393.

<sup>5</sup> Jeter v. Davis, 109 N. C. 458, 13 S. E. Rep. 908.

<sup>6</sup> Gilson v. Gilson, 2 Allen, 115, 117; Burnett v. Pratt, 22 Pick. 556; Howard v. Chase, 104 Mass. 249; Hubby v. Hubby, 5 Cush. 516, 52 Am. Dec. 742; Brown v. Bates, 55 Me. 520, 92 Am. Dec. 613.

<sup>7</sup> Shelden v. Erskine, 78 Mich. 627, 44 N. W. Rep. 146; Adams v. Robertson, 37 Ill. 45; Willis v. Caldwell, 10 B. Mon. 199; Farwell v. Warren, 76 Wis. 527, 45 N. W. Rep. 217.

are tenants in common of the land, and their rights are the same as if one mortgage had been made to both to secure a separate debt to each.<sup>1</sup>

As already noticed, in several States the statutes providing that conveyances to two or more persons shall be construed to create estates in common, expressly except mortgages;<sup>2</sup> and therefore, in such States, whether such mortgages create a joint estate or an estate in common is left open to inquiry.

On general principles a mortgage to two or more persons to secure a debt due to them jointly, creates a joint estate in the mortgages.<sup>3</sup> Upon the death of one such mortgagee, an action to recover the debt or to enforce the mortgage may be maintained in the name of the survivor.<sup>4</sup>

Whether the debt be several or joint, upon foreclosure the mortgagees become seised of the land as tenants in common.<sup>5</sup> The foreclosure operates as a new purchase.

1825. A mortgagee of an undivided half of a parcel of land does not become a tenant in common with the owner of the other half until his title has become absolute by a completed foreclosure. Before that time the mortgage is only a lien, and the estate is to be dealt with as belonging to the mortgagor.<sup>6</sup> For the same reason, until foreclosure is complete the mortgagees to whom possession has been surrendered by the mortgagor cannot maintain a petition for a partition.<sup>7</sup>

A mortgage of an undivided interest in a specified parcel of land is invalid as against the cotenants of the mortgagor. They may obtain a partition of the land without regard to the mortgage; and if it cannot be conveniently divided between all the cotenants, a sum of money may be awarded to the mortgagor for his share of the property.<sup>8</sup>

<sup>1</sup> *Cochran v. Goodell*, 131 Mass. 464; *Ewer v. Hobbs*, 5 Met. 1; *Howard v. Chase*, 104 Mass. 249.

<sup>2</sup> See § 1783.

<sup>3</sup> *Appleton v. Boyd*, 7 Mass. 131; *Goodwin v. Richardson*, 11 Mass. 469; *Earle v. Wood*, 8 Cush. 430, 448, per Shaw, C. J.; *Kinsley v. Abbott*, 19 Me. 430.

<sup>4</sup> *Blake v. Sanborn*, 8 Gray, 154; *Webster v. Vandeventer*, 6 Gray, 428; *Mutual L. Ins. Co. v. Sturges*, 32 N. J. Eq. 678; *Martin v. McReynolds*, 6 Mich. 70.

<sup>5</sup> *Randall v. Phillips*, 3 Mason, 378; *Goodwin v. Richardson*, 11 Mass. 469; *Donnels v. Edwards*, 2 Pick. 617; *Burnett v. Pratt*, 22 Pick. 556; *Hills v. Doe*, 6 N. H. 328.

<sup>6</sup> *Norcross v. Norcross*, 105 Mass. 265, and cases cited; *Shepard v. Richards*, 2 Gray, 424, 61 Am. Dec. 473.

<sup>7</sup> *Ewer v. Hobbs*, 5 Met. 1.

<sup>8</sup> *Marks v. Sewall*, 120 Mass. 174.

## II. *Partnership Realty.*

1826. A partnership is another form of concurrent ownership, but such ownership is the only characteristic of a partnership that belongs also to a joint tenancy and a tenancy in common. "Partnership," says Professor Parsons,<sup>1</sup> "has been compared to tenancy in common, and also to joint tenancy, and has been said to be one or the other of these, modified in certain ways. This was the view taken in all the early books. But this is no more true than that tenancy in common or joint tenancy is a modified partnership. The three things are essentially distinct. They all have the element of joint ownership of property, but in all other respects are different and independent, and the law of each must be sought for in itself. . . . And, as to joint tenancy, not only may all of the four unities — title, interest, time, and possession, every one of which is essential to joint tenancy — be absent from partnership, but, besides this technical difference, the substantial characteristic of the joint tenancy, which is the right of survivorship, is wholly wanting in fact in partnership, for it exists there only in form, and as a mere trust for the purpose of settlement."

1827. Real property becomes partnership assets when the title to it, though nominally in two or more persons, is equitably merged in the joint ownership of a firm.<sup>2</sup> This occurs when it is furnished with partnership funds for partnership uses. Participation in profits is evidence of the existence of a partnership, but is not conclusive of it. That tenants in common are jointly interested in managing the common estate, and obtaining the profits of it, does not make them partners. That they jointly cultivate a farm belonging to them and divide the product, or sell the product and divide the proceeds, does not make them partners. No presumption of a partnership arises from the operation of an oil well by tenants in common.<sup>3</sup> "Tenants in common may become partners, like other persons, where they agree to assume that relation towards each other; but the law will not create the relation for them as the consequence of a course of conduct and dealing naturally referable to a relation already existing between

<sup>1</sup> Parsons on Partnership, 3d ed. p. 2.      Taylor v. Fried, 161 Pa. St. 53; Walker

<sup>2</sup> Sikes v. Work, 6 Gray, 433.      v. Tupper, 152 Pa. St. 1, 25 Atl. Rep.

<sup>3</sup> Neill v. Shamburg, 158 Pa. St. 263; 172.

them which made such a course of conduct to their common advantage.”<sup>1</sup> In another case the same court say: “The several owners may form a partnership for the purpose of operating the common property if they so agree; but, in the absence of an agreement, they will be presumed to deal with each other and the common property as part owners, holding as tenants in common, and liable to each other in account rendered or in equity, as the circumstances may seem to require.”<sup>2</sup>

**1828. Tenants in common engaged in developing the common property** are presumed to continue the same relation to each other, and not to have formed a partnership, in the absence of all proof of a partnership agreement. As between themselves, their relation depends upon their title until they change it by agreement; though as to third persons they may subject themselves to liability as partners by a course of dealing or by their acts and declarations.<sup>3</sup> When tenants in common agree to carry on mining operations upon their land, each contributing towards the expenses in proportion to his or her respective interest or estate in the land, they will be considered with respect both to themselves and third persons, as the ordinary owners of land working their respective shares of the mines, responsible only for their own acts, subject to no laws of partnership whatever, and possessing distinct rights in the property.<sup>4</sup>

**1829. Partnership, as between the partners, is a matter of agreement, depending upon their intention.** The fact that one tenant in common of oil lands collected the rents and royalties under a power of attorney, and remitted to the other tenants their proportions of the net product for distribution, does not tend to establish a partnership between such tenants.<sup>5</sup>

The fact that tenants in common of land enter into a partnership with a third person to deal in cattle, they furnishing the capital, is not sufficient of itself to constitute their land partnership assets.<sup>6</sup>

<sup>1</sup> *Dunham v. Loverock*, 158 Pa. St. 197, 203, per Williams, J.

<sup>2</sup> *Butler Savings Bank v. Osborne*, 159 Pa. St. 10, 15, per Williams, J.

<sup>3</sup> *Butler Sav. Bank v. Osborne*, 159 Pa. St. 10.

<sup>4</sup> *Bainbridge on Mines and Minerals*,

p. 296; *Butler Sav. Bank v. Osborne*, 159 Pa. St. 10.

<sup>5</sup> *St. John v. Coates*, 18 N. Y. Supp. 419; *Worsham v. Vignal*, 5 Tex. Civ. App. 471, 24 S. W. Rep. 562.

<sup>6</sup> *Fordyce v. Hicks*, 80 Iowa, 272, 45 N. W. Rep. 750. And see *Alexander v. Kimbro*, 49 Miss. 529.

1830. A single special venture by two persons on joint account in the purchase of land to hold for sale at a profit does not create a partnership in respect to the land, but merely a tenancy in common between them. An agreement to share the profits and losses in a single transaction does not create a partnership.<sup>1</sup>

A verbal agreement was made between three persons to purchase a tract of land and erect a building thereon, the three to share equally in the net profits. The land was bought by one of them, to whom the deed was made, and a building was erected by him, neither of the others paying anything towards the cost of either the land or building. It was held that the transaction failed to show any partnership between them.<sup>2</sup>

1831. A conveyance to two persons, their heirs and assigns, *prima facie* vests the land in them as tenants in common, though they may be partners; and on the death of one of them his interest descends to his heirs, and is not subject at law to sale and conveyance by the surviving partner.<sup>3</sup>

Where land has been conveyed to several persons as tenants in common, though described as constituting a partnership, and they have assumed the payment of an existing mortgage, a judgment for deficiency in a foreclosure suit, naming the individuals as parties, cannot be rendered against the partnership, but must be against the individuals constituting the partnership. The title in such case is in the individuals and not in the firm.<sup>4</sup>

1832. A joint deed by individual partners in whom the legal title is vested is not always necessary to convey the firm title. One partner executing a deed in behalf of the firm binds his copartners, if there be either a previous parol authority or a subsequent parol adoption of his act.<sup>5</sup>

<sup>1</sup> *Clark v. Sidway*, 142 U. S. 682, 12 Sup. Ct. Rep. 327; *Dickinson v. Williams*, 11 Cush. 258, 59 Am. Dec. 142; *Gwineth v. Thompson*, 9 Pick. 31, 19 Am. Dec. 350; *Fanning v. Chadwick*, 3 Pick. 420, 15 Am. Dec. 233; *Jordan v. Soule*, 79 Me. 590, 12 Atl. Rep. 786; *Harding v. Foxcroft*, 6 Me. 76; *Fowler v. Fowler*, 50 Conn. 256; *Fisher v. Kinaston*, 18 Vt. 489; *Haven v. Mehlgarten*, 19 Ill. 91; *Coles v. Coles*, 15 Johns. 159, 8 Am. Dec. 231; *Galbreath v. Moore*, 2 Watts, 86.

<sup>2</sup> *Morton v. Nelson*, 145 Ill. 586, 32 N. E. Rep. 916.

<sup>3</sup> *Southern Cotton Oil Co. v. Henshaw*, 89 Ala. 448, 7 So. Rep. 760; *Espy v. Comer*, 76 Ala. 501; *Caldwell v. Farmer*, 56 Ala. 405; *Lang v. Waring*, 25 Ala. 625, 60 Am. Dec. 533; *Coles v. Coles*, 15 Johns. 159, 8 Am. Dec. 231; *Wheatley v. Calhoun*, 12 Leigh, 264, 37 Am. Dec. 654.

<sup>4</sup> *La Société Française v. Weidmann*, 97 Cal. 507, 32 Pac. Rep. 583.

<sup>5</sup> *McGahan v. National Bank*, 156 U. S.

**1833.** A partner holding the legal title to land for the firm has the same power over it as over firm personalty, and his conveyance for firm purposes passes the title free of the firm's equities.<sup>1</sup>

**1834.** One partner may make a deed binding upon his copartners if they are present at its execution and authorize it, or if authority to make the deed is fairly inferable from their conduct and the course of business.<sup>2</sup> Where a partner, who holds the legal title to an undivided part of land belonging to the firm, mortgages such part to secure the firm's notes and their renewals, with the knowledge of his copartner, who accepts the benefits of the renewals without objection, such mortgage is valid, and may be enforced as against such copartner and a purchaser of the whole tract at execution sale under a subsequent judgment against the firm and such copartner, who held the legal title to the other undivided part.<sup>3</sup>

Where there were four partners in a sawmill, two of whom owned the land, and one of the others mortgaged it in the name of the four and signed the firm name, it was held that the mortgage was a valid lien on the land, the two owners having received the consideration, and in many ways acknowledged and ratified the mortgage; and that a purchaser of the interest of one of the owners in both land and partnership, after the record of the mortgage, was bound by its lien.<sup>4</sup>

218, 15 Sup. Ct. Rep. 347; 3 Kent Comm. 48; *Cady v. Shepherd*, 11 Pick. 400, 405, 406, 22 Am. Dec. 379; *Peine v. Weber*, 47 Ill. 41; *Frost v. Wolf*, 77 Tex. 455, 14 S. W. Rep. 440; *Schmertz v. Shreeve*, 62 Pa. St. 457, 1 Am. Rep. 439; *Wilson v. Hunter*, 14 Wis. 683, 80 Am. Dec. 795; *Rumery v. McCulloch*, 54 Wis. 565, 12 N. W. Rep. 65; *Pike v. Bacon*, 21 Me. 280, 38 Am. Dec. 259; *Russell v. Annable*, 109 Mass. 72, 12 Am. Rep. 665; *Gunter v. Williams*, 40 Ala. 561; *Sullivan v. Smith*, 15 Neb. 476, 19 N. W. Rep. 620.

This is the accepted doctrine in **New York**: *Smith v. Kerr*, 3 N. Y. 144; *Graser*

*v. Stellwagen*, 25 N. Y. 315; *Van Brunt v. Applegate*, 44 N. Y. 544; and in **South Carolina**: *Stroman v. Varn*, 19 S. C. 307; *Salinas v. Bennett*, 33 S. C. 285, 11 S. E. Rep. 968.

<sup>1</sup> *McGahan v. National Bank*, 156 U. S. 218, 15 Sup. Ct. Rep. 347, per Fuller, C. J.

<sup>2</sup> *McGahan v. National Bank*, 156 U. S. 218, 15 Sup. Ct. Rep. 347, per Fuller, C. J.

<sup>3</sup> *McGahan v. National Bank*, 156 U. S. 218, 15 Sup. Ct. Rep. 347.

<sup>4</sup> *Stroman v. Varn*, 19 S. C. 307.

## CHAPTER XLI.

### RELATIONS OF COTENANTS TO EACH OTHER.

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|--------------------------------------------------------------------------------------------|---------------------------------------------------------------------------------------------------------|
| <p>I. As to incumbrances in general, 1835-1845.</p> <p>II. As to tax sales, 1846-1851.</p> | <p>III. Contribution and liens therefor, 1852-1858.</p> <p>IV. Contracts and management, 1859-1861.</p> |
|--------------------------------------------------------------------------------------------|---------------------------------------------------------------------------------------------------------|

#### *I. As to Incumbrances in General.*

1835. Cotenants stand in a relation of trust or confidence to each other with reference to the joint or common property. If one purchases an outstanding title to such property, or pays an incumbrance upon it, he is presumed to act in the common interest of all the tenants.<sup>1</sup> A "community of interest produces community of duty. . . . A conveyance to one of several tenants in common, or a deed to one of two devisees of the same land, shall inure to the benefit of all who came in under the same title, and are holding jointly or in common. Where several persons have a joint or common interest in an estate, it is not to be tolerated that one shall purchase an incumbrance or an outstanding title, and set it up against the rest for the purpose of depriving them of their interests."<sup>2</sup>

When the common land is subject to a mortgage, and the cotenants enter into an arrangement by which one of them, with

<sup>1</sup> *Smith v. Osborne*, 86 Ill. 606; *Ramberg v. Wahlstrom*, 140 Ill. 182, 29 N. E. Rep. 727; *Titsworth v. Stout*, 49 Ill. 78, 95 Am. Dec. 577; *Jennings v. Moon*, 135 Ind. 168, 34 N. E. Rep. 996; *McPheeters v. Wright*, 124 Ind. 560, 24 N. E. Rep. 734; *Hinters v. Hinters*, 114 Mo. 26, 21 S. W. Rep. 456; *Allen v. De Groodt*, 105 Mo. 442, 16 S. W. Rep. 494, 1049; *Jones v. Stanton*, 11 Mo. 433; *Clements v. Cates*, 49 Ark. 242, 4 S. W. Rep. 776; *Oliver v. Hedderly*, 32 Minn. 455, 21 N. W. Rep. 478; *Tanney v. Tanney*, 159 Pa. St. 277, 28 Atl. Rep. 287; *Weaver v. Wible*, 5 Pa. St. 270, 64 Am. Dec. 696; *Meyer's App.* 2 Pa. St. 463; *Keller v. Auble*, 58 Pa. St. 410; *Bork v. Martin*, 11 N. Y. Supp. 569; *Knolls v. Barnhart*, 71 N. Y. 474; *Swinburne v. Swinburne*, 28 N. Y. 568; *Venable v. Beauchamp*, 3 Dana, 321, 324, 28 Am. Rep. 74; *Gossom v. Donaldson*, 18 B. Mon. 230, 68 Am. Dec. 723; *Boskowitz v. Davis*, 12 Nev. 446; *Brown v. Homan*, 1 Neb. 448.

<sup>2</sup> *Weaver v. Wible*, 25 Pa. St. 270, 64 Am. Dec. 696, per *Lewis, C. J.*



other parties, agrees to pay off the mortgage or buy in the land, and hold it subject to redemption by the other owners, and such arrangement is not fully complied with, but one of the owners, without explicit notice to the others that he is not acting under said arrangement, buys in the land for his own benefit for the balance due on the mortgage debt, which is much less than the value of the land, a court of equity will hold that the purchase was for the benefit of all the owners.<sup>1</sup>

**1836.** One tenant in common purchasing an outstanding title to the common property holds it for the benefit of all, and he cannot set it up against his cotenant to defeat his title, but only to obtain contribution.<sup>2</sup> In a leading case on this subject Chancellor Kent stated the law with his usual clearness:

<sup>1</sup> *Gilchrist v. Beswick*, 33 W. Va. 168, 10 S. E. Rep. 371.

<sup>2</sup> *Rothwell v. Dewees*, 2 Black. 613; *Flagg v. Mann*, 2 Sumn. 486. **Arkansas**: *Brittin v. Handy*, 20 Ark. 381, 73 Am. Dec. 497; *Clements v. Cates*, 49 Ark. 242; *Moore v. Woodall*, 40 Ark. 42. **California**: *Mandeville v. Solomon*, 39 Cal. 125; *Olney v. Sawyer*, 54 Cal. 379. **Illinois**: *Ramberg v. Wahlstrom*, 140 Ill. 182, 29 N. E. Rep. 727; *Montague v. Selb*, 106 Ill. 49; *Bracken v. Cooper*, 80 Ill. 221; *Smith v. Osborne*, 86 Ill. 606; *Titsworth v. Stout*, 49 Ill. 78, 95 Am. Dec. 577. **Indiana**: *Stevens v. Reynolds* (Ind.), 41 N. E. Rep. 931; *Millis v. Roof*, 121 Ind. 360, 23 N. E. Rep. 255; *Elston v. Piggott*, 94 Ind. 14; *McPheeters v. Wright*, 124 Ind. 560, 572, 24 N. E. Rep. 734. **Iowa**: *Moy v. Moy*, 89 Iowa, 511, 56 N. W. Rep. 668; *Shell v. Walker*, 54 Iowa, 386, 6 N. W. Rep. 581; *Fallon v. Chidester*, 46 Iowa, 588, 26 Am. Rep. 164; *Weare v. Van Meter*, 42 Iowa, 128, 20 Am. Rep. 616; *Sears v. Sellew*, 28 Iowa, 501. **Kentucky**: *Lee v. Fox*, 6 Dana, 171; *Venable v. Beauchamp*, 3 Dana, 321, 28 Am. Dec. 74; *Gossom v. Donaldson*, 18 B. Mon. 230, 68 Am. Dec. 723. **Michigan**: *Dubois v. Campau*, 24 Mich. 360. **Mississippi**: *Harrison v. Harrison*, 56 Miss. 174. **Missouri**: *Dillinger v. Kelley*, 84 Mo. 561; *Picot v. Page*, 26 Mo. 398; *Snell v. Har-*

*rison*, 104 Mo. 158, 16 S. W. Rep. 152; *Jones v. Stanton*, 11 Mo. 433. **Nebraska**: *Brown v. Homan*, 1 Neb. 448. **Nevada**: *Boskowitz v. Davis*, 12 Nev. 446. **New York**: *Carpenter v. Carpenter*, 131 N. Y. 101; 29 N. E. Rep. 1013, reversing 12 N. Y. Supp. 189; *Van Horne v. Fonda*, 5 Johns. Ch. 388; *Knolls v. Barnhart*, 71 N. Y. 474; *Koke v. Balken*, 73 Hun, 145, 25 N. Y. Supp. 1038. **North Carolina**: *Page v. Branch*, 97 N. C. 97, 1 S. E. Rep. 625; *Threadgill v. Redwine*, 97 N. C. 241, 2 S. E. Rep. 526; *Grim v. Wicker*, 80 N. C. 343. **Oregon**: *Dray v. Dray*, 21 Oreg. 59, 27 Pac. Rep. 223. **Pennsylvania**: *Tanney v. Tanney*, 159 Pa. St. 277, 28 Atl. Rep. 287; *Keller v. Auble*, 58 Pa. St. 410, 98 Am. Dec. 297; *Lloyd v. Lynch*, 28 Pa. St. 419, 70 Am. Dec. 137; *Weaver v. Wible*, 25 Pa. St. 270, 64 Am. Dec. 696; *Duff v. Wilson*, 72 Pa. St. 442. **Tennessee**: *King v. Rowan*, 10 Heisk. 675; *Tisdale v. Tisdale*, 2 Sneed, 596, 64 Am. Dec. 775. **Texas**: *McFarlin v. Leaman* (Tex. Civ. App.), 29 S. W. Rep. 44. **Vermont**: *House v. Fuller*, 13 Vt. 165, 37 Am. Dec. 580; *Braintree v. Battles*, 6 Vt. 395. **Virginia**: *Forror v. Forror*, 29 Gratt. 134; *Buchanan v. King*, 22 Gratt. 414. **West Virginia**: *Gilchrist v. Beswick*, 33 W. Va. 168, 10 S. E. Rep. 371; *McMahon v. McClernan*, 10 W. Va. 419. **Wisconsin**: *Rountree v. Denson*, 59 Wis. 522.

"In some cases, says Littleton,<sup>1</sup> a release to one joint tenant shall aid the joint tenant to whom it was not made, as well as him to whom it was made. I will not say, however, that one tenant in common may not in any case purchase in an outstanding title for his exclusive benefit. But when two devisees are in possession, under an imperfect title derived from their common ancestor, there would seem, naturally and equitably, to arise an obligation between them, resulting from their joint claim and community of interests, that one of them should not affect the claim to the prejudice of the other. It is like an expense laid out upon a common subject by one of the owners, in which case all are entitled to the common benefit on bearing a due proportion of the expense. It is not consistent with good faith, nor with the duty which the connection of the parties as claimants of a common subject created, that one of them should be able, without the consent of the other, to buy in an outstanding title, and appropriate the whole subject to himself, and thus undermine and oust his companion. It would be repugnant to a sense of refined and accurate justice. It would be immoral, because it would be against the reciprocal obligation to do nothing to the prejudice of each other's equal claim which the relationship of the parties as joint devisees created. Community of interest produces a community of duty; and there is no real difference, on the ground of policy and justice, whether one cotenant buys up an outstanding incumbrance, or an adverse title to disseise and expel his cotenant. It cannot be tolerated when applied to a common subject in which the parties had equal concern, and which created a mutual obligation to deal candidly and benevolently with each other, and to cause no harm to their joint interest." <sup>2</sup>

1837. One cotenant is not ordinarily allowed to purchase the common property at a judicial sale to satisfy an incumbrance upon it.<sup>3</sup> Under exceptional circumstances a cotenant has been allowed to purchase for his own benefit at such sale, as where one had purchased an undivided half part of certain land

<sup>1</sup> § 307.

<sup>2</sup> *Van Horne v. Fonda*, 5 Johns. Ch. 388, 407.

<sup>3</sup> *Peck v. Peck*, 110 N. Y. 64, 16 N. Y. St. Rep. 638, 17 N. E. Rep. 383; *Knolls*

*v. Barnhart*, 71 N. Y. 474; *Holterhoff v. Mead*, 36 Minn. 42, 99 N. W. Rep. 675; *Gibson v. Winslow*, 46 Pa. St. 384, 84 Am. Dec. 552; *Edmund's App.* 68 Pa. St. 24; *Smith v. Osborne*, 86 Ill. 606.

subject to a mortgage then outstanding given by his grantor, and upon a foreclosure sale under that mortgage he purchased in the property for himself. He was also the owner of a subsequent mortgage given to him by his cotenant on the latter's undivided part of the premises; and the court held that under the circumstances, it being a public sale judicial in its nature, and the relations between the parties being at arm's length, the case was taken out of the ordinary rule, and that the cotenant purchasing at the foreclosure sale obtained a good title.<sup>1</sup>

Where a tenant buys the common property at a sheriff's sale to satisfy an incumbrance or lien upon it, the cotenants are not estopped from avoiding the sale by reason of having accepted their shares of the purchase-money, in case their cotenant concealed the fact that he was the actual purchaser by procuring a stranger to bid in the property and convey it to him.<sup>2</sup>

**1838.** But one tenant may buy the interest of his cotenant at a judicial sale. Such a purchase cannot be presumed to be for the benefit of the joint or common estate, but on the contrary is presumed to be for the sole benefit of the purchasing tenant, and for the purpose of extinguishing the joint tenancy, or tenancy in common. The doctrine that one cotenant shall not be allowed to purchase an outstanding title to the joint or common property has no application.<sup>3</sup>

Where, however, there are covenants between the cotenants that they shall sell the common property, and after adjusting any irregularity in the amount paid by each, shall divide the proceeds, and the interest of one is sold upon execution and purchased by the others, the latter does not acquire the land discharged of all claim by his cotenant, and the equity for a division under the covenant did not pass by the sheriff's deed.<sup>4</sup>

**1839.** A tenant in common who has purchased an outstanding title to the common property cannot avail himself of a statute of limitations, whether general or special, to protect himself against his cotenants who claim that the purchase

<sup>1</sup> *Streeter v. Shultz*, 45 Hun, 406, affirmed 127 N. Y. 652, explained in *Peck v. Peck*, 110 N. Y. 64, 74.

<sup>2</sup> *Tanney v. Tanney*, 159 Pa. St. 277, 28 Atl. Rep. 287.

<sup>3</sup> *Peck v. Lockridge*, 97 Mo. 549, 11 S. W. Rep. 246; *Burr v. Mueller*, 65 Ill. 258,

262; *Brittin v. Handy*, 20 Ark. 381, 404, 73 Am. Dec. 497; *Gunter v. Laffan*, 7 Cal. 588; *Alexander v. Kennedy*, 3 Grant's Cas. 379; *Catlin v. Kidder*, 7 Vt. 12.

<sup>4</sup> *Threadgill v. Redwine*, 97 N. C. 241, 2 S. E. Rep. 526; *Tally v. Reed*, 74 N. C. 463; *Love v. Smathers*, 82 N. C. 369.

was made in behalf of all the tenants, as their right in the property is an interest under the common title in no way affected by the sale.<sup>1</sup>

1840. This rule rests upon considerations of mutual trust, and does not, therefore, according to some cases, apply where this does not exist, as where the original interests of such cotenants were acquired under different instruments, from different sources, and at different times. In such case a cotenant who has not used his cotenancy to secure an advantage, or superior means of information about the state of the title, may acquire and assert a superior outstanding title.<sup>2</sup> This exception to the rule can only occur in the case of tenants in common, inasmuch as they are the only cotenants whose title can arise by separate instruments and from different sources. The only unity between them is that of possession; while joint tenants, coparceners, and tenants by the entirety have one and the same interest, and hold by one and the same title.

Where by the act of all the tenants in common the land has passed to a stranger, one who was formerly a cotenant, he may buy it and hold it to his own use, just as such stranger could hold it. Thus, where tenants in common execute a trust deed of their land, and the trustee, in accordance with his powers, mortgages and then sells an undivided interest in the land, a purchase by one of the tenants in common from the trustee's grantee of such interest will not inure to the benefit of his former cotenants.<sup>3</sup>

1841. This rule does not apply when the title acquired is one that does not in any way legally affect the common estate. Thus one of two tenants in common of a leasehold estate may, before the expiration of the lease, purchase of their landlord the fee of the land for his own exclusive benefit; for he does not thereby acquire any rights which are inconsistent with the terms of the lease, or which affect that in any way.<sup>4</sup>

<sup>1</sup> *Tanney v. Tanney*, 159 Pa. St. 277, 28 Atl. Rep. 287; *Jonas v. Flanniken*, 69 Miss. 577, 11 So. Rep. 319; *McGee v. Holmes*, 63 Miss. 50.

<sup>2</sup> *Stevens v. Reynolds (Ind.)*, 41 N. E. Rep. 931; *Roberts v. Thorn*, 25 Tex. 728; *Rippetoe v. Dwyer*, 49 Tex. 498; *King v. Rowan*, 10 Heisk. 675, 682; *Alexander v. Sully*, 50 Iowa, 192; *Matthews v. Bliss*, 22 Pick. 48; *Smiley v. Dixon*, 1 Pen. &

*Watts*, 439, 441; *Frentz v. Klotzsch*, 28 Wis. 312; *Wright v. Sperry*, 21 Wis. 331; *Brittin v. Handy*, 20 Ark. 381.

See, however, *Sedgwick & Waite on Trial of Title to Land*, §§ 293, 294; *Montague v. Selb*, 106 Ill. 49; *Bracken v. Cooper*, 80 Ill. 221.

<sup>3</sup> *Watson v. Edwards*, 105 Cal. 70, 38 Pac. Rep. 527.

<sup>4</sup> *Ramberg v. Wahlstrom*, 140 Ill. 182,

1842. The purchase of a life estate by a tenant in common in the common property does not inure to the benefit of his cotenants. There is no merger in such case of the life estate in the estate in fee belonging to the cotenants.<sup>1</sup>

1843. A mortgagee of an undivided interest in land does not stand in the relation of a joint tenant or tenant in common to the owners of the other part interests in the land, although the mortgage is by a deed absolute on its face, but intended merely as security. Such a mortgagee is not disabled to buy in, hold, and enforce, for his own benefit, an outstanding prior lien on the whole estate.<sup>2</sup> Though the mortgage be in the form of an absolute deed intended as security, the mortgagee has the same liberty as a stranger to acquire outstanding liens or titles affecting such land.

1844. The rule does not apply where the relation between the cotenants is such as not to imply any reciprocal obligations. Thus, where two persons acquire from a common source, by separate deeds, each an undivided half interest in land, each by his deed assuming half of a debt secured by mortgage on the land, either may acquire title under the mortgage by purchase for his own exclusive benefit, and hold it free from any right of the other; there never having been any understanding between them concerning their interests in the land, or their title thereto, or the payment of the mortgage debt, or the possession of the land, or the use thereof, or the purchase under the mortgage, and neither having had exclusive possession of the land.<sup>3</sup>

1845. The rule does not apply to tenants in common who institute partition proceedings and buy in the property themselves at partition sale, for they do not, when the proceeding is regularly conducted, hold the title so acquired in trust for themselves and their cotenants, even though the latter are minors.<sup>4</sup>

29 N. E. Rep. 727; *Snell v. Harrison*, 104 Mo. 158, 16 S. W. Rep. 152.

<sup>1</sup> *McLaughlin v. McLaughlin*, 80 Md. 115, 30 Atl. Rep. 607.

<sup>2</sup> *Bartean v. Merriam*, 52 Minn. 222, 53 N. W. Rep. 1061.

<sup>3</sup> *Fielding v. White* (Tex. Civ. App.),

32 S. W. Rep. 1054, following *Roberts v. Thorn*, 25 Tex. 735; *Rippetoe v. Dwyer*, 49 Tex. 505; *Dwyer v. Rippetoe*, 72 Tex. 520, 10 S. W. Rep. 668; *McFarlin v. Leaman* (Tex. Civ. App.), 29 S. W. Rep. 44.

<sup>4</sup> *Carpenter v. Carpenter*, 131 N. Y. 101, 29 N. E. Rep. 1013.

## II. *As to Tax Sales.*

1846. If one tenant purchases the common or joint property at a tax sale, the purchase inures to the benefit of all the cotenants, so far as it discharges the lien for taxes. It operates merely as a redemption of the property.<sup>1</sup> "There is some uncertainty," says Mr. Justice Holmes,<sup>2</sup> "as to the extent and grounds of the principle that a purchase of a tax title by one tenant in

<sup>1</sup> **Alabama**: *Donnor v. Quartermas*, 90 Ala. 164, 8 So. Rep. 715; *Bailey v. Campbell*, 82 Ala. 342, 2 So. Rep. 646; *Jackson v. King*, 82 Ala. 432, 3 So. Rep. 232; *Johns v. Johns*, 93 Ala. 239, 9 So. Rep. 419; *Pruitt v. Holly*, 73 Ala. 369. **Arkansas**: *Cocks v. Simmons*, 55 Ark. 104, 17 S. W. Rep. 594; *Burgett v. Williford*, 56 Ark. 187, 19 S. W. Rep. 750; *Moore v. Woodall*, 40 Ark. 42. **California**: *Emeric v. Alvarado*, 90 Cal. 444, 464, 27 Pac. Rep. 356; *Moss v. Shear*, 25 Cal. 38, 45, 85 Am. Dec. 94; *Christy v. Fisher*, 58 Cal. 256. **Connecticut**: *Middletown Sav. Bank v. Bacharach*, 46 Conn. 513. **Illinois**: *McChesney v. White*, 140 Ill. 330, 29 N. E. Rep. 709; *Brown v. Hogle*, 30 Ill. 119; *Lewis v. Ward*, 99 Ill. 525; *Sontag v. Bigelow*, 142 Ill. 143, 31 N. E. Rep. 674; *Choteau v. Jones*, 11 Ill. 300, 50 Am. Dec. 460; *Burgett v. Taliaferro*, 118 Ill. 503, 9 N. E. Rep. 334. **Indiana**: *English v. Powell*, 119 Ind. 93, 21 N. E. Rep. 458; *Bender v. Stewart*, 75 Ind. 88, 91. **Iowa**: *Sorenson v. Davis*, 83 Iowa, 405, 49 N. W. Rep. 1004; *Fallon v. Chidester*, 46 Iowa, 588, 593, 26 Am. Rep. 164; *Austin v. Barrett*, 44 Iowa, 488; *Weare v. Van Meter*, 42 Iowa, 128, 20 Am. Rep. 616; *Flinn v. McKinley*, 44 Iowa, 68; *Tice v. Derby*, 59 Iowa, 312, 13 N. W. Rep. 301. **Kansas**: *Phipps v. Phipps*, 47 Kans. 328, 27 Pac. Rep. 972; *Delashmutt v. Parrent*, 39 Kans. 548, 18 Pac. Rep. 712. **Kentucky**: *Venable v. Beauchamp*, 3 Dana, 321, 28 Am. Dec. 74. **Maine**: *Watkins v. Eaton*, 30 Me. 529, 534, 50 Am. Dec. 637. **Massachusetts**: *Hurley v. Hurley*, 148 Mass. 444, 19 N. E. Rep. 545. **Michigan**: *Page v. Webster*, 8 Mich. 263, 77 Am. Dec. 446; *Richards v. Richards*, 75 Mich. 408, 42 N. W. Rep. 954; *Campbell v. Campbell*, 21 Mich. 438. **Minnesota**: *Holterhoff v. Mead*, 36 Minn. 42, 29 N. W. Rep. 675. **Mississippi**: *Clark v. Rainey*, 72 Miss. 151, 16 So. Rep. 499; *Jonas v. Flanniken*, 69 Miss. 577, 11 So. Rep. 319; *Robinson v. Lewis*, 68 Miss. 69, 8 So. Rep. 258; *Wise v. Hyatt*, 68 Miss. 714, 10 So. Rep. 37; *Harrison v. Harrison*, 56 Miss. 174; *Cohea v. Hemingway*, 71 Miss. 22, 14 So. Rep. 734; *Jones v. Merrill*, 69 Miss. 747, 11 So. Rep. 23; *McGee v. Holmes*, 63 Miss. 50; *Allen v. Poole*, 54 Miss. 323, 334; *Fox v. Coon*, 64 Miss. 465, 1 So. Rep. 629. **Nebraska**: *Miller v. Mills*, 4 Neb. 362. **New York**: *Burhans v. Van Zandt*, 7 N. Y. 523. **Ohio**: *Clark v. Lindsey*, 47 Ohio St. 437, 25 N. E. Rep. 422; *Douglas v. Dangerfield*, 10 Ohio, 152; *Piatt v. St. Clair*, 6 Ohio, 227. **Oregon**: *Minter v. Durham*, 13 Oreg. 470, 11 Pac. Rep. 231. **Pennsylvania**: *Tanney v. Tanney*, 159 Pa. St. 277, 28 Atl. Rep. 287; *Maul v. Rider*, 51 Pa. St. 377; *Davis v. King*, 87 Pa. St. 261; *Lloyd v. Lynch*, 28 Pa. St. 419, 70 Am. Dec. 137. **Vermont**: *Downer v. Smith*, 38 Vt. 464, 467. **West Virginia**: *Battin v. Woods*, 27 W. Va. 58. **Wisconsin**: *Hannig v. Mueller*, 82 Wis. 235, 52 N. W. Rep. 98; *Newton v. Marshall*, 62 Wis. 8, 13, 21 N. W. Rep. 803; *Burchard v. Roberts*, 70 Wis. 111, 118, 35 N. W. Rep. 286; *Smith v. Lewis*, 20 Wis. 350; *Jones v. Davis*, 24 Wis. 229; *Phelan v. Boylan*, 25 Wis. 679; *McMahon v. McGraw*, 26 Wis. 614; *Frentz v. Klotsch*, 28 Wis. 312; *Bennett v. Keehn*, 57 Wis. 582, 15 N. W. Rep. 776.

<sup>2</sup> *Hurley v. Hurley*, 148 Mass. 444, 445, 19 N. E. Rep. 545.

common inures for the benefit of all.<sup>1</sup> Some cases dwell principally on the existence of a fiduciary relation,<sup>2</sup> while others put the proposition in the narrower form that a tenant in common cannot take advantage of a title created by his own default as against his cotenant.<sup>3</sup> Undoubtedly, as is said by Dixon, C. J.,<sup>4</sup> it will be found in most of the cases that the party setting up the tax title was under an obligation to pay the taxes."

**1847.** But if tenants in common occupy and improve the common land in severalty, and each is assessed and pays taxes on a particular portion, one of them cannot afterwards, upon a sale of the land for taxes in separate parts, invoke the relation of cotenancy to defeat the tax title acquired by the other.<sup>5</sup>

One tenant in common is under no obligation to pay taxes assessed upon the undivided interest of his cotenant, and therefore his purchase under a tax sale of his cotenant's interest indicates a purpose by the purchaser to claim the whole title adversely to his cotenant.<sup>6</sup>

A tenant in common by purchasing at a tax sale acquires title as against strangers to whom he stands in no fiduciary relation.<sup>7</sup>

**1848.** The husband or wife of one tenant in common is equally disqualified, on grounds of public policy, from purchasing at a tax sale and holding the interest of a cotenant under such title.<sup>8</sup> "If the rule which prevents one spouse from securing a title where the other is disqualified rested only upon a supposed privity of estate between them, it might well be argued that our statutes upon the subject have destroyed its foundation.

<sup>1</sup> *Frentz v. Klotsch*, 28 Wis. 312, 318; *Connecticut Ins. Co. v. Bulte*, 45 Mich. 113, 120, 7 N. W. Rep. 707; *Rothwell v. Dewees*, 2 Black, 613, 618.

<sup>2</sup> *Lloyd v. Lynch*, 28 Pa. St. 419, 424, 70 Am. Dec. 137; *Van Horne v. Fonda*, 5 John. Ch. 388, 407; *Flinn v. McKinley*, 44 Iowa, 68; *Weare v. Van Meter*, 42 Iowa, 128, 20 Am. Rep. 616; *Venable v. Beauchamp*, 3 Dana, 321, 324, 28 Am. Dec. 74.

<sup>3</sup> *Choteau v. Jones*, 11 Ill. 300, 322, 50 Am. Dec. 460; *Voris v. Thomas*, 12 Ill. 442; *Dubois v. Campan*, 24 Mich. 360, 368; *Lacey v. Davis*, 4 Mich. 140, 152, 66 Am. Dec. 524; *Downer v. Smith*, 38 Vt. 464, 468. See *Piatt v. St. Clair*, 6 Ohio,

227; *Bernal v. Lynch*, 36 Cal. 135, 146; *Carithers v. Weaver*, 7 Kans. 110.

<sup>4</sup> Dissenting in *Smith v. Lewis*, 20 Wis. 350, 356.

<sup>5</sup> *Davis v. Cass*, 72 Miss. 985, 18 So. Rep. 454.

<sup>6</sup> *Oglesby v. Hollister*, 76 Cal. 136, 18 Pac. Rep. 146.

<sup>7</sup> *Burgett v. Williford*, 56 Ark. 187, 19 S. W. Rep. 750.

<sup>8</sup> *Rothwell v. Dewees*, 2 Black, 613; *Robinson v. Lewis*, 68 Miss. 69, 8 So. Rep. 258; *Busch v. Huston*, 75 Ill. 343; *Burns v. Byrne*, 45 Iowa, 285; *Lee v. Fox*, 6 Dana, 171; *Young v. Adams*, 14 B. Mon. 127, 58 Am. Dec. 654.

But the rule is founded upon considerations of public policy, and conclusively imputes to the one, as derived from the other, knowledge of those facts the existence of which precludes the other from action. The opportunities that would be afforded for fraudulent practices would be so numerous, and the difficulty of exposing them so great, that courts apply the doctrine of estoppel to both, and thus close the door that offers the temptation."<sup>1</sup>

1849. This rule does not apply where one tenant in common, by agreement of his cotenants, is permitted to acquire the tax title as an adverse title. Thus an agreement by heirs to give their interest in land to the widow, one of them to procure tax title and convey the land to her, divests them of their interest as tenants in common, though, after the tax title is procured, she agrees that the one procuring it shall have the land.<sup>2</sup>

1850. If the relation of cotenancy has in good faith ceased to exist before the purchase of the tax title, one who is freed from further obligation to the other part owners may freely purchase for his own sole and separate interest.<sup>3</sup> But, on the other hand, it has been held that a purchase of a tax certificate by one cotenant, before the period of redemption has expired, will inure to the benefit of the other tenants, though the purchaser was not a tenant in common at the time of his purchase, but became such before he received the tax deed.<sup>4</sup>

1851. But a tenant in common may acquire a title to the common property under a tax sale, when he acquires such title from a third person who is not acting in collusion with him, after the period of redemption has expired.<sup>5</sup> Thus, where

<sup>1</sup> Robinson v. Lewis, 68 Miss. 69, 71, 8 So. Rep. 258, per Cooper, J.

<sup>2</sup> Howe v. Howe, 90 Iowa, 582, 58 N. W. Rep. 908. "True, they made no conveyance or written promise to convey to their mother, but did agree that an adverse title—a tax title—should be permitted to accrue to John A. Howe, which he was to convey to their mother, and thereby invest her with her ownership of the land. If John A. Howe had conveyed to his mother after he acquired the tax title, these heirs could not well question her ownership. He did not convey, because of the subsequent agreement between him and his mother that he should

keep the land. It is quite clear, we think, that the children of Morris Howe, having thus agreed to part with their interest in this piece of land, were not, therefore, tenants in common." Per Given, J.

<sup>3</sup> Wells v. Chapman, 4 Sandf. Ch. 312, 13 Barb. 561; Coleman v. Coleman, 3 Dana, 398, 403, 28 Am. Dec. 86; Larman v. Huey, 13 B. Mon. 436, 448; Oliver v. Hedderly, 32 Minn. 455, 21 N. W. Rep. 478; King v. Rowan, 10 Heisk. 675.

<sup>4</sup> Flinn v. McKinley, 44 Iowa, 68; Tice v. Derby, 59 Iowa, 312, 314, 13 N. W. Rep. 301. And see Sneed v. Atherton, 6 Dana, 276, 279, 32 Am. Dec. 70.

<sup>5</sup> Whitehead v. Curry, 67 Miss. 637, 7



the common land upon such sale was purchased by the State, and after the time for redemption had expired one of the cotenants sought to obtain a loan to enable him to buy the land, but the person of whom he asked the loan himself bought the land of the State, but gave the cotenant who had removed from the land the option of purchasing it at an advanced price, and he finally availed himself of this option, it was held that such purchase was no violation of his duty to the other part owners.<sup>1</sup>

### III. *Contribution and Liens therefor.*

**1852.** An outstanding title or lien acquired by one tenant in common does not vest by operation of law in his cotenant. To entitle him to share in the benefits of the purchase, he must elect within a reasonable time to bear his portion of the expense necessarily incurred in the acquisition of the claim.<sup>2</sup>

Mr. Freeman, stating this rule, continues:<sup>3</sup> "A most natural and material inquiry, then, is, what is a reasonable time? To this inquiry no positive answer can be given. In this, as in all other questions in regard to reasonable time, no doubt each case must necessarily be determined upon its own peculiar circumstances. The cotenant asking a court of equity to award him the benefit of a purchase must show reasonable diligence in making his election. Whatever delay he may have occasioned must be entirely consistent with perfect fair dealing on his part, and in no wise attributable to an effort to retain the advantages while he shirks the responsibilities of the new acquisition."

**1853.** If one tenant removes a mortgage, tax lien, or other incumbrance upon the property, he may be regarded as sub-

So. Rep. 497; *Watkins v. Eaton*, 30 Me. 529, 536, 50 Am. Dec. 637; *Reinboth v. Zerbe Run Imp. Co.* 29 Pa. St. 139; *Lewis v. Robinson*, 10 Watts, 354; *Coleman v. Coleman*, 3 Dana, 398, 403, 28 Am. Dec. 86; *Alexander v. Sully*, 50 Iowa, 192; *Keele v. Cunningham*, 2 Heisk. 288.

<sup>1</sup> *Whitehead v. Curry*, 67 Miss. 637, 7 So. Rep. 497.

<sup>2</sup> *Ramberg v. Wahlstrom*, 140 Ill. 182, 29 N. E. Rep. 727; *Bracken v. Cooper*, 80 Ill. 221; *Carter v. Penn*, 99 Ill. 390; *Stevens v. Reynolds (Ind.)*, 41 N. E. Rep. 931; *Mandeville v. Solomon*, 39 Cal. 125,

133; *Clement v. Cates*, 49 Ark. 242, 4 S. W. Rep. 776; *Brittin v. Handy*, 20 Ark. 381, 73 Am. Dec. 497; *Lee v. Fox*, 6 Dana, 171; *McFarlin v. Leaman (Tex. Civ. App.)*, 29 S. W. Rep. 44; *Roberts v. Thorn*, 25 Tex. 728, 78 Am. Dec. 552; *Rippetoe v. Dwyer*, 49 Tex. 505; *Dwyer v. Rippetoe*, 72 Tex. 520, 534, 10 S. W. Rep. 668; *Weaver v. Wible*, 25 Pa. St. 270, 64 Am. Dec. 696; *Lloyd v. Lynch*, 28 Pa. St. 419, 70 Am. Dec. 137; *Potter v. Herring*, 57 Mo. 184; *Buchanan v. King*, 22 Gratt. 414.

<sup>3</sup> *Cotenancy and Partition*, § 156.

rogated to such lien to secure contribution from his cotenants, or as having an equitable lien upon their interest of the same character as that removed.<sup>1</sup> It seems reasonable to hold that an enforced payment of this character by one tenant in common gives him a lien upon the shares of his cotenants to secure his advances, with a right to retain possession until payment is made.<sup>2</sup> But taxes paid by one tenant in common upon the common property cannot be made a charge upon the estate and interest of a cotenant after such estate and interest has passed into the hands of a purchaser without notice.<sup>3</sup>

1854. When a cotenant has redeemed the property from a tax sale, he is entitled to possession, and to have the lien of the tax sale kept alive until the other part owners pay him their shares of the redemption money. Until such time the others have no right to the possession of any part of the land, in equity or at law; neither can they maintain a petition for a partition.<sup>4</sup>

One joint or common owner may maintain an action for partition against his cotenant, although the latter holds a valid tax lien upon his undivided interest. The lien in such case attaches to the land set off to the lien debtor when partition is complete, and no tender of the amount of the lien is necessary before commencing the action.<sup>5</sup>

1855. A tenant in common who has paid taxes upon the common or joint estate may recover from his cotenant his share of the amount so paid. The tax is a lien upon the land,

<sup>1</sup> *Newbold v. Smart*, 67 Ala. 326; *Bailey v. Laws* (Tex. Civ. App.), 23 S. W. Rep. 20; *Branch v. Makeig* (Tex. Civ. App.), 28 S. W. Rep. 1050; *Rice v. Rice*, 21 Tex. 58, 66; *Bond v. Hill*, 37 Tex. 626; *Furrrh v. Winston*, 66 Tex. 521, 1 S. W. Rep. 527; *Stebbins v. Willard*, 53 Vt. 665; *Hinters v. Hinters*, 114 Mo. 26, 21 S. W. Rep. 456; *Titsworth v. Stout*, 49 Ill. 78, 95 Am. Dec. 577; *Carter v. Penn*, 99 Ill. 390; *Fischer v. Eslaman*, 68 Ill. 78; *Simpson v. Gardiner*, 97 Ill. 237; *Schissel v. Dickson*, 129 Ind. 139, 28 N. E. Rep. 540; *Moon v. Jennings*, 119 Ind. 130, 21 N. E. Rep. 471; *Eads v. Retherford*, 114 Ind. 273, 16 N. E. Rep. 587; *Forrer v. Forrer*, 29 Gratt. 134; *Furman v. McMillan*, 2 Lea, 121; *Venable v. Beauchamp*, 3 Dana, 321, 28 Am. Dec. 74; *Watson's App.* 90 Pa. St. 426; *Oliver v. Montgomery*, 39 Iowa, 601, 42 Iowa, 36; *Kean v. Connelly*, 25 Minn. 222, 33 Am. Rep. 458.

<sup>2</sup> *Wilmot v. Lathrop* (Vt.), 32 Atl. Rep. 861; *Watkins v. Eaton*, 30 Me. 529, 50 Am. Dec. 637. See, also, *Hurley v. Hurley*, 148 Mass. 444, 19 N. E. Rep. 545.

<sup>3</sup> *Welch v. Ketchum*, 48 Minn. 241, 51 N. W. Rep. 113.

<sup>4</sup> *Hurley v. Hurley*, 148 Mass. 444, 447, 19 N. E. Rep. 545; *Watkins v. Eaton*, 30 Me. 529, 535, 50 Am. Dec. 637.

<sup>5</sup> *Schissel v. Dickson*, 129 Ind. 139, 28 N. E. Rep. 540.

which both or all the tenants are equally bound to discharge. The law regards the money paid to discharge this lien as money paid at the request of the other tenants and for their use, and it can be recovered in a common-law action.<sup>1</sup>

But the payment of taxes by one cotenant upon the common property, before the lien has been perfected by a tax sale, does not entitle him to a lien upon the share of the other cotenant. "Undoubtedly, a tax duly assessed under a statute giving a lien is an incumbrance upon the land. But it is a limited or an inchoate one. It gives no title or interest in the land until it has been sold in the way provided by statute."<sup>2</sup>

**1856. A tenant in common who redeems the common property from a mortgage incumbrance may hold it under the mortgage until the other owners pay him their proportionate shares of the money advanced.**<sup>3</sup>

This rule, however, is not followed in some States, but it is held that one tenant in common who has paid a mortgage upon the common property without taking an assignment cannot, after the statute has run against his action at law for contribution, look to equity for relief.<sup>4</sup>

A tenant in common who pays off a mortgage is only entitled to contribution from his cotenants, and cannot acquire an outstanding incumbrance as against them, so as to be subrogated to the rights of the mortgagee.<sup>5</sup>

**1857. Even the payment by one tenant in common of more than his share of the purchase-money, for which no mortgage or other obligation creating a specific lien is given, creates a lien upon the share of the cotenant in whose behalf such payment is made, which may be enforced upon partition.**<sup>6</sup>

If the tenant who has paid a part of the purchase-money for his cotenant is in possession, he is entitled to retain possession until he has been reimbursed for the payment so made for his cotenant;<sup>7</sup> or, upon partition, he is equitably entitled to be reim-

<sup>1</sup> *Kites v. Church*, 142 Mass. 586, 8 N. E. Rep. 743.

<sup>2</sup> *Preston v. Wright*, 81 Me. 306, 309, 17 Atl. Rep. 128, per Danforth, J.

<sup>3</sup> *Hubbard v. Ascutney Mill-Dam Co.* 20 Vt. 402; *Wilmot v. Lathrop* (Vt.), 32 Atl. Rep. 861.

<sup>4</sup> *Rowden v. Murphy* (N. J. Eq.), 20 Atl. Rep. 379.

<sup>5</sup> *Leach v. Hall* (Iowa), 64 N. W. Rep. 790.

<sup>6</sup> *Owen v. McGehee*, 61 Ala. 440.

<sup>7</sup> *Leitch v. Little*, 14 Pa. St. 250.

bursed for such payment. A cotenant who has removed incumbrances upon the joint property may be reimbursed in the same way.<sup>1</sup>

1858. Purchasers at different times of undivided interests by warranty deed are liable to contribute to the payment of liens upon it in the inverse order of their purchases. The last parcel sold must be exhausted for the payment of the whole lien before recourse is had to any of the other parcels, and so back in order to the first parcel sold. It is the same rule that applies where a mortgagor has sold a portion of the mortgaged land by warranty deed; the mortgagor cannot claim contribution of the purchaser, because he is himself liable for the whole debt; and if he then sells the remaining portion to another, such last purchaser steps into the place of the mortgagor, and he cannot call upon the prior purchaser for contribution.<sup>2</sup> Accordingly, where the owner of a lot which is subject to certain liens conveys an undivided half of it by warranty deed, and afterwards conveys the other undivided half by warranty deed to a different grantee, the latter can acquire no title to the undivided half first conveyed under a sheriff's deed made pursuant to a sale to satisfy such liens, nor acquire any lien thereon for money paid to discharge such liens.<sup>3</sup>

#### IV. *Contracts and Management.*

1859. One tenant in common cannot dictate to his cotenants the management of the common property. Thus where there are four owners in common of business property which has been leased to a tenant, the owner of one fourth part, being dissatisfied with the amount of rent received, cannot terminate the tenancy as against the owners of the other three fourths; but the tenant of the property may continue his occupancy under the authority of the other part owners, and he is liable to pay a reasonable rent to the owner of such fourth part interest.<sup>4</sup>

The terms of a contract of sale, by which one cotenant of mining lands disposed of his interest, will not bind the others to

<sup>1</sup> *Vogle v. Brown*, 120 Ill. 338, 11 N. E. Rep. 327, 12 N. E. Rep. 252; *Carter v. Penn*, 99 Ill. 390.

<sup>3</sup> *Jennings v. Moon*, 135 Ind. 168, 34 N. E. Rep. 996.

<sup>4</sup> *Nott v. Owen*, 86 Me. 98, 29 Atl. Rep. 943.

<sup>2</sup> 2 *Jones on Mortg.* §§ 1089, 1091.

accept the royalty therein reserved to the vendor as a fair measure of the value of their rights.<sup>1</sup>

**1860.** One joint tenant or tenant in common is bound by consenting to or recognizing the acts of the others; as, for instance, a contract of sale or lease made by them. Subsequent ratification gives the agency the force of an original express authority.<sup>2</sup> If one signs a contract for sale on behalf of himself and his cotenant, and the latter never expressly assents, but, with knowledge of the contract, does not within a reasonable time disavow it or express absolute dissent, a presumption of his assent arises, which is strengthened in proportion to the length of time during which he lies by; and unless the presumption is rebutted by evidence of circumstances sufficiently strong, he will be bound by the contract.<sup>3</sup>

**1861.** A dedication of a highway to public use cannot be made by one cotenant without the consent, express or implied, of all the other part owners.<sup>4</sup> Less than the whole number of cotenants in abutting lands cannot give consent to the construction of a street-railway track in a street, under a statute providing for such consent.<sup>5</sup>

<sup>1</sup> State Line & S. R. Co.'s App. (Pa.) 32 Atl. Rep. 1126.

<sup>2</sup> Bigg v. Strong, 3 Smale & Giff. 592; Merrifield v. Parritt, 11 Cush. 590; Starks v. Sikes, 8 Gray, 609, 69 Am. Dec. 270; Lyons v. Wait, 51 N. J. Eq. 60, 26 Atl. Rep. 334; Gulick v. Grover, 33 N. J. L. 463; Jacobus v. Mnt. Ben. Life Ins. Co.

27 N. J. Eq. 607; Dyckman v. Mayor, 7 Barb. 498.

<sup>3</sup> Bigg v. Strong, 3 Smale & Giff. 592.

<sup>4</sup> Scott v. State, 1 Sneed, 629; Holcomb v. Coryell, 11 N. J. Eq. 548.

<sup>5</sup> Ronnebaum v. Mt. Auburn Cable Ry. Co. 29 W. L. Bul. 338.

## CHAPTER XLII.

### POSSESSION AND OUSTER OF COTENANT.

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|-----------------------------------------------------------------------------------------------------------------|---------------------------------------------------------------------------------------------------------------------------|
| <p>I. Possession presumed not to be adverse, 1862-1865.</p> <p>II. Notice of adverse possession, 1866-1869.</p> | <p>III. What constitutes an ouster, 1870-1877.</p> <p>IV. Entry and possession under deed of one cotenant, 1878-1882.</p> |
|-----------------------------------------------------------------------------------------------------------------|---------------------------------------------------------------------------------------------------------------------------|

#### *I. Possession presumed not to be Adverse.*

**1862.** The entry and possession of one tenant in common are presumed not to be adverse to his cotenants.<sup>1</sup> His occupa-

<sup>1</sup> *Doe v. Prosser*, Cowp. 217, per Lord Mansfield; *Ricard v. Williams*, 7 Wheat. 59, 121; *Willison v. Watkins*, 3 Pet. 43; *Thomas v. Hatch*, 3 Sumn. 170; *Mining Co. v. Taylor*, 100 U. S. 37. **Alabama**: *Fielder v. Childs*, 73 Ala. 567; *Johnson v. Toulmin*, 18 Ala. 50, 52 Am. Dec. 212. **Arizona**: *Campbell v. Shivers*, 1 Ariz. 161. **Arkansas**: *Brittin v. Handy*, 20 Ark. 381, 73 Am. Dec. 497. **California**: *Oglesby v. Hollister*, 76 Cal. 136, 18 Pac. Rep. 146; *Unger v. Mooney*, 63 Cal. 586, 49 Am. Rep. 100; *Gage v. Downey*, 94 Cal. 241, 29 Pac. Rep. 635; *Miller v. Myles*, 46 Cal. 535, 539; *Gunter v. Laffan*, 7 Cal. 588; *Aguirre v. Alexander*, 58 Cal. 21; *Packard v. Johnson*, 57 Cal. 180. **Connecticut**: *Southworth v. Smith*, 27 Conn. 355, 71 Am. Dec. 72. **Delaware**: *Milbourn v. David* (Del.), 30 Atl. Rep. 971. **Florida**: *Coogler v. Rogers*, 25 Fla. 853, 7 So. Rep. 391; *Gale v. Hines*, 17 Fla. 773; *Kearnes v. Hill*, 21 Fla. 187. **Illinois**: *Sontag v. Bigelow*, 142 Ill. 143, 31 N. E. Rep. 674; *Brown v. Graham*, 24 Ill. 130. **Indiana**: *Nicholson v. Caress*, 76 Ind. 24; *Bowen v. Preston*, 48 Ind. 367; *Elliott v. Frakes*, 90 Ind. 389. **Iowa**: *Kinney v. Slattery*, 51 Iowa, 353. **Maine**: *Hudson v. Coe*, 79 Me. 83, 8 Atl. Rep. 249; *Thornton v. York Bank*, 45 Me. 158, 162; *Gilman v. Stetson*, 18 Me. 428; *Vaughan v. Bacon*, 15 Me. 455, 33 Am. Dec. 628. **Maryland**: *McLaughlin v. McLaughlin*, 80 Md. 115, 30 Atl. Rep. 607. **Massachusetts**: *Ingalls v. Newhall*, 139 Mass. 268, 30 N. E. Rep. 96; *Porter v. Hill*, 9 Mass. 34, 6 Am. Dec. 22; *Whiting v. Dewey*, 15 Pick. 428; *Higbee v. Rice*, 5 Mass. 344, 352, 4 Am. Dec. 63; *Parker v. Proprietors*, 3 Metc. 91; *Marcy v. Stone*, 8 Cush. 4, 54 Am. Dec. 736. **Michigan**: *Fenton v. Miller*, 94 Mich. 204, 53 N. W. Rep. 957; *Campau v. Campau*, 44 Mich. 31, 5 N. W. Rep. 1062. **Minnesota**: *Strong v. Colter*, 13 Minn. 82. **Mississippi**: *Day v. Davis*, 64 Miss. 253, 8 So. Rep. 203; *Hignite v. Hignite*, 65 Miss. 447, 4 So. Rep. 345; *Harrison v. Harrison*, 56 Miss. 174. **Missouri**: *Rodney v. McLaughlin*, 97 Mo. 426, 9 S. W. Rep. 726; *Warfield v. Lindell*, 30 Mo. 272, 77 Am. Dec. 614; *Davis v. Givens*, 71 Mo. 94; *Bernecker v. Miller*, 40 Mo. 473, 93 Am. Dec. 309; *Robidoux v. Cassilegi*, 10 Mo. App. 516. **Nebraska**: *Crook v. Vandevort*, 13 Neb. 505. **Nevada**: *Van Valkenburg v. Huff*, 1 Nev. 142. **New Hampshire**: *Brooks v. Fowle*, 14 N. H. 248. **New Jersey**: *Foulke v. Bond*, 41 N. J. L. 527. **New York**: *Hitchcock v. Skinner*, Hoff. Ch. 21; *Beebe v. Griffing*

tion is presumed to be in accordance with his right as part owner to the possession of the whole undivided land. "As between cotenants, evidence of long-continued, visible, uninterrupted, and even exclusive occupation by one cotenant is not enough to bar the rights of the other cotenants. There must be evidence from which an ouster, a putting out and a keeping out, of the cotenants, can be inferred."<sup>1</sup>

**1863.** A tenant in common in possession is presumed to hold in the right of his cotenants, as well as himself, until notice is brought home to them of an intention to disseise them.<sup>2</sup> Therefore where two tenants in common are in possession together, and one is turned out by a stranger, but the other continues in possession, his possession is still that of the other as well as his own.<sup>3</sup> In like manner, if a disseisor who has been in possession of the common estate yields it up to one of the owners in common, his entry and possession has the effect to put all the tenants in common in possession, and to prevent the running of the statute of limitations against any of them prior to that time.<sup>4</sup>

**1864.** If the possession of one tenant in common is accompanied by acts hostile to and inconsistent with any claim of his cotenants, and with such open disavowal of their claim as to give them notice that his possession is adverse, there is an ouster

14 N. Y. 235; *Florence v. Hopkins*, 46 N. Y. 182; *Culver v. Rhodes*, 87 N. Y. 348; *Hulse v. Hulse*, 5 N. Y. Supp. 747; *La Tourette v. Decker*, 18 N. Y. Supp. 840; *Humbert v. Trinity Church*, 24 Wend. 587. **North Carolina**: *Covington v. Stewart*, 77 N. C. 148; *Day v. Howard*, 73 N. C. 1. **Oregon**: *Northrop v. Marquam*, 16 Oreg. 173, 18 Pac. Rep. 449. **Pennsylvania**: *Watson v. Gregg*, 10 Watts, 289, 36 Am. Dec. 176; *Hart v. Gregg*, 10 Watts, 185, 36 Am. Dec. 166; *Phillips v. Gregg*, 10 Watts, 158, 36 Am. Dec. 158. **South Carolina**: *McGee v. Hall*, 26 S. C. 179, 1 S. E. Rep. 711; *Allen v. Hall*, 1 McCord, 131. **Utah**: *Lillianskyoldt v. Goss*, 2 Utah, 292. **Vermont**: *Roberts v. Morgan*, 30 Vt. 319.

<sup>1</sup> *Mansfield v. McGinniss*, 86 Me. 118, 29 Atl. Rep. 956; *Bellis v. Bellis*, 122 Mass. 414, per Morton, J.; *Ingalls v.*

*Newhall*, 139 Mass. 268, 30 N. E. Rep. 96; *McLaughlin v. McLaughlin*, 80 Md. 115, 30 Atl. Rep. 607; *Van Bibber v. Frazier*, 17 Md. 436; *Smith v. Young* (Iowa), 56 N. W. Rep. 506; *Sibley v. Alba*, 95 Ala. 191, 10 So. Rep. 831; *Brady v. Huff*, 75 Ala. 80; *Burrus v. Meadors*, 90 Ala. 140, 7 So. Rep. 469; *Newbold v. Smart*, 67 Ala. 326; *Stevenson v. Anderson*, 87 Ala. 228, 6 So. Rep. 285; *Duncan v. Williams*, 89 Ala. 341, 7 So. Rep. 416; *Bolton v. Hamilton*, 2 Watts & S. 294, 37 Am. Dec. 509.

<sup>2</sup> *Elder v. McClaskey*, 70 Fed. Rep. 529.

<sup>3</sup> *Bernecker v. Miller*, 40 Mo. 473, 93 Am. Dec. 309; *Garrison v. Savignac*, 25 Mo. 47, 69 Am. Dec. 448.

<sup>4</sup> *Vaughan v. Bacon*, 15 Me. 455, 33 Am. Dec. 628.

sufficient to set the statute of limitations running. It was held that the possession of one heir was adverse where it appeared that upon the death of his father he entered into the occupancy of the premises, caused them to be inclosed with a fence, cultivated them himself during many years, and in other years rented them to others, and appropriated the entire rents to himself, claimed the land as his own, paid the taxes thereon, took conveyances purporting to be of the entire tract, and executed a mortgage thereon to secure his own debt.<sup>1</sup>

1865. The intention of one tenant in common to hold adversely to his cotenants must be shown unmistakably by his acts or declarations. Generally such intention is manifest only through the acts of the tenant in possession, without any assertion of an exclusive right by words.<sup>2</sup> Any circumstances which indicate the assertion of exclusive possession are evidence of the intention of such tenant to exclude his cotenants.<sup>3</sup> Such intention need not be manifested by an exclusion by physical force.<sup>4</sup>

A mere secret mental intention to convert a possession which was friendly in its inception into one of hostility does not make it such in law.<sup>5</sup>

One cotenant may make his possession adverse by words alone, as by forbidding the other tenant to enter, and telling him he must get possession by law.<sup>6</sup> But a mere demand of possession and a refusal to comply with the demand are hardly sufficient.<sup>7</sup>

## II. *Notice of Adverse Possession.*

1866. To make the possession of one tenant adverse and an ouster of his cotenants, his acts in assertion of his exclusive title must be brought home to the knowledge of the

<sup>1</sup> *Feliz v. Feliz*, 105 Cal. 1, 38 Pac. Rep. 521, per Harrison, J., citing *Unger v. Mooney*, 63 Cal. 586, 49 Am. Rep. 100; *Bath v. Valdez*, 70 Cal. 350, 11 Pac. Rep. 724; *Oglesby v. Hollister*, 76 Cal. 136, 18 Pac. Rep. 146; *Winterburn v. Chambers*, 91 Cal. 170, 27 Pac. Rep. 658.

<sup>2</sup> *Newell v. Woodruff*, 30 Conn. 492; *Law v. Patterson*, 1 Watts & S. 184, 191.

<sup>3</sup> *Simmons v. Nahant*, 3 Allen, 316; *Lefavour v. Homan*, 3 Allen, 354; *Fredrick v. Gray*, 10 S. & R. 182; *Cain v. Furlow*, 47 Ga. 674.

<sup>4</sup> *Gale v. Hines*, 17 Fla. 773; *Warfield v. Lindell*, 30 Mo. 272, 77 Am. Dec. 614.

<sup>5</sup> *Comstock v. Eastwood*, 108 Mo. 41, 18 S. W. Rep. 39.

<sup>6</sup> *Gordon v. Pearson*, 1 Mass. 323; *Marcy v. Marcy*, 6 Met. 360; *Shumway v. Holbrook*, 1 Pick. 114, 117, 11 Am. Dec. 153; *Norris v. Sullivan*, 47 Conn. 474; *Bracket v. Norcross*, 1 Me. 89; *Avery v. Hall*, 50 Vt. 11.

<sup>7</sup> *Carpentier v. Mendenhall*, 28 Cal. 484; *Colburn v. Mason*, 25 Me. 434, 43 Am. Dec. 292.



others.<sup>1</sup> "Actual occupancy, actual exercise of acts of ownership, actual improvements of the property, may all coexist, and

<sup>1</sup> *Prescott v. Nevers*, 4 Mason, 326; Fed. Cas. No. 11,390; *Zeller v. Eckert*, 4 How. 289. **Alabama**: *Johns v. Johns*, 93 Ala. 239, 9 So. Rep. 419; *Burrus v. Meadors*, 90 Ala. 140, 7 So. Rep. 469; *Woodstock Iron Co. v. Roberts*, 87 Ala. 436, 6 So. Rep. 349; *Fitzgerald v. Williamson*, 85 Ala. 585, 5 So. Rep. 309; *Newbold v. Smart*, 67 Ala. 326. **California**: *Winterburn v. Chambers*, 91 Cal. 170, 27 Pac. Rep. 658; *Alvarado v. Nordholt*, 95 Cal. 116, 30 Pac. Rep. 211; *Bath v. Valdez*, 70 Cal. 350, 11 Pac. Rep. 724; *Oglesby v. Hollister*, 76 Cal. 136, 18 Pac. Rep. 146; *Unger v. Mooney*, 63 Cal. 586, 49 Am. Rep. 100; *Miller v. Myles*, 46 Cal. 535; *Gage v. Downey*, 94 Cal. 241, 29 Pac. Rep. 635; *Packard v. Johnson*, 57 Cal. 180. **Connecticut**: *Newell v. Woodruff*, 30 Conn. 492, 498; *Adam v. Ames Iron Co.* 24 Conn. 230; *White v. Beckwith*, 62 Conn. 79, 25 Atl. Rep. 400. **Georgia**: *Lawson v. Cunningham*, 21 Ga. 454. **Illinois**: *Sontag v. Bigelow*, 142 Ill. 143, 31 N. E. Rep. 674; *Comer v. Comer*, 119 Ill. 170, 8 N. E. Rep. 796. **Indiana**: *Price v. Hall (Ind.)*, 39 N. E. Rep. 941; *Maple v. Stevenson*, 122 Ind. 368, 23 N. E. Rep. 854; *King v. Carmichael (Ind.)*, 35 N. E. Rep. 509; *Nicholson v. Caress*, 76 Ind. 24; *Sanford v. Tucker*, 54 Ind. 219; *Bowen v. Preston*, 48 Ind. 367. **Kentucky**: *Greenhill v. Biggs*, 85 Ky. 155, 2 S. W. Rep. 774; *Riggs v. Dooley*, 7 B. Mon. 236; *Gill v. Fauntleroy*, 8 B. Mon. 177; *Larman v. Huey*, 13 B. Mon. 436; *Barret v. Coburn*, 3 Metc. 513. **Maine**: *Bracket v. Norcross*, 1 Me. 89. **Massachusetts**: *Marcy v. Marcy*, 6 Met. 360; *Cummings v. Wyman*, 10 Mass. 464. **Michigan**: *Fenton v. Miller*, 94 Mich. 204, 53 N. W. Rep. 957; *Dubois v. Campau*, 28 Mich. 304; *Campau v. Campau*, 45 Mich. 367, 8 N. W. Rep. 85; *Cook v. Clinton*, 64 Mich. 309, 31 N. W. Rep. 317. **Minnesota**: *Lindley v. Groff*, 37 Minn. 338, 34 N. W. Rep. 26; *Lowry v. Tileny*, 31 Minn. 500, 18 N. W. Rep. 452. **Missouri**: *Comstock v. Eastwood*, 108 Mo. 41, 18 S. W. Rep. 39; *Childs v. Kansas City, St. J. & C. R. Co.* 117 Mo. 414, 23 S. W. Rep. 373; *Peck v. Lockridge*, 97 Mo. 549, 11 S. W. Rep. 246; *Warfield v. Lindell*, 30 Mo. 272, 77 Am. Dec. 614; *Rodney v. McLaughlin*, 97 Mo. 426, 9 S. W. Rep. 726; *Lapeyre v. Paul*, 47 Mo. 586. **Montana**: *Peter v. Stephens*, 11 Mont. 115, 29 Pac. Rep. 403, 28 Am. St. Rep. 448. **Nevada**: *McDonald v. Fox*, 20 Nev. 364, 22 Pac. Rep. 234. **New York**: *La Frombois v. Jackson*, 8 Cow. 589, 18 Am. Dec. 463; *Millard v. McMullin*, 68 N. Y. 345, 5 Hun, 572; *Culver v. Rhodes*, 87 N. Y. 348, 354; *Trustees v. Kirk*, 84 N. Y. 215, 220, 38 Am. Rep. 505; *Gedney v. Prall*, 6 N. Y. Supp. 165; *Stoddard v. Weston*, 6 N. Y. Supp. 34. **Oregon**: *Northrop v. Marquam*, 16 Ore. 173, 18 Pac. Rep. 449. **Pennsylvania**: *Forward v. Deetz*, 32 Pa. St. 69; *Dikeman v. Parrish*, 6 Pa. St. 210, 47 Am. Dec. 455; *Lodge v. Patterson*, 3 Watts, 74, 27 Am. Dec. 335; *Berg v. McLafferty (Pa. St.)*, 12 Atl. Rep. 460. **Rhode Island**: *Waterman v. Andrews*, 14 R. I. 600. **Tennessee**: *Story v. Saunders*, 8 Humph. 663. **Texas**: *Scofield v. Douglass (Tex. Civ. App.)*, 30 S. W. Rep. 817; *Puckett v. McDaniel (Tex. Civ. App.)*, 28 S. W. Rep. 360; *Golson v. Fielder*, 2 Tex. Civ. App. 400, 21 S. W. Rep. 173; *Norton v. Collins (Tex. Civ. App.)*, 20 S. W. Rep. 1113; *Phillipson v. Flynn*, 83 Tex. 580, 19 S. W. Rep. 136; *Evans v. Templeton*, 69 Tex. 375, 6 S. W. Rep. 843. **Vermont**: *Chandler v. Ricker*, 49 Vt. 128; *Roberts v. Morgan*, 30 Vt. 319; *Holley v. Hawley*, 39 Vt. 525, 94 Am. Dec. 350. **Virginia**: *Pillow v. Southwest Va. Imp. Co. (Va.)* 23 S. E. Rep. 32; *Stonestreet v. Doyle*, 75 Va. 356, 40 Am. Rep. 731; *Caperton v. Gregory*, 11 Gratt. 505. **West Virginia**: *Flynn v. Lee*, 31 W. Va. 487, 7 S. E. Rep. 430; *Rust v. Rust*, 17 W. Va. 901; *Hudson v. Putney*, 14 W. Va. 561. **Wisconsin**: *Stewart v. Stewart*, 83 Wis.

yet the holding not become adverse to the cotenant. Eviction, denial of the right to enter, or exclusive claim of the right to occupy, must exist, and must be shown to have been made known to the cotenant, before the possession becomes adverse in law.<sup>1</sup>

1867. The possession of a tenant in common may become adverse to his cotenants by acts so open and notorious as to show them that he claims exclusive title and possession.<sup>2</sup> Judge Taft, in the Circuit Court of Appeals, fully and clearly states the law upon this subject in a recent decision, saying: "Before adverse possession by one tenant in common against another can begin, the one in possession must, by acts of the most open and notorious character, clearly show to the world, and to all having occasion to observe the condition and occupancy of the property, that his possession is intended to exclude, and does exclude, the rights of his cotenant. It is not necessary for him to give actual notice of this ouster or disseising of his cotenant to him. He must, in the language of the authorities, 'bring it home' to his cotenant. But he may do this by conduct the implication of which cannot escape the notice of the world about him, or of any one, though not a resident in the neighborhood, who has an interest in the property, and exercises that degree of attention in respect to what is his that the law presumes in every owner."<sup>3</sup>

Where one was adjudged to be a tenant in common with others, but he continued in possession for more than ten years afterwards, and made valuable improvements, in an action against him by his cotenants it was held that the judgment in the former

364, 53 N. W. Rep. 686; *Sydnor v. Palmer*, 29 Wis. 226, 249; *Challefoux v. Ducharme*, 4 Wis. 554, 564.

<sup>1</sup> *Johns v. Johns*, 93 Ala. 239, 9 So. Rep. 419, per Stone, C. J., citing *Newbold v. Smart*, 67 Ala. 326; *Woodstock Iron Co. v. Roberts*, 87 Ala. 436, 6 So. Rep. 349; *Burrus v. Meadors*, 90 Ala. 140, 7 So. Rep. 469; *Fitzgerald v. Williamson*, 85 Ala. 585, 5 So. Rep. 309.

<sup>2</sup> *Elder v. McClaskey*, 70 Fed. Rep. 529, 542; *In re Broderick's Will*, 21 Wall. 503, 519; *Zeller v. Eckert*, 4 How. 289; *Townsend v. Eichelberger*, 51 Ohio St. 213, 38 N. E. Rep. 207; *Webster v. Bible Society*, 50 Ohio St. 1, 13, 33 N. E. Rep. 297; *State v. Standard Oil Co.* 49 Ohio St. 137, 188,

30 N. E. Rep. 279; *Williams v. Pomeroy Coal Co.* 37 Ohio St. 583; *Howk v. Minnick*, 19 Ohio St. 462; *Hogg v. Beerman*, 41 Ohio St. 81, 99; *Adam v. Ames Iron Co.* 24 Conn. 230; *Rosenau v. Syring*, 25 Oreg. 386, 35 Pac. Rep. 844; *Miller v. Myles*, 46 Cal. 535; *Beall v. Evans*, 1 Tex. Civ. App. 443, 20 S. W. Rep. 945; *Mhoon v. Cain*, 77 Tex. 316, 14 S. W. Rep. 24; *Craig v. Cartwright*, 65 Tex. 421, 424; *Bracken v. Jones*, 63 Tex. 186; *Moody v. Butler*, 63 Tex. 210; *Word v. Drottthett*, 44 Tex. 373; *Baily v. Trammell*, 27 Tex. 317, 328; *Mayes v. Manning*, 73 Tex. 43, 11 S. W. Rep. 136.

<sup>3</sup> *Elder v. McClaskey*, 70 Fed. Rep. 529, 542.

suit put an end to his former adverse possession and restored the seisin of all the tenants in common; that his possession after the judgment became adverse to his cotenants only after knowledge that he claimed to hold the land adversely to them was brought home to them; and that the delay on their part to take action to assert their right of possession did not constitute such laches as would defeat their action.<sup>1</sup>

1868. But in order to make the possession of a tenant in common adverse, it is not necessary that his cotenants should have actual knowledge of his intention to assume exclusive possession.<sup>2</sup> "If a tenant in common, in order to make his possession adverse to a cotenant, is obliged to seek the latter out and actually inform him of his intention, then it would become impossible to set the statute running against absent heirs, whose existence and whereabouts were unknown to the tenant, and whose heirship and interest in the property were unknown to themselves."<sup>3</sup> If the hostile character of the possession is so openly manifested that a man of reasonable diligence would discover it, his cotenants will be deemed to have notice of his adverse holding.<sup>4</sup>

<sup>1</sup> *Stewart v. Stewart*, 83 Wis. 364, 53 N. W. Rep. 686.

<sup>2</sup> *Clymer v. Dawkins*, 3 How. 674, where constructive notice of disseisin was held sufficient in an opinion by Mr. Justice Story. *Rich v. Bray*, 37 Fed. Rep. 273, 278; *Roberts v. Moore*, 3 Wall. Jr. 292, 294, 297, Fed. Cas. No. 11,905; *Bath v. Valdez*, 70 Cal. 350, 11 Pac. Rep. 724; *Winterburn v. Chambers*, 91 Cal. 170, 182, 27 Pac. Rep. 658; *Greenhill v. Biggs*, 85 Ky. 155, 2 S. W. Rep. 774; *Rutter v. Small*, 68 Md. 133, 11 Atl. Rep. 698; *Peck v. Lockridge*, 97 Mo. 549, 11 S. W. Rep. 246; *Warfield v. Lindell*, 38 Mo. 561, 90 Am. Dec. 443; *Abernathie v. Con. Virginia Min. Co.* 16 Nev. 260, 269; *Forest v. Jackson*, 56 N. H. 357; *Foulke v. Bond*, 41 N. J. L. 527, 540; *Barr v. Chapman* (Ohio C. P.), 30 W. L. Bul. 264; *Dikeman v. Parrish*, 6 Pa. St. 210, 227, 47 Am. Dec. 455; *Lodge v. Patterson*, 3 Watts, 74, 77, 27 Am. Dec. 335; *Weisinger v. Murphy*, 2 Head, 674. In the case of *Youngs v. Heffner*, 36 Ohio St. 232, two brothers owned a tract in

common. One left and went to Texas, leaving the farm to the other, with the agreement that he cultivate the farm for the benefit of both. Trace of the absent brother was lost for more than seven years, and steps were taken to settle his estate as of one dead. Partition proceedings were brought by his representatives, and the tract sold in fee. Twelve years after, the brother returned. The supreme court held that previous to the partition proceedings the tenancy had been avowedly in common, but that thereafter the possession was adverse, although the absent brother had not actual notice of them.

That actual knowledge or notice is necessary, see *Chandler v. Ricker*, 49 Vt. 128.

<sup>3</sup> *Elder v. McClaskey*, 70 Fed. Rep. 529, C. C. A., per Taft, J., reversing *McClaskey v. Barr*, 47 Fed. Rep. 154.

<sup>4</sup> *Van Gunden v. Virginia Coal & Iron Co.* 8 U. S. App. 229, 52 Fed. Rep. 838, 3 C. C. A. 294; *Winterburn v. Chambers*, 91 Cal. 170, 27 Pac. Rep. 658.

1869. When the notice of adverse possession is purely constructive, the evidence of such notice must be entirely convincing. Thus one cotenant out of actual possession cannot rely for adverse possession, as against another cotenant out of possession, upon the possession of a third cotenant. It is not clear that the possession of such third cotenant can create a title by adverse possession for any one but himself.<sup>1</sup>

### III. *What constitutes an Ouster.*

1870. Much stronger evidence is necessary to prove an ouster by a cotenant than to sustain ordinary adverse possession.<sup>2</sup> In either case it must appear that there has been a wrongful exclusion from possession of the party entitled to it. "In each case the same kind of possession is required, and it must be taken and held with the same hostile intent. In the case of a dispossession by a stranger, the fact that such stranger takes the actual and exclusive possession of the land is of itself a notice of the character of such possession, and of the intent with which it was done. In the case of the cotenant, however, the intent with which the possession is taken is not manifested by the mere fact of possession, but must be established either by actual notice, or by acts or declarations so open and notorious, and of such a nature, that it may readily be presumed that the cotenant out of possession is informed thereby of the hostile intent with which the possession is held. It is the intent which determines the character of the possession; but it is essential that this intent be in some mode, either by actual or presumptive notice, directly or indirectly, communicated to the other cotenant. This intent is not the secret purpose of the occupant, but is the purpose which the acts themselves manifest, and the acts

<sup>1</sup> Gage v. Downey, 94 Cal. 241, 29 Pac. Rep. 635.

<sup>2</sup> Winterburn v. Chambers, 91 Cal. 170, 27 Pac. Rep. 658; Trenouth v. Gilbert, 63 Cal. 404; Price v. Hall (Ind.), 39 N. E. Rep. 941; Barret v. Coburn, 3 Metc. (Ky.) 510, 13 Am. Dec. 140; Highstone v. Burdette, 54 Mich. 329, 20 N. W. Rep. 64; Hudson v. Coe, 79 Me. 83, 8 Atl. Rep. 249; Ingalls v. Newhall, 139 Mass. 268, 30 N. E. Rep. 96; Norris v. Dunn, 70 Ga. 796, 800; Forward v. Deetz, 32 Pa.

St. 72; Baily v. Trammell, 27 Tex. 317, 328; Teal v. Terrell, 58 Tex. 257; Stewart v. Stewart, 83 Wis. 364, 53 N. W. Rep. 686; Sydnor v. Palmer, 29 Wis. 226, 249.

The case of Newell v. Woodruff, 30 Conn. 492, holding that ouster by a tenant in common of his cotenant does not differ in its nature from any other ouster, is contrary to all the authorities, and is criticised by Mr. Freeman in his authoritative work on Cotenancy, § 231.

done must be manifested to the person against whom the ouster is directed.”<sup>1</sup>

1871. Where a tenant in common denies, in a pleading, his cotenant's right, it is evidence of ouster, as well as any other form of claim to exclusive ownership.<sup>2</sup>

1872. A long-continued, exclusive possession by a tenant in common is evidence of his assertion of a title against his cotenants, when such exclusive possession is with their knowledge. But a presumption that such possession is adverse does not ordinarily arise from the beginning of such possession, so that a much longer possession than that of twenty years, which would suffice for acquiring a title by a stranger, is required to establish a title by adverse possession in favor of a tenant in common against his cotenants.<sup>3</sup> “How long a possession of the character above stated should be, on the part of the cotenant, before any presumption should arise in his favor that it was an assertion of title as against his cotenants, must depend on many circumstances, such as the character of the land itself, of the mode of possession, of its publicity, and of the knowledge which those to be affected by it had, or must be deemed to have had, that it was

<sup>1</sup> *Winterburn v. Chambers*, 91 Cal. 170, 180, 27 Pac. Rep. 658, per Harrison, J. And see *Oglesby v. Hollister*, 76 Cal. 136, 18 Pac. Rep. 146.

<sup>2</sup> *Amick v. Brubaker*, 101 Mo. 473, 14 S. W. Rep. 627; *Minton v. Steele*, 125 Mo. 181, 28 S. W. Rep. 746; *Jordan v. Surghnor*, 107 Mo. 520, 17 S. W. Rep. 1009; *Harrison v. Taylor*, 33 Mo. 211, 82 Am. Dec. 159; *Ketchum v. Barber* (Cal.), 12 Pac. Rep. 251; *Phelan v. Smith*, 100 Cal. 158, 34 Pac. Rep. 667; *Greer v. Tripp*, 56 Cal. 209; *Spect v. Gregg*, 51 Cal. 198; *Packard v. Johnson*, 51 Cal. 545; *Miller v. Myles*, 46 Cal. 535; *Marshall v. Shafter*, 32 Cal. 177; *Moore v. Moore* (Cal.), 34 Pac. Rep. 90; *Siglar v. Van Ripper*, 10 Wend. 414; *Clason v. Rankin*, 1 Duer, 337; *Noble v. McFarland*, 51 Ill. 226.

<sup>3</sup> *Peaceable v. Read*, 1 East, 568; *Fairclaim v. Shackleton*, 5 Burr. 2604; *Doe v. Prosser*, Cowp. 217; *Lafavour v. Homan*, 3 Allen, 354; *Parker v. Proprietors*, 3

Met. 91; *Ingalls v. Newhall*, 139 Mass. 268, 30 N. E. Rep. 96; *Pillow v. Southwest Va. Imp. Co.* (Va.) 23 S. E. Rep. 32; *Stonestreet v. Doyle*, 75 Va. 356, 359, 40 Am. Rep. 731; *Coogler v. Rogers*, 25 Fla. 853, 7 So. Rep. 391; *Frederick v. Gray*, 10 Serg. & R. 182; *Lodge v. Patterson*, 3 Watts, 74, 77, 27 Am. Dec. 335; *Law v. Patterson*, 1 Watts & S. 184; *Gregg v. Blackmore*, 10 Watts, 192; *McCall v. Webb*, 88 Pa. St. 150; *Northrop v. Wright*, 24 Wend. 221; *Van Dyck v. Van Buren*, 1 Caines, 84; *Jackson v. Whitbeck*, 6 Cow. 632, 16 Am. Dec. 454; *Dryden v. Newman*, 116 Ill. 186, 190, 4 N. E. Rep. 768; *Littlejohn v. Barnes*, 138 Ill. 478, 28 N. E. Rep. 980; *Chambers v. Pleak*, 6 Dana, 426, 432, 32 Am. Dec. 78; *Linker v. Benson*, 67 N. C. 150; *Warfield v. Lindell*, 30 Mo. 272, 77 Am. Dec. 614; *Johnson v. Toulmin*, 18 Ala. 50, 52 Am. Dec. 212; *Dubois v. Campau*, 28 Mich. 304.

adverse to them. The acts done should be equivalent to an amotion or ouster, before they can be treated as constituting a disseisin." <sup>1</sup>

**1873.** Mere silent possession by one cotenant, though long continued, not accompanied by any act which affords notice to the other that his possession is adverse, does not amount to adverse possession. <sup>2</sup>

The employment of an agent by one cotenant to look after wild and uncultivated land and keep off trespassers, though continued for some years after the cotenant had acquired a tax title to the common land, does not make his possession adverse. <sup>3</sup>

Such acts, by one tenant upon the common land, as building of fences, the clearing of timber, and the cultivation of the soil, are in their nature quite consistent with a title in another. <sup>4</sup> So, also, are such acts as cutting trees <sup>5</sup> or grass, <sup>6</sup> or the taking of all the profits. <sup>7</sup>

**1874.** The statute of limitations does not begin to run in favor of one tenant in common against his cotenants until his possession is visible, distinct, notorious, continued, and hostile; it must be an actual, visible appropriation of the land, under claim of right inconsistent with the rights of the true owner, and must disseise the owner. "When limitation is set up by one tenant in common against another, it must not only

<sup>1</sup> *Ingalls v. Newhall*, 139 Mass. 268, 30 N. E. Rep. 96, per Devens, J.

<sup>2</sup> *M'Clung v. Ross*, 5 Wheat. 116; *Baker v. Whiting*, 3 Sumn. 475; *Winterburn v. Chambers*, 91 Cal. 170, 27 Pac. Rep. 658; *Owen v. Morton*, 24 Cal. 373; *Busch v. Huston*, 75 Ill. 343; *Brown v. Hogle*, 30 Ill. 119; *Milbourn v. David* (Del.), 30 Atl. Rep. 971; *Van Bibber v. Frazier*, 17 Md. 436; *Sontag v. Bigelow*, 142 Ill. 143, 31 N. E. Rep. 674; *Hudson v. Coe*, 79 Me. 83, 8 Atl. Rep. 249; *Thornton v. York Bank*, 45 Me. 158; *Campbell v. Campbell*, 13 N. H. 483; *Blakeney v. Ferguson*, 20 Ark. 547; *Small v. Clifford*, 38 Me. 213; *Odom v. Weathersbee*, 26 S. C. 244, 1 S. E. Rep. 890; *Northrop v. Wright*, 24 Wend. 221; *Squires v. Clark*, 17 Kans. 84; *Berthold v. Fox*, 13 Minn. 501, 97 Am. Dec. 243; *Abercrombie v. Baldwin*, 15 Ala. 363.

<sup>3</sup> *English v. Powell*, 119 Ind. 93, 21 N. E. Rep. 458.

<sup>4</sup> *Graydon v. Hurd*, 6 U. S. App. 610, 5 C. C. A. 258, 55 Fed. Rep. 724; *Root v. Woolworth*, 150 U. S. 401, 415, 14 Sup. Ct. Rep. 136; *Hudson v. Coe*, 79 Me. 83, 8 Atl. Rep. 249; *Thornton v. York Bank*, 45 Me. 158; *Harman v. Gartman*, Harp. (S. C.) L. 430, 18 Am. Dec. 656; *Catlin v. Kidder*, 7 Vt. 12; *Wait v. Richardson*, 33 Vt. 190, 78 Am. Dec. 622.

<sup>5</sup> *Ewer v. Lovell*, 9 Gray, 276; *Wait v. Richardson*, 33 Vt. 190, 78 Am. Dec. 622; *Chandler v. Ricker*, 49 Vt. 128; *Peck v. Ward*, 18 Pa. St. 506.

<sup>6</sup> *Booth v. Adams*, 11 Vt. 156, 34 Am. Dec. 680.

<sup>7</sup> *Linker v. Benson*, 67 N. C. 150; *Sil-loway v. Brown*, 12 Allen, 30; *Chandler v. Ricker*, 49 Vt. 128.

amount to an ouster of the other joint tenant, but it must be of such a character, and under such claim, as will give notice to him of the intention to claim the whole.<sup>1</sup>

A tenant in common asserting his title against a cotenant in possession is not affected by any statute of limitations, or by any rule against stale demands, unless the facts show an adverse holding by the tenant in possession, or a repudiation or denial of the rights of the cotenant to such extent that it amounts in law to ouster.<sup>2</sup> The statute of limitations begins to run from the time that one tenant denies the right of his cotenant.<sup>3</sup>

The possession of one cotenant being the possession of all, the minority of one of the cotenants, which prevents the statute of limitations from running against him, is a protection for all the cotenants.<sup>4</sup>

**1875.** The payment of taxes on the common land by one tenant does not show an ouster of the other tenants,<sup>5</sup> whose title appears of record; and if the land was unoccupied, and no use was made of it, the payment of the taxes for forty years and more is not of itself conclusive of adverse possession.<sup>6</sup>

<sup>1</sup> *Beall v. Evans*, 1 Tex. Civ. App. 443, 20 S. W. Rep. 945, per Key, J.; *Mhoon v. Cain*, 77 Tex. 316, 14 S. W. Rep. 24; *Craig v. Cartwright*, 65 Tex. 413, 421; *Bracken v. Jones*, 63 Tex. 184; *Satterwhite v. Rosser*, 61 Tex. 166, 170; *Word v. Drouthett*, 44 Tex. 365, 373; *Moody v. Butler*, 63 Tex. 210; *Coogler v. Rogers*, 25 Fla. 853, 7 So. Rep. 391; *Wade v. Doyle*, 17 Fla. 527; *McGee v. Hall*, 26 S. C. 179, 1 S. E. Rep. 711; *Sydnor v. Palmer*, 29 Wis. 249; *Stewart v. Stewart*, 83 Wis. 364, 53 N. W. Rep. 686; *Springer v. Young*, 14 Oreg. 280, 12 Pac. Rep. 400.

<sup>2</sup> *New York & T. Land Co. v. Hyland* (Tex. Civ. App.), 28 S. W. Rep. 206; *Mosely v. Withie*, 26 Tex. 720; *Golson v. Fielder*, 2 Tex. Civ. App. 400, 21 S. W. Rep. 173; *Phillipson v. Flynn*, 83 Tex. 580, 583, 19 S. W. Rep. 136; *Alexander v. Kennedy*, 19 Tex. 488, 496, 70 Am. Dec. 358; *Moody v. Butler*, 63 Tex. 210.

<sup>3</sup> *Tarleton v. Goldthwaite*, 23 Ala. 346, 58 Am. Dec. 296; *Huff v. McDonald*, 22 Ga. 131; *Crapo v. Cameron*, 61 Iowa, 447, 16 N. W. Rep. 523; *Jeter v. Davis*, 109

N. C. 458, 13 S. E. Rep. 908; *Gilchrist v. Middleton*, 107 N. C. 663, 12 S. E. Rep. 85; *Jolly v. Bryan*, 86 N. C. 457; *Northcott v. Casper*, 6 Ired. Eq. 303; *Foreman v. Drake*, 98 N. C. 311, 3 S. E. Rep. 842; *Hampton v. Wheeler*, 99 N. C. 222, 6 S. E. Rep. 236; *Page v. Branch*, 97 N. C. 97, 1 S. E. Rep. 625; *Almy v. Daniels*, 15 R. I. 312, 4 Atl. Rep. 753.

<sup>4</sup> *McGee v. Hall*, 26 S. C. 179, 1 S. E. Rep. 711.

<sup>5</sup> *White v. Beckwith*, 62 Conn. 79, 25 Atl. Rep. 400; *Ball v. Palmer*, 81 Ill. 370; *Brown v. Hogle*, 30 Ill. 119; *Sontag v. Bigelow*, 142 Ill. 143, 31 N. E. Rep. 474; *Pierson v. Conley*, 95 Mich. 619, 55 N. W. Rep. 387; *Fenton v. Miller*, 94 Mich. 204, 53 N. W. Rep. 957; *Campau v. Campau*, 44 Mich. 31, 5 N. W. Rep. 1062; *Lagoria v. Dozier* (Va.), 22 S. E. Rep. 239; *Tulloch v. Worrall*, 49 Pa. St. 133; *Golson v. Fielder*, 2 Tex. Civ. App. 400, 21 S. W. Rep. 173; *Phillipson v. Flynn*, 83 Tex. 580, 19 S. W. Rep. 136.

<sup>6</sup> *White v. Beckwith*, 62 Conn. 79, 25

1876. An exclusive appropriation of the common land, or any part of it, by a tenant in common to his own use, by the erection of a permanent structure, is evidence of a disseisin of his cotenants.<sup>1</sup> But his erection of a light, temporary structure, such as a boat-house or fish-house, so built as to be easily removable, the leasing of it, the collection of the rents, and the payment of the taxes, do not amount to an ouster of his cotenants.<sup>2</sup>

The piling of lumber upon the land is not such an occupation of it as to amount to an ouster.<sup>3</sup>

1877. Whether the acts of one tenant constitute an ouster of his cotenant is a question for the jury. The law will not presume an ouster, and the court will not infer it.<sup>4</sup> The burden of proving an ouster is upon the party alleging it.<sup>5</sup>

#### IV. *Entry and Possession under Deed of One Cotenant.*

1878. A tenant in common does not make his possession adverse to his cotenant by undertaking to convey the entire estate.<sup>6</sup> But if the grantee enters into possession under such deed and holds exclusive possession, paying the taxes for a sufficient time to acquire title under the statute of limitations, the other tenants in common will lose their title.<sup>7</sup>

Atl. Rep. 400; *Keyser v. Evans*, 30 Pa. St. 507.

<sup>1</sup> *Bennett v. Clemence*, 6 Allen, 10, 18; *Howe v. Howe*, 90 Iowa, 582, 58 N. W. Rep. 908.

<sup>2</sup> *Ingalls v. Newhall*, 139 Mass. 268, 30 N. E. Rep. 96; *Sontag v. Bigelow*, 142 Ill. 143, 31 N. E. Rep. 674; *Busch v. Huston*, 75 Ill. 343; *Ball v. Palmer*, 81 Ill. 370.

<sup>3</sup> *Keay v. Goodwin*, 16 Mass. 1.

<sup>4</sup> *Cummings v. Wyman*, 10 Mass. 465; *Carpentier v. Mendenhall*, 28 Cal. 484; *Clark v. Crego*, 47 Barb. 599; *McCloskey v. McCloskey* (Pa. St.), 16 Atl. Rep. 30; *Keyser v. Evans*, 30 Pa. St. 507; *Blackmore v. Gregg*, 2 Watts & S. 182; *Hart v. Gregg*, 10 Watts, 185, 36 Am. Dec. 166; *Taylor v. Hill*, 10 Leigh, 457; *Purcell v. Wilson*, 4 Gratt. 16; *Harmon v. James*, 15 Miss. 111, 45 Am. Dec. 296.

<sup>5</sup> *Van Bibber v. Frazier*, 17 Md. 436.

<sup>6</sup> *Ferguson v. Wright*, 113 N. C. 537,

18 S. E. Rep. 691; *Page v. Branch*, 97 N. C. 97, 1 S. E. Rep. 625; *New York & T. Land Co. v. Hyland* (Tex. Civ. App.), 28 S. W. Rep. 206; *Noble v. Hill* (Tex. Civ. App.), 27 S. W. Rep. 756. But a sale of the entire property in a chattel by one tenant in common is a conversion, for which trover may be maintained by his cotenant. *Smyth v. Tankersley*, 20 Ala. 212; *Steiner v. Tranum*, 98 Ala. 315, 18 So. Rep. 365.

<sup>7</sup> *Kittredge v. Proprietors*, 17 Pick. 246, 28 Am. Dec. 296; *Bigelow v. Jones*, 10 Pick. 161; *Parker v. Proprietors*, 3 Met. 91, 37 Am. Dec. 121; *Marcy v. Marcy*, 6 Met. 360; *Byers v. Carll* (Tex. Civ. App.), 27 S. W. Rep. 190; *Maxwell v. Higgins*, 38 Neb. 671, 57 N. W. Rep. 388; *Kinney v. Slatery*, 51 Iowa, 353, 1 N. W. Rep. 626; *Moore v. Antil*, 53 Iowa, 612, 6 N. W. Rep. 14; *Unger v. Mooney*, 63 Cal. 586, 49 Am. Rep. 100; *Foulke v. Bond*, 41 N. J. L. 527; *Culler*



A conveyance from one of several cotenants to a person in exclusive adverse possession, conveying absolutely all the property, does not make the grantee a cotenant with the other holders of the legal title, and so render his possession consistent with their rights.<sup>1</sup> Such a conveyance is an ouster, and a cotenant out of possession may maintain an action at law to recover his portion.<sup>2</sup>

It has also been held that a conveyance by warranty deed by a tenant in common is an ouster of the others, so as to make the grantee liable to the other cotenants for the rents and profits, though none were collected.<sup>3</sup>

A mortgage executed by a tenant in common is not equivalent to a disseisin of the others.<sup>4</sup>

**1879.** An occupation of lands, beginning under deeds in fee simple of the entire title, authorizes the presumption of an intent to hold exclusive possession of the whole. The possession of the grantee being under color of title, and with claim of exclusive title, is adverse to any part owner in common. His entry and possession are referred to the title under which he claims.<sup>5</sup>

*v. Motzer*, 13 S. & R. 356, 15 Am. Dec. 604; *Iddings v. Cairns*, 2 Grant, 88; *Warfield v. Lindell*, 30 Mo. 272, 77 Am. Dec. 614; *Challefoux v. Ducharme*, 8 Wis. 287; *Sydnor v. Palmer*, 29 Wis. 226; *Crapo v. Cameron*, 61 Iowa, 447, 16 N. W. Rep. 523.

<sup>1</sup> *King v. Carmichael*, 136 Ind. 20, 35 N. E. Rep. 509; *Irey v. Markey*, 132 Ind. 546, 32 N. E. Rep. 309; *Frick v. Sinon*, 75 Cal. 337, 17 Pac. Rep. 439; *Larman v. Huey*, 13 B. Mon. 436.

<sup>2</sup> *Odom v. Weathersbee*, 26 S. C. 244, 1 S. E. Rep. 890.

<sup>3</sup> *Leach v. Hall (Iowa)*, 64 N. W. Rep. 790.

<sup>4</sup> *Leach v. Hall (Iowa)*, 64 N. W. Rep. 790; *Salem Nat. Bank v. White (Ill.)*, 42 N. E. Rep. 312; *Wilson v. Collishaw*, 13 Pa. St. 276.

<sup>5</sup> *Prescott v. Nevers*, 4 Mason, 326; *Van Gunden v. Virginia Coal & Iron Co.* 8 U. S. App. 229, 52 Fed. Rep. 838, 3 C. C. A. 294; *Bradstreet v. Huntington*, 5 Pet. 401, 444; *Barr v. Chapman*, 30 W. L.

Bul. 264. **California**: *Gregory v. Gregory*, 102 Cal. 50, 36 Pac. Rep. 364. See, however, *Seaton v. Son*, 32 Cal. 481. **Connecticut**: *White v. Beckwith*, 62 Conn. 79, 25 Atl. Rep. 400; *Clark v. Vaughan*, 3 Conn. 191. **Florida**: *Kearnes v. Hill*, 21 Fla. 185. **Illinois**: *Sontag v. Bigelow*, 142 Ill. 143, 31 N. E. Rep. 674. **Indiana**: *King v. Carmichael*, 136 Ind. 20, 35 N. E. Rep. 509; *Wright v. Kleyla*, 104 Ind. 223, 227, 4 N. E. Rep. 16. **Iowa**: *Kinney v. Slattery*, 51 Iowa, 353, 1 N. W. Rep. 626. **Kentucky**: *Greenhill v. Biggs*, 85 Ky. 155, 2 S. W. Rep. 774. **Massachusetts**: *Kittredge v. Proprietors*, 17 Pick. 246, 28 Am. Dec. 296; *Higbee v. Rice*, 5 Mass. 344, 4 Am. Dec. 63. **Michigan**: *Highstone v. Burdette*, 61 Mich. 54, 27 N. W. Rep. 852. **New Hampshire**: *Newmarket Manuf. Co. v. Pendergast*, 24 N. H. 69. **New York**: *Jackson v. Smith*, 13 Johns. 411; *Town v. Needham*, 3 Paige, 545, 24 Am. Dec. 246; *Wright v. Saddler*, 20 N. Y. 329. **Pennsylvania**: *Culler v. Motzer*, 13 S. & R.

In Indiana it is held that possession of land under a deed given upon a sale for taxes is adverse, though the title under the deed may be invalid.<sup>1</sup>

The record of a deed, conveying to a tenant in common the entire property by specific description, is notice to his cotenants of the existence of such deed. The character of the entry and possession of such tenant may be inferred from the conveyance and title under which he claims, and will be regarded as adverse to the title of his cotenants.<sup>2</sup>

**1880.** An entry and possession under general warranty deeds in fee simple from one tenant in common, with claim of exclusive ownership in fee, is an ouster of all other persons claiming an interest in the land at and from the time they have a right of entry. The extent of the estate purporting to be conveyed characterizes the entry and subsequent possession, and shows beyond doubt that they were made under a claim to the whole, and were with intent to oust all others asserting an interest.<sup>3</sup>

356, 358, 15 Am. Dec. 604. **Virginia**: Buchanan v. King, 22 Gratt. 414, 422. **West Virginia**: Cooley v. Porter, 22 W. Va. 120.

The rule is otherwise in **North Carolina**: Day v. Howard, 73 N. C. 1; Caldwell v. Neely, 81 N. C. 114. And perhaps in **Vermont**: Roberts v. Morgan, 30 Vt. 319; Holley v. Hawley, 39 Vt. 525, 532, 94 Am. Dec. 350.

<sup>1</sup> English v. Powell, 119 Ind. 93, 21 N. E. Rep. 458; Sims v. Gay, 109 Ind. 501, 9 N. E. Rep. 120; Wright v. Kleyla, 104 Ind. 223, 4 N. E. Rep. 16; Doe v. Hearick, 14 Ind. 242; Hearick v. Doe, 4 Ind. 164.

<sup>2</sup> Puckett v. McDaniel (Tex. Civ. App.), 28 S. W. Rep. 360; Church v. Waggoner, 78 Tex. 200, 14 S. W. Rep. 581; Mayes v. Manning, 73 Tex. 43, 11 S. W. Rep. 136.

<sup>3</sup> Townsend & Pastor's Case, 4 Leon. 52; Elder v. McClaskey, 70 Fed. Rep. 529 (C. C. A.), per Taft, J.; Prescott v. Nevers, 4 Mason, 326, Fed. Cas. No. 11,390; Bradstreet v. Huntington, 5 Pet. 401; Clymer v. Dawkins, 3 How. 674; Hall v. Law, 102 U. S. 461, 466. **Cali-**

**fornia**: Unger v. Mooney, 63 Cal. 586, 49 Am. Rep. 100. **Connecticut**: Clark v. Vaughan, 3 Conn. 191. **Georgia**: Horne v. Howell, 46 Ga. 9; Cain v. Furrow, 47 Ga. 674. **Illinois**: Hinkley v. Greene, 52 Ill. 230. **Indiana**: Nelson v. Davis, 35 Ind. 474; English v. Powell, 119 Ind. 93, 21 N. E. Rep. 458. **Iowa**: Kinney v. Slattery, 51 Iowa, 353, 1 N. W. Rep. 626. **Kentucky**: Greenhill v. Biggs, 85 Ky. 155, 2 S. W. Rep. 774; Gill v. Fauntleroy, 8 B. Mon. 177. **Maine**: Thomas v. Pickering, 13 Me. 337. **Maryland**: Rutter v. Small, 68 Md. 133, 11 Atl. Rep. 698. **Massachusetts**: Higbee v. Rice, 5 Mass. 344, 4 Am. Dec. 63; Kirtledge v. Proprietors, 17 Pick. 246, 28 Am. Dec. 296; Parker v. Proprietors, 3 Met. 91, 101, 37 Am. Dec. 121. **Michigan**: Sands v. Davis, 40 Mich. 14, 18. **Missouri**: Long v. Stapp, 49 Mo. 508. **New Hampshire**: Forest v. Jackson, 56 N. H. 357. **New Jersey**: Foulke v. Bond, 41 N. J. L. 527, 539, 541. **New York**: Christie v. Gage, 71 N. Y. 189; Jackson v. Smith, 13 Johns. 406; Clapp v. Bromagham, 9 Cow. 530, 551, 557; Bogardus v. Trinity Church, 4 Paige, 178. **North**

Although the grantee is already in the actual adverse possession of the land at the time of taking such deed from one tenant in common, his continuing in possession under the deed is as much a disseisin as would have been an actual entry under it. He does not become a cotenant with the other tenants in common.<sup>1</sup>

**1881.** The occupancy and exclusive enjoyment of a purchaser from a tenant in common under a deed of the entire land and estate, with the knowledge, actual or constructive, of the tenant out of possession, in the absence of any facts or circumstances from which a contrary intention might reasonably be inferred, if continued for the statutory period of limitation, *prima facie* constitutes an ouster and adverse possession.<sup>2</sup>

But the possession of one who enters under such a deed is not adverse if the other cotenants have no notice of such deed, either actual or constructive, or of his claim to be the owner of the whole interest in the land.<sup>3</sup>

Yet a purchaser from a part of the original tenants in common who has entered into possession and made extensive improvements and paid the taxes, under a claim of exclusive ownership for a period sufficient to create a bar under the statute of limitations, is presumed to have acquired title by an ouster of the cotenants of his grantors.<sup>4</sup>

**1882.** One tenant in common, who enters into possession as a stranger to the rights of his cotenants, is not estopped from setting up against them an adverse title that originated before his purchase.<sup>5</sup>

One in possession under a claim of complete ownership may

Carolina: Covington v. Stewart, 77 N. C. 148. Pennsylvania: Dikeman v. Parrish, 6 Pa. St. 210, 47 Am. Dec. 455; Law v. Patterson, 1 Watts & S. 184. South Carolina: Odom v. Weathersbee, 26 S. C. 244, 1 S. E. Rep. 890; Gray v. Bates, 3 Strobb. 498. Tennessee: Weisinger v. Murphy, 2 Head, 674. Texas: De Leon v. McMurray, 5 Tex. Civ. App. 280, 23 S. W. Rep. 1038. Vermont: Hodges v. Eddy, 38 Vt. 327. Virginia: Caperton v. Gregory, 11 Gratt. 505.

<sup>1</sup> Frick v. Sinon, 75 Cal. 337, 17 Pac. Rep. 439.

<sup>2</sup> Price v. Hall (Ind.), 39 N. E. Rep. 941.

<sup>3</sup> Hignite v. Hignite, 65 Miss. 447, 4 So. Rep. 345.

<sup>4</sup> Lewis v. Terrell (Tex. Civ. App.), 26 S. W. Rep. 754; Alexander v. Kennedy, 19 Tex. 488, 494, 70 Am. Dec. 358.

<sup>5</sup> Watkins v. Green, 101 Mich. 493, 60 N. W. Rep. 44; Sands v. Davis, 40 Mich. 14; Campau v. Dubois, 39 Mich. 274; Blackwood v. Van Vleit, 30 Mich. 118.

fortify his title by purchasing outstanding titles of tenants in common without making his possession subordinate to the newly acquired title or becoming a tenant in common thereof.<sup>1</sup>

<sup>1</sup> *Elder v. McClaskey*, 70 Fed. Rep. Am. Dec. 136; *Cannon v. Stockmon*, 36 529, 547; *Fox v. Widgery*, 4 Me. 214; Cal. 535, 95 Am. Dec. 205; *Winterburn Jackson v. Smith*, 13 Johns. 406, 413; *v. Chambers*, 91 Cal. 170, 183, 27 Pac. Northrop *v.* Wright, 7 Hill, 476, 489, Rep. 658; *Cook v. Clinton*, 64 Mich. 309, 496; *Bryan v. Atwater*, 5 Day, 181, 5 313, 31 N. W. Rep. 317.

## CHAPTER XLIII.

### LIABILITIES OF COTENANTS TO EACH OTHER.

I. For rents and profits received, 1883-1886.	III. For money expended in repairs and improvements, 1898-1907.
II. For use and occupation, 1887-1897.	IV. For services performed, 1908-1910.
	V. For waste, 1911-1916.

#### *I. For Rents and Profits received.*

1883. At the common law one cotenant could not be compelled to account to another for rents and profits received from the joint or common land. Thus Coke says: "If one joint tenant or tenant in common of land maketh his companion his bailiff of his part, he shall have an action of account against him, as hath been said. But, although one tenant in common, or joint tenant, without being made bailiff, take the whole profits, no action of account lieth against him; for in an action of account he must charge him either as a guardian, bailiff, or receiver, as hath been said before, which he cannot do in this case, unless his companion constitute him his bailiff. And therefore all those books which affirm that an action of account lieth by one tenant in common, or joint tenant, against another, must be intended, when the one maketh the other his bailiff, for otherwise, never his bailiff to render an account, is a good plea."<sup>1</sup>

To remedy this hardship at the common law was the purpose of the statute of 4 Anne,<sup>2</sup> which provided that "actions of account shall and may be brought and maintained . . . by one joint tenant, and tenant in common, . . . against the other, as bailiff for receiving more than comes to his just share or proportion." As stated in a decision of the Supreme Court of Florida, "Under the statute of Anne it was no longer necessary that one tenant in common should take the profits as bailiff by appointment to make him responsible. It was only necessary that he should receive more than his just share of the profits. By this

<sup>1</sup> Coke on Littleton, 200 b.

<sup>2</sup> Ch. 16, § 27.

act, and without appointment by his cotenant, he became bailiff, and was responsible for what he actually received beyond his just share.”<sup>1</sup>

This statute of Anne has generally been adopted in this country as part of the common law, but in several States has been reenacted in the same terms, or in substantially the same terms.<sup>2</sup>

1884. Under this statute one joint tenant, or tenant in common, is liable to his cotenant for his share of the rents of the property he has actually collected.<sup>3</sup> But it is only when a cotenant has received in money more than his share of the rents and profits that he is liable to an action at law to account for a share of the profits beyond the amount of his own share. He is not chargeable with a share of the value of the crops he has raised upon the joint or common estate unless he has sold them and received money therefor.<sup>4</sup> He is not chargeable with any part of the value of the use of the entire estate when he has occupied it without any agreement, express or implied, to render compensation to his cotenant. “Ever since estates in common have been known to the law, it has been the unques-

<sup>1</sup> *Bird v. Bird*, 15 Fla. 424, 21 Am. Rep. 296, 298, per Westcott, J.

<sup>2</sup> **Indiana**: R. S. 1894, § 289. **Minnesota**: G. S. 1894, § 5880. **New Jersey**: R. S. 1887, p. 4, “Account,” § 3. **New York**: *Roseboom v. Roseboom*, 15 Hun, 309, 316. **Oregon**: 2 Annot. Laws 1892, § 2991. **Vermont**: R. L. 1880, § 1202; *Holmes v. Best*, 58 Vt. 547, 5 Atl. Rep. 384. **Virginia**: Code 1887, § 3292. **West Virginia**: Code 1891, ch. 100, § 14. Construction is different, however. *Ward v. Ward* (W. Va.), 21 S. E. Rep. 746. **Wisconsin**: Annot. Stats. 1889, § 2199.

<sup>3</sup> **Alabama**: *Pope v. Harkins*, 16 Ala. 321; *Gayle v. Johnston*, 80 Ala. 395. **California**: *Goodenow v. Ewer*, 16 Cal. 461, 76 Am. Dec. 540; *Howard v. Throckmorton*, 59 Cal. 79. **Connecticut**: *Barnum v. Landon*, 25 Conn. 137, 152. **Georgia**: *Huff v. McDonald*, 22 Ga. 131, 161, 68 Am. Dec. 487. **Illinois**: *Crow v. Mark*, 52 Ill. 332. **Iowa**: *Austin v. Barrett*, 44 Iowa, 488. **Kansas**: *Scantlin v. Allison*, 32 Kans. 376, 4 Pac. Rep. 618. **Kentucky**: *Bridgford v. Barbour*, 80 Ky.

529; *Burch v. Burch*, 82 Ky. 622. **Maine**: *Moses v. Ross*, 41 Me. 360, 66 Am. Dec. 250; *Gowen v. Shaw*, 40 Me. 56; *Buck v. Spofford*, 31 Me. 34; *Dyer v. Wilbur*, 48 Me. 287; *Cutler v. Currier*, 54 Me. 81. **Massachusetts**: *Shepard v. Richards*, 2 Gray, 424, 61 Am. Dec. 473; *Sargent v. Parsons*, 12 Mass. 149; *Badger v. Holmes*, 6 Gray, 118, 119, per Bigelow, J. **Missouri**: *In re Tyler*, 40 Mo. App. 378. **New Jersey**: *Davidson v. Thompson*, 22 N. J. Eq. 83; *Izard v. Bodine*, 11 N. J. Eq. 403, 69 Am. Dec. 595. **New York**: *Hannan v. Osborn*, 4 Paige, 336; *Woolver v. Knapp*, 18 Barb. 265. **South Carolina**: *Puckett v. Smith*, 5 Strob. 26, 33 Am. Dec. 686. **Texas**: *Osborn v. Osborn*, 62 Tex. 495.

<sup>4</sup> *Peck v. Carpenter*, 7 Gray, 283, 66 Am. Dec. 477; *Shepard v. Richards*, 2 Gray, 424, 61 Am. Dec. 473; *Miller v. Miller*, 9 Pick. 34; *Munroe v. Luke*, 1 Met. 464; *Blood v. Blood*, 110 Mass. 545; *Roseboom v. Roseboom*, 81 N. Y. 356, 15 Hun, 309.

tioned legal right of a tenant in common — one of his essential proprietary rights — to occupy, use, and enjoy the common property without liability to account to his cotenants, so long as he does not prevent them from exercising the same right.”<sup>1</sup>

1885. But a cotenant is entitled to deduct from the receipts the expenses and charges attendant upon the rents and profits. In a suit for a share of the profits of a farm, the evidence must show that the occupying tenant has received more than his share of the proceeds of the entire crops and products of the estates owned in common, or that there is a surplus thereof in his hands for which he is bound to account to the plaintiff or his ward. “It is not enough for the plaintiff to show that the defendant has taken more than his proportion of a single article raised on the estate, but it must be made to appear that he has received more than his aliquot part of the proceeds of all the products of the common property, after deducting all reasonable and proper charges. There must be a balance due at the commencement of the plaintiff’s action, in the hands of the defendant, as the result of a final settlement of the account between the parties relating to the estate in common.”<sup>2</sup>

1886. A joint tenant, or a tenant in common, has no lien upon the undivided interest of his cotenant for rents in excess of his share collected and retained by him,<sup>3</sup> though upon partition an allowance may be made for such rents.<sup>4</sup>

And such lien does not exist as against a *bona fide* purchaser or incumbrancer of the interest of the cotenant from whom the rent is due.<sup>5</sup>

## II. *For Use and Occupation.*

1887. Under this statute, and the common law founded upon it, neither a joint tenant, nor a tenant in common, occupying the common property alone, is liable to his cotenants

<sup>1</sup> Gage v. Gage (N. H.), 29 Atl. Rep. 543, per Carpenter, J., delivering a dissenting opinion.

<sup>2</sup> Shepard v. Richards, 2 Gray, 424, 61 Am. Dec. 473, 474, per Bigelow, J. And see Edsall v. Merrill, 37 N. J. Eq. 114; Dech’s Appeal, 57 Pa. St. 467, 472; Vass v. Hill (N. J. Eq.), 21 Atl. Rep. 585.

<sup>3</sup> Jones on Liens, § 1155; Flack v. Gosnell, 76 Md. 88, 24 Atl. Rep. 414; Devries

v. Hiss, 72 Md. 560, 20 Atl. Rep. 131; Burch v. Burch, 82 Ky. 622; Brittinum v. Jones, 56 Ark. 624, 20 S. W. Rep. 520; Clark v. Hershey, 52 Ark. 473, 492, 12 S. W. Rep. 1077.

<sup>4</sup> Scott v. Guernsey, 48 N. Y. 124; Hannan v. Osborn, 4 Paige, 336.

<sup>5</sup> Burns v. Dreyfus, 69 Miss. 211, 11 So. Rep. 107.

for rent, on account of his own use and occupation, unless such hostile acts on his part are shown as constitute an adverse possession and actual ouster of his cotenants.<sup>1</sup> This statute gives no remedy to one cotenant against another for the mere use and occupation of the joint or common estate. In the leading case in England on this statute the court say on this point: "Every case

<sup>1</sup> *Henderson v. Eason*, 17 Q. B. 701, 718, per Lord Cottenham; *McMahon v. Burchell*, 5 Hare, 322, 2 Phil. 127; *Gayle v. Johnston*, 80 Ala. 395; *Fielder v. Childs*, 73 Ala. 567; *Terrell v. Cunningham*, 70 Ala. 100; *Newbold v. Smart*, 67 Ala. 326. **Arkansas**: *Hamby v. Wall*, 48 Ark. 135, 2 S. W. Rep. 705. **California**: *McCord v. Oakland Q. M. Co.* 64 Cal. 134, 27 Pac. Rep. 863; *Pico v. Columbet*, 12 Cal. 414, 73 Am. Dec. 550; *Goodenow v. Ewer*, 16 Cal. 461, 76 Am. Dec. 540. **Florida**: *Bird v. Bird*, 15 Fla. 424, 21 Am. Rep. 296. **Illinois**: *Woolley v. Schrader*, 116 Ill. 39, 4 N. E. Rep. 658; *Sconce v. Sconce*, 15 Bradw. App. 169. **Indiana**: *Davis v. Hutton*, 127 Ind. 481, 26 N. E. Rep. 1006; *Carver v. Fennimore*, 116 Ind. 236, 19 N. E. Rep. 103; *Humphries v. Davis*, 100 Ind. 369; *Crane v. Wagoner*, 27 Ind. 52, 89 Am. Dec. 493. Each one has right to enter and use the land, and this right cannot be impaired by the fact that others absent themselves, or do not claim their right to a common enjoyment. Unless the one in possession denies the right of the others to enter and enjoy the estate, or agrees to pay rent, nothing can be claimed of him. It is presumed that the others consent to his use. **Iowa**: *Belknap v. Belknap*, 77 Iowa, 71, 41 N. W. Rep. 568; *Reynolds v. Wilmeth*, 45 Iowa, 693; *Janey v. Brown*, 48 Iowa, 568; *Varnum v. Leek*, 65 Iowa, 751, 23 N. W. Rep. 151. **Kansas**: *Scantlin v. Allison*, 32 Kans. 376, 4 Pac. Rep. 618. **Kentucky**: *Bridgford v. Barbour*, 80 Ky. 529; *Nelson v. Clay*, 7 J. J. Marsh. 138, 141, 23 Am. Dec. 387. **Louisiana**: *Becnel v. Becnel*, 23 La. Ann. 150; *Balfour v. Balfour*, 33 La. Ann. 297. **Maine**: *Colburn v. Mason*, 25 Me. 434, 43 Am. Dec. 292; *Gowen v. Shaw*, 40 Me. 56, 58; **Maryland**: *McLaughlin v. McLaughlin*, 80 Md. 115, 30 Atl. Rep. 607; *Israel v. Israel*, 30 Md. 120, 96 Am. Dec. 571. **Massachusetts**: *Sargent v. Parsons*, 12 Mass. 149, a leading case; *Shepard v. Richards*, 2 Gray, 424, 61 Am. Dec. 473; *Wilbur v. Wilbur*, 13 Met. 404; *Badger v. Holmes*, 6 Gray, 118; *Peck v. Carpenter*, 7 Gray, 283, 66 Am. Dec. 477; *Blood v. Blood*, 110 Mass. 545. **Michigan**: *Everts v. Beach*, 31 Mich. 136, 18 Am. Rep. 169. **Minnesota**: *Hause v. Hause*, 29 Minn. 252, 13 N. W. Rep. 43; *Kean v. Connelly*, 25 Minn. 222, 33 Am. Rep. 458. **Missouri**: *Ragan v. McCoy*, 29 Mo. 356; *In re Tyler*, 40 Mo. App. 378. **New Hampshire**: *Berry v. Whidden*, 62 N. H. 473; *Webster v. Calef*, 47 N. H. 289. **New Jersey**: *Sailer v. Sailer*, 41 N. J. Eq. 398, 5 Atl. Rep. 319; *Izard v. Bodine*, 11 N. J. Eq. 403, 69 Am. Dec. 595; *Barrell v. Barrell*, 25 N. J. Eq. 173; *Edsall v. Merrill*, 37 N. J. Eq. 114, 116. **New York**: *Le Barron v. Babcock*, 122 N. Y. 153, 25 N. E. Rep. 253, reversing 46 Hun, 598; *Scott v. Guernsey*, 60 Barb. 163; *Wilcox v. Wilcox*, 48 Barb. 327; *Dresser v. Dresser*, 40 Barb. 300; *Woolver v. Knapp*, 18 Barb. 265; *Roseboom v. Roseboom*, 81 N. Y. 356, 15 Hun, 309; *Zapp v. Miller*, 109 N. Y. 51, 15 N. E. Rep. 889; *Rich v. Rich*, 2 N. Y. Supp. 770; *McCabe v. McCabe*, 18 Hun, 153. **North Carolina**: *Meredith v. Andres*, 7 Ired. 5, 45 Am. Dec. 504. **Pennsylvania**: *Kline v. Jacobs*, 68 Pa. St. 57. **Texas**: *Bennett v. Virginia Ranch & Cattle Co.* 1 Tex. Civ. App. 321, 21 S. W. Rep. 126; *Osborn v. Osborn*, 62 Tex. 495; *Baylor v. Hopf*, 81 Tex. 637, 17 S. W. Rep. 230; *Thompson v. Jones*, 77 Tex. 626, 14 S. W. Rep. 222; *Neil v. Shackelford*, 45 Tex. 119.



in which a tenant in common *receives* more than his share is within the statute; and account will lie when he does receive, but not otherwise. It is to be observed, also, that the receipt of issues and profits is not mentioned, but simply the receipt of more than comes to his just share; and, further, he is to account when he *receives*, not *takes*, more than comes to his just share.”<sup>1</sup>

Tenants in common, who are also trustees for a cotenant, and who occupy a part of the common property, must account to him for a reasonable rent.<sup>2</sup>

1888. A claim for use and occupation may, however, be made available as an equitable set-off. While one cotenant cannot recover of another for the mere occupation of the common property, yet such occupation may be considered, and made an equitable set-off against a claim for repairs made by the occupying tenant. The claim for repairs, in the absence of an agreement, is likewise not the subject of an action by one cotenant against another.<sup>3</sup> “The same principle which admits one of these claims into the computation opens the door to the other as a set-off against the first.”

1889. One cotenant occupying the common land, and raising crops upon it, is the sole owner of them,<sup>4</sup> and can maintain trover against his cotenants for the crops carried away by them, without his consent, after he has severed them from the soil.

The crops raised by a cotenant who occupies and cultivates the joint or common estate belong to him, though he may be liable to account for the profits received from the same. The property is solely in the tenant who raises the crops, and therefore a mortgage

<sup>1</sup> Henderson v. Easen, 17 Q. B. 701, 718. And see McMahon v. Burchell, 2 Phillips, 134.

<sup>2</sup> Spellbrink's Est. 15 Pa. Co. Ct. 506, 3 Pa. Dist. 807.

<sup>3</sup> Davis v. Chapman, 36 Fed. Rep. 42.

<sup>4</sup> Henderson v. Eason, 17 Q. B. 701, 4 Kent Com. 369; Freem. Cotenancy, § 286; Calhoun v. Curtis, 4 Metc. 413, 38 Am. Dec. 380; Brown v. Wellington, 106 Mass. 318, 8 Am. Rep. 330; Bird v. Bird, 15 Fla. 424, 21 Am. Rep. 296; Kennon v. Wright, 70 Ala. 434; Creed v. People, 81 Ill. 565; Le Barron v. Bab-

cock, 122 N. Y. 153, 157, 25 N. E. Rep. 253. “When a cotenant of such lands peaceably takes the products grown during his possession, there comes a time when he is vested with the sole title, which cannot be later than when, in the due course of husbandry, they are peaceably and in good faith severed by him from the common estate on which they were grown. If they do not then become the individual property of the cotenant who grew and severed them, it is difficult to see what subsequent act he could perform which would vest him with the title.” Per Follett, C. J.

of them by him is good against his cotenants, and the mortgagee is not liable to account to them.<sup>1</sup>

1890. In several States, however, the statute of Anne and the common law founded upon it have been changed by enactments which in effect make a joint tenant or a tenant in common, who retains exclusive possession of the property, liable to his cotenants for their share of the rental value or benefits of such use and occupation.<sup>2</sup>

<sup>1</sup> *Bird v. Bird*, 15 Fla. 424, 21 Am. Rcp. 296.

<sup>2</sup> **Connecticut**: If one joint tenant, tenant in common, or coparcener shall receive, use, or take the benefit of the estate in greater proportion than the amount of his interest, he shall be liable to account to his cotenant, in an action of account, for such sum as he has received exceeding his due proportion. G. S. 1888, § 1039.

**Delaware**: A tenant in common, or a joint tenant, or a coparcener, may maintain against his cotenant an action on the case for use and occupation. Code 1893, p. 656, § 2.

**Georgia**: If a tenant in common receives any rent or other profit, or commits any waste, or if he by any means deprives his cotenant of the use of his fair proportion of the property, or if he appropriates all to his exclusive use, or if the property is of such a character as that the use of it must necessarily be exclusive, then he is liable to account to his cotenant. Code 1882, § 2302; *Huff v. McDonald*, 22 Ga. 131, 68 Am. Dec. 487.

**Illinois**: Where one or more joint tenants, tenants in common, or coparceners in real estate, or any interest therein, shall take and use the profits or benefits thereof in greater proportion than his, her, or their interest, such person or persons, his, her, or their executors and administrators, shall account therefor to his or their cotenant, jointly or severally. R. S. 1889, ch. 2, § 1; *McParland v. Larkin*, 155 Ill. 84, 39 N. E. Rep. 609. In *Woolley v. Schrader*, 116 Ill. 39, 4 N. E.

Rep. 658, the court said: "By the express terms of our own act, the tenant is required to account to his cotenants for benefits as well as profits; and we fail to perceive any difficulty in giving effect to this provision of the statute that may not arise in any case where the value of anything is to be ascertained from opinions of witnesses or extrinsic circumstances."

**Ohio**: One tenant in common, or coparcener, may recover from another his share of the rents and profits received by such tenant in common or coparcener from the estate, according to the justice of the case. R. S. 1890, § 5774. It is to be observed that this statute differs from the statute of Anne by including "profits" and the words "according to the justice and equity of the case." And accordingly, under this statute, a tenant is liable for use and occupation. A tenant who uses the common land to pasture his cattle is liable to account to his cotenants for his share of the value of such use. *West v. Weyer*, 46 Ohio St. 66, 18 N. E. Rep. 537; *Conard v. Conard*, 38 Ohio St. 467.

**Rhode Island**: If joint tenant, tenant in common, or coparcener shall take, receive, use, or have the benefit of the estate in greater proportion than his interest therein, he shall be liable to render his account of the use and profit of such common property to his cotenant. G. L. 1896, ch. 273, § 1. This statute is broader in scope than the statute of 4 & 5 Anne, ch. 16, and makes a tenant in common, who receives more than his share of benefit from the common property, *ipso facto* a bailiff of his cotenant for the excess, so far as

**1891.** In some States, moreover, a different construction has been put upon this statute, or upon statutes in like terms enacted here, to the effect that one tenant in common is liable to account to his cotenant for the use and enjoyment of the common property.<sup>1</sup>

**1892.** But if one excludes his cotenant under a claim of exclusive right, the cotenant is entitled to compensation to the extent of the use of which he has been wrongly deprived; that is, he is entitled to the profits of so much of the common property as the occupying tenant has appropriated and used in excess of his share.<sup>2</sup>

maintaining an action of account is concerned. *Hazard v. Albrow*, 17 R. I. 181, 20 Atl. Rep. 834; *Knowles v. Harris*, 5 R. I. 402, 73 Am. Dec. 77. In *Almy v. Daniels*, 15 R. I. 312, 4 Atl. Rep. 753, 10 Atl. Rep. 654, the court deduced the following rules in regard to accounting for the use and occupation of the common land: "1. When a tenant in common has the entire and exclusive occupation of the whole or any part of the common estate, he is liable to account therefor. 2. When he has the income or profit of more than his share, he is liable to account for the excess. 3. When he uses the estate only to an extent less than his share, and not to the extent of an ouster or denial of right of his cotenant, he is not liable to account; and therefore such use cannot be offset against the excessive use by his cotenant. A charge for such use would be a charge for the use of one's own property, and for the exercise of his legal right." See, also, *Almy v. Daniels*, 17 R. I. 543, 23 Atl. Rep. 637; *Knowles v. Harris*, 5 R. I. 402, 73 Am. Dec. 77.

<sup>1</sup> **Georgia:** *Shiels v. Stark*, 14 Ga. 429. **Mississippi:** *Medford v. Frazier*, 58 Miss. 241. **New Hampshire:** *Gage v. Gage* (N. H.), 29 Atl. Rep. 543; *Porter v. Eaton* (N. H.), 29 Atl. Rep. 1027. **South Carolina:** *Annely v. De Saussure*, 26 S. C. 497, 2 S. E. Rep. 490; *Thompson v. Bostick*, 1 McMull. Eq. 75. "The occupier is his own tenant." *Pearson v. Carlton*, 18 S. C. 47. **Tennessee:** *Tyner v. Fen-*

*ner*, 4 Lea, 469, 473; *Blanton v. Vanzant*, 2 Swan, 276. **Virginia:** *Early v. Friend*, 16 Gratt. 21, 78 Am. Dec. 649; *Graham v. Pierce*, 19 Gratt. 28, 100 Am. Dec. 658; *Ruffner v. Lewis*, 7 Leigh, 720, 30 Am. Dec. 513; *Newman v. Newman*, 27 Gratt. 714; *White v. Stuart*, 76 Va. 546. **West Virginia:** *Ward v. Ward* (W. Va.), 21 S. E. Rep. 746; *Dodson v. Hays*, 29 W. Va. 577, 2 S. E. Rep. 415; *Rust v. Rust*, 17 W. Va. 901. **Vermont:** *Hayden v. Merrill*, 44 Vt. 336, 348, 8 Am. Rep. 372.

<sup>2</sup> *McGahan v. Nat. Bank*, 156 U. S. 218, 15 Sup. Ct. Rep. 347. **Georgia:** *Shiels v. Stark*, 14 Ga. 429. **Illinois:** *Noble v. McFarland*, 51 Ill. 226. **Indiana:** *Bowen v. Swander*, 121 Ind. 164, 22 N. E. Rep. 725; *Carver v. Fennimore*, 116 Ind. 236, 19 N. E. Rep. 103; *Carver v. Coffman*, 109 Ind. 547, 10 N. E. Rep. 567; *Humphries v. Davis*, 100 Ind. 369; *Winings v. Wood*, 53 Ind. 187; *Crane v. Waggoner*, 27 Ind. 52, 89 Am. Dec. 493; *Estep v. Estep*, 23 Ind. 114. **Iowa:** *Austin v. Barrett*, 44 Iowa, 488; *Burns v. Byrne*, 45 Iowa, 285; *Dodge v. Davis*, 85 Iowa, 77, 52 N. W. Rep. 2; *Varnum v. Leek*, 65 Iowa, 751, 23 N. W. Rep. 151; *Sears v. Sellow*, 28 Iowa, 501. **Kansas:** *Scantlin v. Allison*, 32 Kans. 376, 4 Pac. Rep. 618. **Maryland:** *Israel v. Israel*, 30 Md. 120, 96 Am. Dec. 571. **Missouri:** *Childs v. Kansas City, St. J. & C. R. Co.* 117 Mo. 414, 23 S. W. Rep. 373. **New Jersey:** *Rowden v. Murphy* (N. J. Eq.), 20 Atl. Rep. 379; *Edsall v. Merrill*, 37 N.

1893. An agreement to pay for use and occupation may be implied, as well where the parties are tenants in common as in any other case, only that such agreement will not be implied from occupation in the case of a cotenant as in the case of a stranger. There must, however, be something more than the mere occupancy of the common property by one cotenant, and a forbearance to occupy by the other. If there has been a parol agreement between them that each shall occupy a particular part of a building on the common land, and the property is so used by them for several years, after which one of them appropriates the use of the entire building, and is notified by the other that he will charge rent for his part, the occupying tenant is liable to the other for the use and occupation of such part.<sup>1</sup>

1894. Under an oral agreement by a tenant in common occupying the whole estate to pay his cotenant for the occupation, the latter may recover for the same, although his claim is described in the declaration as "rent." The sum recoverable is what the occupation is reasonably worth, from the time the agreement was made, so long as the tenant might occupy under the agreement.<sup>2</sup> Of course the agreement must be express; it cannot be implied from the fact of the tenant's occupation. To the objection that the action could not be maintained because one cotenant cannot recover "rent" of another by reason of occupation, the court, by Field, J., said: "By statute as well as by usage, in this Commonwealth, the word 'rent' may include the compensation to be paid for the occupation of land by a ten-

J. Eq. 114; *Barrell v. Barrell*, 25 N. J. Eq. 173; *Davidson v. Thompson*, 22 N. J. Eq. 83; *Vass v. Hill* (N. J. Eq.), 21 Atl. Rep. 585. **New York**: *Zapp v. Miller*, 109 N. Y. 51, 15 N. E. Rep. 889; *Stephenson v. Cotter*, 5 N. Y. Supp. 749; *Scott v. Guernsey*, 48 N. Y. 106. **Rhode Island**: *Almy v. Daniels*, 15 R. I. 312, 4 Atl. Rep. 753, 10 Atl. Rep. 654. **South Carolina**: *Annely v. De Saussure*, 26 S. C. 497, 2 S. E. Rep. 490; *Thompson v. Bostick*, 1 McM. Eq. 78; *Hancock v. Day*, 1 McM. Eq. 69, 72, 36 Am. Dec. 293; *Holt v. Robertson*, 1 McM. Eq. 475; *Jones v. Massey*, 14 S. C. 292; *Scaife v. Thomson*, 15 S. C. 337; *Pearson v. Carlton*, 18 S. C. 47. **Texas**: *Oshorn v. Osborn*, 62 Tex.

495; *Neil v. Shackelford*, 45 Tex. 119, 131. **Vermont**: *Hayden v. Merrill* 44 Vt. 336, 348, 8 Am. Rep. 372; *Holmes v. Best*, 58 Vt. 547, 5 Atl. Rep. 385. **Virginia**: *Early v. Friend*, 16 Gratt. 21, 47, 78 Am. Dec. 649.

<sup>1</sup> *Boley v. Barutio*, 120 Ill. 192, 11 N. E. Rep. 393, affirming 24 Ill. App. 515, per Magruder, J., citing *Illinois Cent. R. Co. v. Thompson*, 116 Ill. 159, 5 N. E. Rep. 117; *Oakes v. Oakes*, 16 Ill. 106; *Chapin v. Foss*, 75 Ill. 280.

<sup>2</sup> *Kites v. Church*, 142 Mass. 586, 8 N. E. Rep. 743. See, also, *Sprout v. Crowley*, 30 Wis. 187; *Davies v. Skinner*, 58 Wis. 638, 17 N. W. Rep. 427, 46 Am. Rep. 665.

ant, whether he holds under a written lease, or at will, or at sufferance, and whether the amount to be paid has been defined by the agreement of the parties, or has been left indefinite."

**1895.** Whether a tenant in common is liable to his cotenant for the use and occupation of the common property where the obligation to pay rent has been created by lease of the cotenant's interest, and the lessee has remained in possession after the expiration of the lease, is a question upon which the authorities are not agreed. On the one hand, it is held that the tenant holding over is deemed to be in possession under the lease, and therefore that he is liable to an action for use and occupation.<sup>1</sup> On the other hand, it is held that a tenant in common holding over after the expiration of such a lease is to be deemed to be in possession by virtue of his own title, rather than by virtue of holding over under the lease.<sup>2</sup>

Where it is agreed among cotenants that one of them shall occupy the common land until a specified event, at a stipulated rent, and his occupation under the agreement is continued after the occurrence of such event, the rent fixed by the agreement will be treated as the measure of liability during such occupancy, unless there is evidence of a change of value.<sup>3</sup>

**1896.** But where one tenant in common has gone into possession by virtue of a lease made by him and his cotenant to a firm of which he is a member, the lease being of the whole premises, including the interests of both tenants in common, and he or his firm has held over, it is held that it is not to be presumed that he remained in possession after the expiration of the lease as a part owner, but rather as lessee, the lease being regarded as renewed, and therefore that he is liable, or his firm is liable, to the other tenant in common for the use and occupation of the premises leased.<sup>4</sup>

<sup>1</sup> *Leigh v. Dickeson*, L. R. 12 Q. B. D. 194.

<sup>2</sup> *Valentine v. Healey*, 86 Hun, 259, 33 N. Y. Supp. 246; *Wilcox v. Wilcox*, 48 Barb. 327; *Dresser v. Dresser*, 40 Barb. 300; *McKay v. Mumford*, 10 Wend. 351; *Mumford v. Brown*, 1 Wend. 52, 19 Am. Dec. 461; *Davies v. Skinner*, 58 Wis. 638, 17 N. W. Rep. 427, 46 Am. Rep. 665.

<sup>3</sup> *Clayton v. McCay*, 143 Pa. St. 225, 22 Atl. Rep. 754.

<sup>4</sup> *Valentine v. Healey*, 86 Hun, 259, 260, 33 N. Y. S. 246. *Van Brunt, P. J.*, said: "There was no claim or pretence of going into possession because of any title, except that derived from the lease. Now, it being conceded and admitted by the pleadings that the possession was of this character, where is there any room for an

1897. One tenant in common who is under obligation to pay his cotenant for the use of his share cannot, without consent, escape such obligation by using only a portion of the estate, such as he may deem to be his proper share of the whole. Thus where such a tenant has paid rent for the use of a farm to his cotenants until one of them notified him to quit, but afterwards remained in possession and cultivated a portion of the farm, it was held that he was liable to such cotenant for the use and occupation of his share. "One tenant in common cannot so take possession of the whole, and determine for himself that he will farm for himself and others only a certain portion, to the exclusion of all the rest from the profits of such portion. There can be no ideal partition by which one in possession can cultivate his supposed part of the whole, in the hope of saving himself from accounting for the just proportion of what he actually raises to each of the other tenants in common. Nor can one of seven tenants in common cultivate for himself and five others so much of the whole as he may regard six sevenths, and then say to the seventh that he has no share in what he has grown. He cannot say, 'I did not farm for you, but only for myself and the other five.' The plain principle that each is alike seised of every part forbids any such appropriation."<sup>1</sup>

### III. *For Money expended in Repairs and Improvements.*

1898. At common law no action lies by one cotenant against the others to recover any portion of the expense of repairs or permanent improvements of the common property, in the absence of an express or implied agreement to contribute to such expense, or of circumstances which amount to a ratification of such expenditure.<sup>2</sup> The only remedies of the cotenant

assumption, when the tenants hold over, that they are in possession because of any other title than that of lessees? There is no pretence that any other title has been acquired since the execution of the lease, or that any other rights have devolved upon the defendants or either of them. It would seem, under such circumstances, that the ordinary rule in reference to holding over must necessarily apply."

<sup>1</sup> Wickoff v. Wickoff (N. J.), 18 Atl. Rep. 74, per Bird, V. C.

<sup>2</sup> Pickering v. Pickering, 63 N. H. 468, 3 Atl. Rep. 744; Wiggin v. Wiggin, 43 N. H. 561, 568, 80 Am. Dec. 192; Stevens v. Thompson, 17 N. H. 103; Converse v. Ferre, 11 Mass. 325; Calvert v. Aldrich, 99 Mass. 74, 96 Am. Dec. 693; Farrand v. Gleason, 56 Vt. 633; Kidder v. Rixford, 16 Vt. 169, 42 Am. Dec. 504; Alden v. Carleton, 81 Me. 358, 17 Atl. Rep. 299; Mumford v. Brown, 6 Cow. 475, 16 Am. Dec. 440; Harry v. Harry, 127 Ind. 91, 26 N. E. Rep. 562; Alleman v. Hawley,

who has made such expenditures for improvements are to reimburse himself from the rents, issues, and profits received by him from the common property ;<sup>1</sup> or, upon partition, to have land, upon which the improvements are, set off to him in division ; or, in case of a sale, to have the benefit of the expenditure, so far as this has enhanced the amount received for the land. Where a tenant in common or joint tenant is called on for rents and profits in equity, he may deduct ordinary repairs, on the principle that he who asks help from a court of equity must do equity.<sup>2</sup>

1899. One cotenant is not allowed to improve the common property at the expense of another without his authority, express or implied.<sup>3</sup> He cannot maintain an action against his cotenant for contribution, unless there is an agreement to contribute.<sup>4</sup> If such an agreement be shown, the tenant who paid for the improvements may maintain an action at law against his cotenant who fails or refuses to pay his share of the expense.<sup>5</sup>

1900. An improving tenant may obtain compensation for his expenditures beyond his share when his cotenant goes into court and asks its aid for a partition; in that case the generally recognized rule is, that such cotenant is entitled to relief only upon condition that the equitable claims of the improving tenant shall be taken into account, and that either the part of the estate which he has improved shall be set off to him, or that, in case a sale is made, such part of the proceeds as arise from the improvements shall be awarded to him in addition to his proper share.<sup>6</sup> "This relief is administered, not upon the ground that

117 Ind. 532, 20 N. E. Rep. 441 ; *Elrod v. Keller*, 89 Ind. 382 ; *Lane v. Taylor*, 40 Ind. 495 ; *Carver v. Fennimore*, 116 Ind. 236, 19 N. E. Rep. 103 ; *Bazemore v. Davis*, 55 Ga. 504 ; *Welland v. Williams* (Nev.), 29 Pac. Rep. 403 ; *Annely v. De Saussure*, 26 S. C. 497, 2 S. E. Rep. 490, 4 Am. St. Rep. 725.

<sup>1</sup> *Gregg v. Patterson*, 9 Watts & S. 197 ; *Bazemore v. Davis*, 55 Ga. 504.

<sup>2</sup> *Ward v. Ward* (W. Va.), 21 S. E. Rep. 746, 749, per Brannon, J., citing *Hannan v. Osborn*, 4 Paige, 336, 343 ; *Ruffners v. Lewis*, 7 Leigh, 720, 743, 30 Am. Dec. 513 ; *Graham v. Pierce*, 19 Gratt. 28, 100 Am. Dec. 658 ; *Freem. Coten.* § 279 ; *Farrand v. Gleason*, 56 Vt. 633 ; *Nelson v.*

*Leake*, 25 Miss. 199 ; *Reed v. Jones*, 8 Wis. 434 ; *Kline v. Jacobs*, 68 Pa. St. 57.

<sup>3</sup> *Rico R. & M. Co. v. Musgrave*, 14 Colo. 79, 23 Pac. Rep. 458 ; *Ward v. Ward* (W. Va.), 21 S. E. Rep. 746.

<sup>4</sup> *Neuman v. Dreifurst*, 9 Colo. 228, 11 Pac. Rep. 98 ; *Crest v. Jack*, 3 Watts, 238, 27 Am. Dec. 353 ; *Morgan v. Morgan*, 23 La. Ann. 502.

<sup>5</sup> *Jordan v. Soule*, 79 Me. 590, 12 Atl. Rep. 786 ; *Soule v. Frost*, 76 Me. 119 ; *Aldrich v. Husband*, 131 Mass. 480, 135 Mass. 317 ; *Calvert v. Aldrich*, 99 Mass. 74, 96 Am. Dec. 693 ; *Scott v. Guernsey*, 48 N. Y. 106 ; *Ward v. Ward* (W. Va.), 21 S. E. Rep. 746.

<sup>6</sup> *Ford v. Knapp*, 102 N. Y. 135, 55

the improving tenant, who acts without the agreement or assent of the other owners, gains a lien upon the property for his advances, but stands upon the proposition that one who seeks equity must do equity, and that the tenant out of the actual occupation who asks a court of equity to award him partition is entitled to relief only upon condition that the equitable rights of his cotenants shall be respected."<sup>1</sup>

There is an equitable lien in favor of a cotenant who has expended money in repairs or improvements of the common property in excess of his share; so that, if upon an accounting there is found to be a balance from one to the other due for such expenditures, the tenant in whose favor the balance is due has an equitable lien and right to reimbursement out of the share of the other.<sup>2</sup>

1901. If one cotenant who makes improvements upon the common property at the request of the other has a lien upon the latter's share of the property to secure the repayment of the money so expended, such lien binds the property not only in his hands, but in his hands of the grantee with notice.<sup>3</sup>

1902. A lien for money expended by one cotenant in repairs and improvements arises where a contract to reimburse him can be implied at law. Mr. Pomeroy says:<sup>4</sup> "The right to a contribution or reimbursement from the owner, and the equitable lien on the property benefited as a security therefor, have been extended to other cases, where a party innocently and in good faith, though under a mistake as to the true condition of the title,

Am. Rep. 782, reversing 31 Hun, 522; *Green v. Putnam*, 1 Barb. 500; *Town v. Needham*, 3 Paige, 545, 24 Am. Dec. 246; *In re Heller*, 3 Paige, 199; *St. Felix v. Rankin*, 3 Edw. Ch. 323; *Conklin v. Conklin*, 3 Sandf. Ch. 64; *Carver v. Coffman*, 109 Ind. 547, 10 N. E. Rep. 567.

<sup>1</sup> *Ford v. Knapp*, 102 N. Y. 135, 6 N. E. Rep. 283, 55 Am. Rep. 782, per Finch, J., citing *Swan v. Swan*, 8 Price, 518; *Taylor v. Baldwin*, 10 Barb. 582.

<sup>2</sup> *Lucy, Estate of*, 4 Misc. 349, 351, 24 N. Y. Supp. 352; *Dyckman v. Valiente*, 42 N. Y. 549, 564; *Wright v. Wright*, 59 How. 176, 186; *Prentice v. Janssen*, 7 Hun, 86; *Mumford v. Nicoll*, 20 Johns. 611, 634; *Green v. Putnam*, 1 Barb. 500.

<sup>3</sup> *Torrey v. Martin* (Tex.), 4 S. W. Rep. 642; *Ward v. Ward* (W. Va.), 21 S. W. Rep. 746; *Houston v. McCluney*, 8 W. Va. 135; *Prentice v. Janssen*, 79 N. Y. 478; *Baird v. Jackson*, 98 Ill. 78.

<sup>4</sup> 3 Pom. Eq. Jur. §§ 1240, 1241. See, also, 1 Story, Eq. Jur. 13th ed. §§ 554, 555; *Leake v. Hayes* (Wash.), 43 Pac. Rep. 48; *Carver v. Coffman*, 109 Ind. 547, 10 N. E. Rep. 567; *Annely v. De Saussure*, 17 S. C. 389; *Scaife v. Thomson*, 15 S. C. 337; *Hall v. Piddock*, 21 N. J. Eq. 311; *Carter v. Carter*, 5 Munf. 108; *Worthington v. Hiss*, 70 Md. 172, 16 Atl. Rep. 534, 17 Atl. Rep. 1026; *Green v. Putnam*, 1 Barb. 500.



makes improvements or repairs or other expenditures which permanently increase the value of the property, so that the real owner, when he seeks the aid of equity to establish his right to the property itself, or to enforce some equitable claim upon it, having been substantially benefited, is required, upon principles of justice and equity, to repay the amount expended."

1903. A cotenant who has made permanent improvements has no lien upon the common property or upon the interests of the others for his expenditures, unless they are made with their express or implied consent.<sup>1</sup> The distinction between the case of necessary repairs of the joint property and the case of permanent improvements of the same should be carefully kept in mind; for, while a lien may be implied in case of necessary repairs, a lien for permanent improvements can arise only from the agreement, either express or implied, of the joint owner whose property is to be charged. In the one case the lien rests upon general principles of equity, and in the other it rests upon contract. As between tenants in common, where one has kept the other out of possession, ignorantly believing himself to be the sole owner, and has made permanent improvements, he cannot recover the value of such improvements from his cotenant unless the latter himself resorts to equity.<sup>2</sup>

1904. For necessary repairs a cotenant is not merely entitled to contribution, but has a lien on the interests of the others for money expended in making the repairs.<sup>3</sup> "That neces-

<sup>1</sup> *Taylor v. Baldwin*, 10 Barb. 626; *Carver v. Coffman*, 109 Ind. 547, 10 N. E. Rep. 567. In *Corbett v. Laurens*, 5 Rich. Eq. 301, 315, Chancellor Wardlaw said: "To reimburse the improving tenant in common, to the extent of the cost of the improvements to himself, would enable one of prodigality and capricious taste to deprive his fellows in the tenure of all shares in the common estate by subjecting them to debts for structures and innovations that were valueless and distasteful. It is scarcely less objectionable to allow to an improving tenant in common, by general rule, reimbursement to the extent of the market value imparted by his improvements to the estate; for the commercial value does not constitute the whole value of an estate. Some changes might in-

crease the price an estate would bring at auction which would greatly disparage it in the estimation of some of the joint owners, such as the removal of a monumental ruin for the erection of a shop. One who does not wish to sell his undivided share of an estate can hardly be compelled, consistently with equity, to pay for improvements, so called, that are offensive to his taste, or to his ancestral and patriotic pride, or disproportionate to his means."

<sup>2</sup> *Bazemore v. Davis*, 55 Ga. 504, except by virtue of a statute allowing such improvements to be set off against a claim for mesne profits. *Galusha v. Sinclear*, 3 Vt. 394.

<sup>3</sup> *Lane v. Craddock*, 3 P. Wms. 158; s. c. under name of *Lake v. Gibson*, 1

sary repairs should be made a charge on the estate when one cotenant refuses to join in making them, or, from disability, is incapable of doing so, seems to us to be warranted, not only by sound principles of equity, but to be often demanded by the best interest of the non-consenting tenant."<sup>1</sup> Unless the property could be so charged for such repairs which one tenant is willing to make, the property might remain unfit for use, and worthless or unprofitable to both tenants. One tenant should not be forced to let his property go to ruin, or to sell his interest, because his cotenant is unwilling or unable to make the necessary repairs. Neither should the tenant who is willing to incur the cost of making such repairs be forced to do so at his own expense without security for the repayment of his cotenant's share, but the law should afford him immediate security therefor by means of a lien upon his cotenant's interest.

In some cases much stress is laid upon the limitation that the repairs for which a claim for contribution can be made, to say nothing of a lien, must be such as are absolutely necessary for the continued use and enjoyment of the property;<sup>2</sup> and, moreover, that such repairs are limited to houses and mills already erected and in being, which have fallen into decay, and cannot be extended to arable land or woodland.<sup>3</sup>

1905. If the tenant whose estate has been benefited by repairs made by his cotenant be an infant, no lien against his estate can be enforced during his minority. The most that the court could do would be to decree, upon a proper bill, that the infant and his guardian should be restrained from taking any share of the rents and profits of the common property until the infant should arrive at full age, unless the infant or his guardian should pay or secure to the tenant who had made the repairs such portion of the money advanced as the infant would be bound to contribute on his arrival at full age.<sup>4</sup>

1906. A cotenant who has made improvements is not

Eq. Cas. Abr. 290; *Scott v. Nesbitt*, 14 Ves. 437, 444; *Swan v. Swan*, 8 Price, 518; *Coffin v. Heath*, 6 Met. 76; *Percy v. Millaudon*, 18 Martin, 616, 17 Am. Dec. 196; *Torrey v. Martin* (Tex.), 4 S. W. Rep. 642; *Taylor v. Baldwin*, 10 Barb. 626; *Darling v. Harmon*, 47 Minn. 166, 49 N. W. Rep. 686; *Alexander v. Elli-*

*son*, 79 Ky. 148, per Cofer, C. J.; *Fowler v. Fowler*, 50 Conn. 256.

<sup>1</sup> *Alexander v. Ellison*, 79 Ky. 148.

<sup>2</sup> *Dech's App.* 57 Pa. St. 467.

<sup>3</sup> *Beaty v. Bordwell*, 91 Pa. St. 438; *Gregg v. Patterson*, 9 W. & S. 197; *Crest v. Jack*, 3 Watts, 238.

<sup>4</sup> *Coffin v. Heath*, 6 Met. 76.

chargeable with the rents due to his improvements in case he is allowed no compensation for such improvements. But where he is compensated to the extent of the increased value imparted to the premises by these improvements, he should be charged with so much of the rents as is due to the property in its improved condition.<sup>1</sup> If it appears that the improvements placed on the land by a tenant in common are equal to its rental value while he was in possession, he is entitled to recover such portion of the taxes on the land paid by him while in possession as inured to the other tenants in common.<sup>2</sup>

If the occupying cotenant has made improvements under the mistaken belief that he was the owner of the whole property, he is ordinarily accountable for the fair rental value of it in the condition in which it was when he took possession and before the improvements were made.<sup>3</sup>

1907. Where one tenant in common mortgages the entire property to secure a loan used in improving such property, the mortgagee is entitled to a lien on the interest of the mortgagor, and also on the increase in the value of the interests of the other cotenants caused by such improvements.<sup>4</sup>

#### IV. *For Services performed.*

1908. A cotenant is not entitled to charge for services rendered in the care and management of the common property unless there is a contract, express or implied, for such com-

<sup>1</sup> *Annelly v. De Saussure*, 26 S. C. 497, 2 S. E. Rep. 490, 4 Am. St. Rep. 725. And see *Johnson v. Harrellson*, 18 S. C. 604; *Buck v. Martin*, 21 S. C. 590, 593, 53 Am. Dec. 702; *Ward v. Ward* (W. Va.), 21 S. E. Rep. 746; *Chinn v. Murray*, 4 Gratt. 348; *Worthington v. Hiss*, 70 Md. 172, 16 Atl. Rep. 534, 17 Atl. Rep. 1026; *Leake v. Hayes* (Wash.), 43 Pac. Rep. 48; *Nelson v. Clay*, 7 J. J. Marsh. 138, 23 Am. Dec. 387; *Killmer v. Wuchner*, 79 Iowa, 722, 45 N. W. Rep. 299; *Ford v. Knapp*, 102 N. Y. 135, 6 N. E. Rep. 283.

<sup>2</sup> *Leake v. Hayes* (Wash.), 43 Pac. Rep. 48.

<sup>3</sup> *Southern Cotton Oil Co. v. Henshaw*, 89 Ala. 448, 7 So. Rep. 760; *Hannah v. Carver*, 121 Ind. 278, 23 N. E. Rep. 93;

*Carver v. Fennimore*, 116 Ind. 236, 19 N. E. Rep. 103; *Dungan v. Van Publ*, 8 Iowa, 263; *Pickering v. Pickering*, 63 N. H. 468, 3 Atl. Rep. 744; *Morrison v. Robinson*, 31 Pa. St. 456; *White v. Stuart*, 76 Va. 546; *Early v. Friend*, 16 Gratt. 21, 78 Am. Dec. 649; *Ward v. Ward* (W. Va.), 21 S. E. Rep. 746, 749; *Phillips v. Chamberlain*, 61 Miss. 740; *Tatum v. McLellan*, 56 Miss. 352; *Annelly v. De Saussure*, 26 S. C. 497, 2 S. E. Rep. 490, 4 Am. St. Rep. 725; *Scaife v. Thomson*, 15 S. C. 337.

Rents on the land in its improved condition were allowed in *Evetts v. Tendick*, 44 Tex. 570.

<sup>4</sup> *Salem Nat. Bank v. White* (Ill.), 42 N. E. Rep. 312; *Lagger v. Mut. Union L. Asso.* 146 Ill. 283, 33 N. E. Rep. 946.

pensation.<sup>1</sup> But a contract or mutual understanding may be implied from the circumstances of the case; and, if no specific amount was agreed upon as compensation, the law will imply an obligation to pay a reasonable compensation.<sup>2</sup>

1909. A tenant in common will not be allowed commissions for renting the common land, or compensation for the care of the property, when he has held the property in hostility to his cotenant, and has rented the land in his own name.<sup>3</sup> All he can justly claim in such case is reimbursement of a share of all moneys he has actually expended in the care and preservation of the property. He might be allowed compensation in case it is shown that he honestly supposed he had the entire fee and ownership of the land.<sup>4</sup>

1910. A tenant in common in possession having incurred expense in defending the title to the common lands, the failure or refusal of his cotenant to contribute towards such expense does not amount to an abandonment by him of his title to such lands. He is liable, however, for his share of such expenses on an accounting.<sup>5</sup>

#### V. *For Waste.*

1911. By the common law a cotenant cannot be guilty of committing waste, because partition may be compelled. The same acts which, if committed by a tenant for life or for years, would constitute waste, do not constitute waste when committed by a cotenant.<sup>6</sup>

In many States one tenant in common, or joint tenant, has an action against another for waste, in which he is usually allowed treble or double damages.<sup>7</sup>

<sup>1</sup> *Harry v. Harry*, 127 Ind. 91, 26 N. E. Rep. 562; *Ranstead v. Ranstead*, 74 Md. 378, 22 Atl. Rep. 405; *Hamilton v. Co-nine*, 28 Md. 635, 92 Am. Dec. 724; *Reybold v. Dodd*, 1 Harr. (Del.) 401, 26 Am. Dec. 401; *Franklin v. Robinson*, 1 Johns. Ch. 157, 164; *Bradford v. Kimberly*, 3 Johns. Ch. 431; *Powell v. Jones*, 72 Ala. 392; *Russell v. Russell*, 62 Ala. 48; *Raun v. Reynolds*, 18 Cal. 289; *Sears v. Munson*, 23 Iowa, 380; *Levi v. Karrick*, 13 Iowa, 344; *Redfield v. Gleason*, 61 Vt. 220, 15 Am. St. Rep. 889; *Fuller v. Fuller*, 23 Fla. 236, 2 So. Rep. 426.

<sup>2</sup> *Ranstead v. Ranstead*, 74 Md. 378, 22 Atl. Rep. 405.

<sup>3</sup> *Hattersley v. Bissett* (N. J. Eq.), 30 Atl. Rep. 86.

<sup>4</sup> *Sailer v. Sailer*, 41 N. J. Eq. 398, 401, 5 Atl. Rep. 319.

<sup>5</sup> *Gosselin v. Smith*, 154 Ill. 74, 39 N. E. Rep. 980.

<sup>6</sup> *Elwell v. Burnside*, 44 Barb. 447; *McCord v. Oakland Q. M. Co.* 64 Cal. 134, 27 Pac. Rep. 863; *Hensal v. Wright*, 10 Pa. Co. Ct. 416.

<sup>7</sup> *California*: Code of Civ. Pro. § 732. *Delaware*: R. Code 1893, ch. 88, § 4.

1912. Wilful waste by one cotenant, in the nature of the destruction of the common property, will be restrained by injunction.<sup>1</sup> But as each cotenant has a right to use and enjoy the common property, he will not ordinarily be restrained from committing waste which is not malicious or destructive of such property. Thus one tenant may cut down timber which is fit for cutting,<sup>2</sup> or wood fit for cutting,<sup>3</sup> or crops in their season.<sup>4</sup> The only remedy in such case is by an account.<sup>5</sup> Where, however, one cotenant was cutting and selling timber from the common land, he was restrained, at the instance of the others, on its appearing that he was insolvent, and would not be able to account for the proceeds.<sup>6</sup>

1913. In some States the cutting and removing of timber from unoccupied lands is regarded as waste.<sup>7</sup> When the timber upon the common land constitutes its entire value, or the greater part of its value, one cotenant who cuts and removes it is liable to the others for the value of their interests in it, in an action of trover. The fact that the timber was liable to destruction by fire affords no sufficient reason in law why one part owner

**Florida:** R. S. 1892, § 1827. **Georgia:** Code 1882, § 2302. **Idaho:** R. S. 1887, § 4530. **Iowa:** R. S. 1888, § 4568. **Kentucky:** G. S. 1894, § 2332. **Maine:** R. S. 1883, ch. 95, § 5. **Massachusetts:** P. S. 1882, ch. 179, §§ 6, 7. **Michigan:** 2 Howell's Annot. Stats. 1882, § 7942. **Minnesota:** G. S. 1894, § 5882. **Missouri:** R. S. 1889, § 6405. **Montana:** 2 Codes 1895, § 1301. **Nebraska:** Comp. Stats. 1893, p. 943, § 633. **New Hampshire:** P. S. 1891, ch. 216, § 3. **New Jersey:** R. S. 1877, p. 1236, § 5. **New York:** Bliss's Annot. Code 1895, p. 2181. **North Carolina:** 1 Code 1883, § 627. **North Dakota:** R. Code 1895, § 5921. **Ohio:** 1 R. S. 1890, § 5774. **Oregon:** Hill's Annot. Stats. 1892, § 337. **Rhode Island:** G. L. 1896, ch. 268, § 2. **South Dakota:** R. Code 1895, § 5921. **Utah:** 2 Comp. Laws 1888, p. 322, § 3464. **Virginia:** Code 1877, p. 666, § 2776. **Washington:** 2 G. S. 1891, § 660. **West Virginia:** Code 1891, ch. 92, § 2. **Wisconsin:** Annot. Stats. 1889, § 3173.

<sup>1</sup> Job v. Potton, L. R. 20 Eq. 84; Bai-

ley v. Hobson, L. R. 5 Ch. 180; Arthur v. Lamb, 2 Drew. & Sm. 428; Dougall v. Foster, 4 Grant U. C. 319; Stout v. Curry, 110 Ind. 514, 11 N. E. Rep. 487; Kennedy v. Scovil, 12 Conn. 316, 327.

<sup>2</sup> Goodman v. Kine, 8 Beav. 379; Goodwyn v. Spray, 2 Dick. 667; Martyn v. Knollys, 8 T. R. 145; Patureau v. Wilbert, 44 La. Ann. 355, 10 So. Rep. 782; Hihn v. Peck, 18 Cal. 640; McCord v. Oakland Q. M. Co. 64 Cal. 134, 27 Pac. Rep. 863.

<sup>3</sup> Hastings v. Hastings, 110 Mass. 280.

<sup>4</sup> Jacobs v. Seward, L. R. 4 C. P. 328, 5 H. L. 464; Bailey v. Hobson, L. R. 5 Ch. 180.

<sup>5</sup> Foster on Joint Ownership, 18.

<sup>6</sup> Smallman v. Onions, 3 Bro. C. C. 621.

<sup>7</sup> Clow v. Plummer, 85 Mich. 550, 48 N. W. Rep. 795; Benedict v. Torrent, 83 Mich. 181, 47 N. W. Rep. 129. **Pennsylvania:** Act of May 4, 1869; Bush v. Gamble, 127 Pa. St. 43, 17 Atl. Rep. 865.

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should cut and remove it without the consent of the other part owners.<sup>1</sup>

A tenant in common who has ousted his cotenant is liable to him for waste in cutting timber.<sup>2</sup>

1914. One cotenant may work a mine in the usual way, and extract ore therefrom without being chargeable with waste, or liable to the other cotenants in any way, if he does not exclude them.<sup>3</sup> The cotenants out of possession have the right at any time to enter into an equal enjoyment of possession, and their neglect to do so may be regarded as an assent to the sole occupation of the other.

If a cotenant working a mine can be required to account for a share of the profits, this cannot be done by any proceeding at law unless specially provided by statute, but only in an equitable proceeding for an accounting, in which allowance will be made for all proper expenditures in working the mine and protecting the common property. An action for damages on the ground of waste is not a proper action for an accounting.<sup>4</sup>

Under a statute which subjects tenants in common in possession of mineral lands to accountability to their cotenants for minerals taken out, the compensation is to be measured by the fair market value of the minerals in place. "Where the mineral land has never been developed, and no mines or quarries have been opened, the fair market value of the mineral in place, which would be the value of the privilege of removing it, in view of all its special circumstances, would represent the true measure of compensation to the owner. So, too, if the land were fully developed and mines or quarries opened, and all the expenses incurred which enable the operator to proceed at once to the taking of the mineral, the value of the mineral in place, ready to be taken, would be enhanced by these considerations, and the price of the privilege of taking it in such circumstances would also represent the measure of compensation."<sup>5</sup>

1915. Under a statute providing for a forfeiture of three times the amount of damages for waste committed by a joint

<sup>1</sup> *Clow v. Plummer*, 85 Mich. 550, 48 N. W. Rep. 795.

<sup>2</sup> *Dodge v. Davis*, 85 Iowa, 77, 52 N. W. Rep. 2.

<sup>3</sup> *McCord v. Oakland Q. M. Co.* 64 Cal. 134, 27 Pac. Rep. 863.

<sup>4</sup> *McCord v. Oakland Q. M. Co.* 64 Cal. 134, 27 Pac. Rep. 863.

<sup>5</sup> *Fulmer's Appeal*, 128 Pa. St. 24, 39, 18 Atl. Rep. 493, per Green, J.

tenant, coparcener, or tenant in common, the forfeiture will not be enforced in case the waste was committed by a cotenant in good faith, under the honest belief that he had a good title to the whole property. "If a man in good faith buys land supposing that he gets a title in fee to the whole, and cuts wood from it, it is not to be presumed that the statute intended that he should be subject to the severe penalty of threefold the amount of damage done, if he afterwards discovers that he has a title only to an undivided portion instead of to the whole of the land. The object of the statute is to enforce a penalty against tenants in common, or joint tenants, who knowingly encroach upon the rights of their cotenants."<sup>1</sup>

1916. Cotenants who commit waste are liable to each other jointly or severally, for the damages, but the amount of a recovery against a stranger or a grantee of a cotenant must be apportioned to correspond with his undivided interest in the land.<sup>2</sup>

<sup>1</sup> *Jenkins v. Wood*, 145 Mass. 494, 496,  
14 N. E. Rep. 512, per Morton, C. J.

<sup>2</sup> *McDodrill v. Pardee, &c. Lumber Co.*  
(W. Va.) 21 S. E. Rep. 878.

## CHAPTER XLIV.

### REMEDIES BETWEEN COTENANTS.

1917. In some States an action in *assumpsit* may be maintained by one cotenant against another who receives in money more than his share of the rents and profits of the common estate. Such an action is based upon the statute of Anne,<sup>1</sup> which is a part of the common law. Under that statute it was at first held that an action of account was necessary. "But in order to maintain such action it was necessary that one tenant should show, not mere occupation of the premises by another tenant in common, but an actual receipt by him of the rents and profits over and above his share thereof, and which actually belonged to his cotenant. To avoid the somewhat tedious proceedings pertaining to the old action of account, an action on the case upon a promise to account was at first substituted;<sup>2</sup> and afterwards Lord Holt, in construing the statute, came to the conclusion that, whenever account could be maintained, *indebitatus assumpsit* might be also, holding that, the statute being a remedial one, it ought to receive a liberal construction.<sup>3</sup> While the right of action was founded on the statute of Anne, and not by any right under the old common law, from the liberal construction placed upon it by a long series of decisions, it became as firmly settled that the action of general *indebitatus assumpsit* for money had and received would lie, in place of the old action of account, by one tenant in common against his cotenant as bailiff, for receiving more than his share of the rents and profits."<sup>4</sup>

<sup>1</sup> 4 & 5 Anne, ch. 16.

<sup>2</sup> *Brigham v. Eveleth*, 9 Mass. 538, 541.

<sup>3</sup> *Jones v. Harraden*, 9 Mass. 540.

<sup>4</sup> *Maine*: R. S. 1883, ch. 95, § 20; *Hudson v. Coe*, 79 Me. 83, 90, 8 Atl. Rep. 249, per Foster, J.; *Dyer v. Wilbur*, 48 Me. 287; *Buck v. Spofford*, 40 Me. 328.

*Massachusetts*: *Shepard v. Richards*, 2 Gray, 424, 61 Am. Dec. 473; *Dickinson v. Williams*, 11 Cush. 258, 59 Am. Dec. 142; *Monroe v. Luke*, 1 Met. 459; *Miller v. Miller*, 7 Pick. 133, 19 Am. Dec. 264, 9 Pick. 34. "This right of action was founded on the statute of Anne, but was extended to an action for



One tenant in common may maintain an action at law against his cotenant for money expended in removing an incumbrance upon the common property which they had jointly covenanted to remove, although the tenancy in common still continues.<sup>1</sup> "Even in the case of copartners, assumpsit has been held to lie if there are no outstanding demands against the partners, or outstanding debts to be collected, so that the judgment to be rendered will be a final settlement between the parties."<sup>2</sup>

1918. The remedy by action to compel an accounting in equity is the remedy between cotenants authorized in terms by the statute of Anne, and an action at law for money had and received cannot be maintained in some courts.<sup>3</sup>

The liability of one cotenant to account to another may arise either from receiving from a third party more than his share of the rents and profits, or from his appropriating to his own use more than his proportion of the common estate; or from his not having contributed his share of the expenses incurred by his cotenant in the care, improvement, or preservation of the common property.<sup>4</sup>

1919. One tenant in common may maintain ejectment against a cotenant if there has been an ouster.<sup>5</sup> The ouster

money had and received, because the action of account, by reason of its prolixity, had become disused in this Commonwealth." *Badger v. Holmes*, 6 Gray, 118, 119, per Bigelow, J. **Michigan**: *Fiquet v. Allison*, 12 Mich. 328, 86 Am. Dec. 54. **New York**: *Coles v. Coles*, 15 Johns. 159, 8 Am. Dec. 231. See *Sherman v. Balloru*, 8 Cow. 304. **Pennsylvania**: *Borrell v. Borrell*, 33 Pa. St. 492; *Gillis v. McKinney*, 6 Watts & S. 78. **New Hampshire**: *Mooers v. Bunker*, 29 N. H. 420.-

<sup>1</sup> *Dickinson v. Williams*, 11 Cush. 258, 59 Am. Dec. 142.

<sup>2</sup> *Dickinson v. Williams*, 11 Cush. 258, 59 Am. Dec. 142, per Dewey, J., citing *Rockwell v. Wilder*, 4 Met. 556; *Brinley v. Kupfer*, 6 Pick. 179; *Williams v. Henderson*, 11 Pick. 79.

<sup>3</sup> *Thomas v. Thomas*, 5 Exch. 28; *Angelo v. Angelo*, 146 Ill. 629, 35 N. E. Rep. 229; *Crow v. Mark*, 52 Ill. 332; *Hamilton v. Conine*, 28 Md. 635, 92 Am.

Dec. 724; *Webster v. Calef*, 47 N. H. 289; *Terrell v. Murray*, 2 Yerg. 384.

<sup>4</sup> *Angelo v. Angelo*, 146 Ill. 629, 35 N. E. Rep. 229; *Van Brunt v. Gordon*, 53 Minn. 227, 54 N. W. Rep. 1118.

<sup>5</sup> *Co. Litt.* 199 b; *Stedman v. Smith*, 8 El. & Bl. 1; *Jacobs v. Seward*, L. R. 5 H. L. 464; *Barnitz v. Casey*, 7 Cranch, 456. **Alabama**: *Southern Cotton Oil Co. v. Henshaw*, 89 Ala. 448, 7 So. Rep. 760. **California**: *Ewald v. Corbett*, 32 Cal. 493; *Carpentier v. Mendenhall*, 28 Cal. 484. **Colorado**: *Annot. Stats.* 1891, § 2527. Applies also to destruction or injury of the common property. **Connecticut**: *Cross v. Robinson*, 21 Conn. 379; *Norris v. Sullivan*, 47 Conn. 474. **Florida**: *Gale v. Hines*, 17 Fla. 773; *Kearnes v. Hill*, 21 Fla. 185; *Coogler v. Rogers*, 25 Fla. 853, 7 So. Rep. 391. **Illinois**: *Noble v. McFarland*, 51 Ill. 226. **Indiana**: *Bethell v. McCool*, 46 Ind. 303. **Maine**: *Cutts v. King*, 5 Me. 482. **Massachusetts**: *Higbee*

must be proved, unless the defendant in his answer claims the whole property in his own right. In such action, if it appears that the defendant has an estate in common with the plaintiff, the plaintiff cannot recover possession of the entire estate, to the exclusion of the defendant, but only of his undivided interest. He is let into joint possession with the defendant.<sup>1</sup>

One tenant in common who has been ousted by his cotenant may maintain trespass against him.<sup>2</sup> In trespass to try title brought by one tenant in common, an actual ouster must be shown, as in an action of ejectment. He may, however, recover the entire property as against one who shows no title, although he has alleged an undivided interest in the whole.<sup>3</sup>

1920. In ejectment by one tenant in common against the other an accounting may be had, and one who has paid out money for taxes, or on account of mortgages and interest thereon, should be reimbursed for the share of his cotenant.<sup>4</sup>

1921. One tenant in common cannot deny the validity of the common source of title while he himself claims, or remains in, possession under it; nor will he be permitted, while remaining in possession, to defend himself by proving a paramount title in some third person.<sup>5</sup> Where the title or interest of tenants in com-

*v. Rice*, 5 Mass. 344, 4 Am. Dec. 63. **Michigan**: *Gower v. Quinlan*, 40 Mich. 572. **Missouri**: *Childs v. Kansas City, &c. R. Co.* 117 Mo. 414; *Jordan v. Surghnor*, 107 Mo. 520, 17 S. W. Rep. 1009; *Harrison v. Taylor*, 33 Mo. 211, 82 Am. Dec. 159; *Wommack v. Whitmore*, 58 Mo. 448; *Lambert v. Blumenthal*, 26 Mo. 471; *Peterson v. Laik*, 24 Mo. 541, 69 Am. Dec. 441. **New York**: *Clark v. Crego*, 47 Barb. 599; *Clason v. Rankin*, 1 Duer, 337; *Sharp v. Ingraham*, 4 Hill, 116; *Siglar v. Van Riper*, 10 Wend. 414; *Edwards v. Bishop*, 4 N. Y. 61. **North Carolina**: *Jones v. Cohen*, 82 N. C. 75; *Day v. Howard*, 73 N. C. 1. **South Carolina**: *Jones v. Weathersbee*, 4 Strob. 50, 51 Am. Dec. 653; *Young v. De Bruhl*, 11 Rich. 638, 73 Am. Dec. 127. **Tennessee**: *Story v. Saunders*, 8 Humph. 663, 668. **Texas**: *St. Louis, A. & T. R. Co. v. Prather*, 75 Tex. 53, 12 S. W. Rep. 969. **Vermont**: *University of Vermont v. Reynolds*, 3 Vt. 542, 23 Am. Dec. 234. **Virginia**: *Taylor*

*v. Hill*, 10 Leigh, 457. **Washington**: *Mabie v. Whittaker*, 10 Wash. 656, 39 Pac. Rep. 172. **Wisconsin**: *McCourt v. Eckstein*, 22 Wis. 153.

<sup>1</sup> *Ewald v. Corbett*, 32 Cal. 493.

<sup>2</sup> *Thompson v. Gerrish*, 57 N. H. 85; *Odiorne v. Lyford*, 9 N. H. 502, 511, 32 Am. Dec. 387; *Booth v. Adams*, 11 Vt. 156, 34 Am. Dec. 680.

<sup>3</sup> *Allen v. Peters*, 77 Tex. 59, 13 S. W. Rep. 767.

<sup>4</sup> *Goodtitle v. Tombs*, 3 Wils. 118; *Stewart v. Stewart*, 90 Wis. 516, 63 N. W. Rep. 886.

<sup>5</sup> *Olney v. Sawyer*, 54 Cal. 379; *Lawrence v. Webster*, 44 Cal. 385; *Bornheimer v. Baldwin*, 42 Cal. 34; *Millis v. Roof*, 121 Ind. 360, 23 N. E. Rep. 255. *Funk v. Newcomer*, 10 Md. 301; *Brown v. Homan*, 1 Neb. 448; *Knolls v. Barnhart*, 71 N. Y. 474; *Phelan v. Kelly*, 25 Wend. 389, 391; *Jackson v. Streeter*, 5 Cow. 529; *Keller v. Auble*, 58 Pa. St. 410, 98 Am. Dec. 297; *Weaver v. Wible*, 25 Pa. St. 270, 64 Am.

mon accrues under the same instrument, or act of the parties or of the law, neither can deny the validity of the instrument or act. It is only where one asserts an interest acquired from a source disconnected from that of his cotenants that he can dispute the validity of the interest held by them.

1922. An action of trespass quare clausum may be maintained by one cotenant against another for an actual expulsion.<sup>1</sup> "There is no reason why a tenant in common, rather than any other person put or kept out of possession of his estate, should be denied the election of suing in trespass, and limited to a writ of entry, in which he could recover no damage for the injury to him by the expulsion or ouster."<sup>2</sup>

The erection of a building upon a portion of land held in common, by one of the tenants in common, is such an exclusive appropriation thereof to his own use as to amount to an ouster of his cotenant, and will entitle the latter to maintain an action for the trespass, or to remove the building.<sup>3</sup> But an exclusive occupation of a part of the land for a temporary purpose, such as piling boards and lumber, not being an ouster, does not make the tenant liable to any action.<sup>4</sup>

1923. An action of trespass quare clausum may be sustained by one cotenant against another who destroys the common property, or so conducts with reference to it as to effect a practical destruction of the interest of his cotenant therein, such as removing machinery from a mill owned in common,<sup>5</sup> or diverting from such mill the natural flow of the mill-stream and appropriating the stream to the sole use of another mill;<sup>6</sup> or demolishing a mill and appropriating the materials to the sole use of

Dec. 696; *Frentz v. Klotsch*, 28 Wis. 312; *Buchanan v. King*, 22 Gratt. 414.

<sup>1</sup> *Murray v. Hall*, 7 C. B. 441, overruling dictum of *Littledale, J.*, in *Cubitt v. Porter*, 8 B. & C. 257; *Stedman v. Smith*, 8 El. & Bl. 6; *Wilkinson v. Haygarth*, 12 Q. B. 837; *Silloway v. Brown*, 12 Allen, 30, 37; *Bennett v. Clemence*, 6 Allen, 10, 18; *Badger v. Holmes*, 6 Gray, 118; *Munroe v. Luke*, 1 Met. 459; *Odiorne v. Lyford*, 9 N. H. 502, 32 Am. Dec. 387; *Erwin v. Olmsted*, 7 Cow. 229; *Dubois v. Beaver*, 25 N. Y. 123, 82 Am. Dec. 326; *McGill v. Ash*, 7 Pa. St. 397; *Filbert v.*

*Hoff*, 42 Pa. St. 97, 82 Am. Dec. 493; *Booth v. Adams*, 11 Vt. 156, 34 Am. Dec. 680; *Wilkins v. Burton*, 5 Vt. 76.

*Contra*, *Wait v. Richardson*, 33 Vt. 190, 194, 78 Am. Dec. 622.

<sup>2</sup> *Silloway v. Brown*, 12 Allen, 30, 38, per *Gray, J.*

<sup>3</sup> *Bennett v. Clemence*, 6 Allen, 10.

<sup>4</sup> *Keay v. Goodwin*, 16 Mass. 1.

<sup>5</sup> *Symonds v. Harris*, 51 Me. 14, 81 Am. Dec. 553.

<sup>6</sup> *Blanchard v. Baker*, 8 Me. 253, 23 Am. Dec. 504.

such cotenant;<sup>1</sup> or wasting the water of an aqueduct which was the common property.<sup>2</sup>

1924. Cotenants may deal with each other without restriction in matters not connected with the subject-matter of their cotenancy, and in such matters they are not restricted in their remedies. Tenants in common who risk the common property for the benefit of a cotenant may maintain a joint action against him on his promise to reimburse them for its loss; as where tenants in common mortgage their common property to secure the debt of one, on his promise to reimburse them for any loss on account thereof, and the property is sold to pay the debt, they may maintain a joint action against him.<sup>3</sup>

One cotenant, receiving the income of lands owned in common for distribution among the others, is not a trustee of the moneys received by him, but a mere debtor to whom the ordinary rules of limitation apply. He is liable not only to an action at law for the amount due the others, but to an accounting in equity, and the right of action in equity will be considered barred in analogy to the limitation of a similar action at law.<sup>4</sup>

<sup>1</sup> *Maddox v. Goddard*, 15 Me. 218, 33 Am. Dec. 604.

<sup>2</sup> *McLellan v. Jenness*, 43 Vt. 183, 5 Am. Rep. 270.

<sup>3</sup> *McGill v. McGill* (Pa.), 33 Atl. Rep. 146.

<sup>4</sup> *St. John v. Coates*, 18 N. Y. Supp. 419.

## CHAPTER XLV.

### REMEDIES AGAINST STRANGERS.

I. In personal actions, 1925-1934.

| II. In real actions, 1935-1938.

#### I. *In Personal Actions.*

1925. Tenants in common should join in personal actions against strangers, and in actions which are founded upon their possession.<sup>1</sup> Their possession is one though their estates are several. They should join in actions of trespass or trover for injuries to the common property. The injury is single, and not divisible into separate actions. Tenants in common must "join in actions of trespass relating to the possession, because in actions of this nature, though the estates are several, yet the damages survive to all, and it is deemed that it would be unreasonable, when the damage is thus entire, to bring several actions for a single trespass. Thus it is laid down that tenants in common shall join in actions personal, as trespass in breaking into their houses, breaking their inclosures or fences, feeding, wasting, or defouling their grass, cutting down their timber, etc., and shall recover jointly their damages; because in those actions, though their estates are several, yet the damages survive to all, and it

<sup>1</sup> *Pruitt v. Ellington*, 59 Ala. 454; *Gilmore v. Wilbur*, 12 Pick. 120, 124, 22 Am. Dec. 410; *Bullock v. Hayward*, 10 Allen, 460; *Daniels v. Daniels*, 7 Mass. 135; *White v. Brooks*, 43 N. H. 402; *Murray v. Webster*, 5 N. H. 391; *Campbell v. Wallace*, 12 N. H. 362, 370, 37 Am. Dec. 219; *Lane v. Dobyns*, 11 Mo. 106; *Lothrop v. Arnold*, 25 Me. 136, 43 Am. Dec. 256; *Kimball v. Sumner*, 62 Me. 305, 310; *De Puy v. Strong*, 37 N. Y. 372, 3 Keyes, 603; *Hill v. Gibbs*, 5 Hill, 56, 58; *Austin v. Hall*, 13 Johns. 286, 7 Am. Dec. 376; *Decker v. Livingston*, 15 Johns. 479; *Low v. Mumford*, 14 Johns.

426; *Irwin v. Brown*, 35 Pa. St. 331; *McGill v. McGill* (Pa.), 33 Atl. Rep. 146; *Gulf C. & S. F. Ry. Co. v. Cusenberry*, 86 Tex. 525, 26 S. W. Rep. 43; *Gillum v. St. Louis, A. & T. Ry. Co.* 5 Tex. Civ. App. 338, 23 S. W. Rep. 716; *Houston, &c. R. Co. v. Knapp*, 51 Tex. 592; *Lee v. Turner*, 71 Tex. 264, 9 S. W. Rep. 149; *Rowland v. Murphy*, 66 Tex. 534, 1 S. W. Rep. 658; *International, &c. Ry. Co. v. Ragsdale*, 67 Tex. 24, 28, 2 S. W. Rep. 515; *Hill v. Newman*, 67 Tex. 265, 3 S. W. Rep. 271; *Johnson v. Sepulbeda*, 5 Cal. 149.

would be unreasonable to bring several actions for one single trespass." <sup>1</sup>

Under statutes giving damages for flowing land, a complaint for flowing land owned by tenants in common must be maintained by all of them; one of them cannot bring the process alone.<sup>2</sup>

All the owners in common must join in an action of tort in the nature of waste. Though the injury is to their real estate, the damages belong to them jointly.<sup>3</sup>

So an action for the abatement of a nuisance should be maintained by all the tenants in common jointly.<sup>4</sup> So, also, they must join in an action on the case for a destruction of their title deeds.<sup>5</sup>

1926. Though the estates of the cotenants are several, the damages are one, so to speak, and belong to them jointly. One may release a claim for damages arising from trespass upon the common property for which a joint action is brought.<sup>6</sup>

1927. When the tort is waived and an action of assumpsit is brought for the injury, the tenants must join in the action.<sup>7</sup> The wrongdoer's legal liability being to all the tenants in common jointly, their action must be a joint one, whether sounding in tort or in contract.<sup>8</sup>

1928. But if one cotenant brings suit without joining the others, and the defendant does not take advantage of the defect by plea in abatement, the plaintiff may recover damages proportionate to his interest in the property.<sup>9</sup> In such case a

<sup>1</sup> *May v. Slade*, 24 Tex. 205, 208, per Wheeler, C. J.

<sup>2</sup> *Tucker v. Campbell*, 36 Me. 346.

<sup>3</sup> *Bullock v. Hayward*, 10 Allen, 460.

<sup>4</sup> *Parke v. Kilham*, 8 Cal. 77, 68 Am. Dec. 310.

<sup>5</sup> *Daniels v. Daniels*, 7 Mass. 135.

<sup>6</sup> *Hodges v. Heal*, 80 Me. 281, 14 Atl. Rep. 11; *Kimball v. Sumner*, 62 Me. 305, 310; *Bradley v. Boynton*, 22 Me. 287; *Austin v. Hall*, 13 Johns. 286, 7 Am. Dec. 376; *Stapleton v. King*, 33 Iowa, 28, 35. This rule does not pertain to Texas: *Gillum v. St. Louis, A. & T. Ry. Co.* 5 Tex. Civ. App. 338, 23 S. W. Rep. 716.

<sup>7</sup> *Gilmore v. Wilbur*, 12 Pick. 120, 22 Am. Dec. 410; *Putnam v. Wise*, 1 Hill, 234, 37 Am. Dec. 309.

<sup>8</sup> *Irwin v. Brown*, 35 Pa. St. 331. In Alabama, however, the action may either

be joint or several. *Tankersley v. Childers*, 23 Ala. 781, 783; *Smyth v. Tankersley*, 20 Ala. 212, 56 Am. Dec. 193; *Smith v. Wiley*, 22 Ala. 396, 405, 58 Am. Dec. 262.

<sup>9</sup> *Addison v. Overend*, 6 T. R. 766; *Lowery v. Rowland* (Ala.), 16 So. Rep. 88; *Lothrop v. Arnold*, 25 Me. 136, 43 Am. Dec. 256; *Gulf C. & S. F. Ry. Co. v. Cusenberry*, 86 Tex. 525, 26 S. W. Rep. 43; *Lee v. Turner*, 71 Tex. 264; *Rowland v. Murphy*, 66 Tex. 534, 1 S. W. Rep. 658; *Parks v. Dial*, 56 Tex. 261; *May v. Slade*, 24 Tex. 205; *Gillum v. St. Louis, A. & T. Ry. Co.* 5 Tex. Civ. App. 338, 23 S. W. Rep. 716; *Harker v. Dement*, 9 Gill, 7, 52 Am. Dec. 670; *Winters v. McGhee*, 3 Sneed, 128; *Dubois v. Glaub*, 52 Pa. St. 238; *Agnew v. Johnson*, 17 Pa. St. 373, 55 Am. Dec. 565;

judgment in favor of one tenant for a trespass upon the common land does not prevent his cotenant from recovering from the trespasser the damages he has sustained by the trespass. One cotenant as the representative of another cannot recover the entire damages done to the common estate.<sup>1</sup>

1929. But in case there is no injury to the joint possession, and the tenants in common are not jointly interested in the damages, the remedy may be by several action.<sup>2</sup> The tenant injured in his possession may maintain the suit alone, and recover for the injury to him alone.

It seems, too, that one tenant in common may maintain alone a suit for an injury to the common property in case his cotenants refuse to join in the prosecution of the suit; and that in such case the one bringing and prosecuting the suit would be allowed to retain all the benefits of the recovery.<sup>3</sup>

One tenant in common may maintain an action against a stranger for an injury to his individual property. Thus, one tenant in common of a pasture may maintain an action against the owner of a domestic animal which breaks into the field and injures the live-stock of such tenant rightfully grazing there, and the other tenants are not necessary parties to such action.<sup>4</sup>

1930. Tenants in common must join in an action for rent under a joint lease executed by them, unless the lease provides for a separate rendering of rent to each, or contains a covenant for the payment of rent to each separately. But where they have not bound themselves by a joint demise, but are claiming rents under a lease made by their ancestor or devisor, their rights accord with their interests, and one of them can sue for his proportion of the rent separately, and the tenant is compelled to pay to each his proportionate share.<sup>5</sup> "Where there is no express

McGill v. McGill (Pa.), 33 Atl. Rep. 146; v. Quimby, 29 Me. 196, 48 Am. Dec. 525.  
Webber v. Merrill, 34 N. H. 202; White v. Brooks, 43 N. H. 402.

<sup>1</sup> Gillum v. St. Louis, A. & T. Ry. Co. 5 Tex. Civ. App. 338, 23 S. W. Rep. 716; May v. Slade, 24 Tex. 205; Rowland v. Murphy, 66 Tex. 534, 1 S. W. Rep. 658; Lee v. Turner, 71 Tex. 264, 9 S. W. Rep. 149.

<sup>2</sup> Milner v. Milner, 101 Ala. 599, 14 So. Rep. 373; Lothrop v. Arnold, 25 Me. 136, 43 Am. Dec. 256; Longfellow

<sup>3</sup> Paine v. Slocum, 56 Vt. 504, 511.  
<sup>4</sup> Morgan v. Hudnell (Ohio), 40 N. E. Rep. 716.

<sup>5</sup> Cobb v. Kidd, 19 Blatchf. 560; Bowser v. Cox, 3 Ind. App. 309, 29 N. E. Rep. 616; Crosby v. Loop, 13 Ill. 625; Doe v. Botts, 4 Bibb, 420; Cole v. Patterson, 25 Wend. 456; Jones v. Felch, 3 Bosw. 63; Porter v. Bleiler, 17 Barb. 149; Decker v. Livingston, 15 Johns. 479.

## §§ 1931, 1932.] REMEDIES AGAINST STRANGERS.

contract with all and their legal interest is several, the covenantees must sue separately; yet, where the contract is entered into with the covenantees jointly and the estate taken by them is several, they may at their option sue jointly or severally, — jointly in respect of the joint contract, severally in respect of the interest.”<sup>1</sup> This is illustrated in a recent English case where the question was whether, where an owner of land is entitled to the benefit of a covenant running with the land, and devises his land to six cotenants, the case can be treated as if there were a separate covenant with each of the cotenants, so that each of them can sue separately to enforce the covenant made with the testator. The court say they are not seised *per my et per tout*, but each has one undivided sixth part, and the covenant becomes equivalent to six separate covenants, on which separate actions can be brought.<sup>2</sup> If there be a joint lease by two tenants in common reserving an entire rent, they may join in an action to recover the same; but if there be a separate reservation to each, then there must be separate actions.<sup>3</sup>

1931. Even when it is stipulated that half of the rent shall be paid to each of two owners in common, if the covenants are with them jointly, they may maintain a joint action for rent. The stipulation did not abrogate the covenants, and it is not to be supposed that it was intended that the lessors should each pursue a separate remedy for the breach of a covenant for the payment of rent.<sup>4</sup>

But if a tenant in common leases his undivided share of the common property, he may maintain an action to recover the rent without joining his cotenant, who has no interest in the rent.<sup>5</sup>

Under a lease executed by tenants in common jointly, either has the right, as against the lessee, to receive the entire rent and to give a receipt for it.<sup>6</sup>

1932. For use and occupation where there was no express contract therefor, tenants in common may join;<sup>7</sup> for although

<sup>1</sup> Platt on Covenants, p. 130.

<sup>2</sup> Roberts v. Holland [1893], 1 Q. B. 665, 667, per Wills, J.

<sup>3</sup> Powis v. Smith, 5 B. & Ald. 850, per Abbott, C. J.

<sup>4</sup> Wall v. Hinds, 4 Gray, 256, 64 Am. Dec. 64.

<sup>5</sup> Hayden v. Patterson, 51 Pa. St. 261.

<sup>6</sup> Miner v. Lorman, 70 Mich. 173, 38 N. W. Rep. 18; Kimball v. Sumner, 62 Me. 305; Hodges v. Heal, 80 Me. 281, 14 Atl. Rep. 11.

<sup>7</sup> Cobb v. Kidd, 19 Blatchf. 560.



there is no joint demise, there is an implication of a promise on the part of the tenant to pay the rent to the owners.

1933. One tenant of lands who has sold wood, grass, gravel, or other thing of value from it may maintain an action for the purchase-money; and his cotenant cannot afterwards recover the price of the thing, or of any share of it, from the purchaser. He is protected in the payment made to the other cotenant.<sup>1</sup>

1934. One tenant in common, without joining his cotenants, may maintain proceedings to remove an incumbrance and cloud upon the common property, such, for instance, as a proceeding to quash a special assessment for street improvements. Such tenant has an independent right and interest in the property, and is entitled as owner to protect it.<sup>2</sup>

Tenants in common are not obliged to join in an action against their grantor for a breach of the covenants of warranty, for the reason that they have several freeholds.<sup>3</sup>

## II. *In Real Actions.*

1935. In real actions at common law, tenants in common cannot join. Their estates are several, and they must sever in their actions for the recovery of such estates from strangers.<sup>4</sup> There are statutory provisions in several States authorizing them to sue either jointly or severally. Under the modern codes of procedure, which generally provide that "all persons having an interest in the subject of the action, and in obtaining the relief demanded, may be joined as plaintiffs," tenants in common may

<sup>1</sup> *Watson v. Union Gravel Co.* 50 Mo. App. 635; *Lyman v. Boston & M. R. Co.* 58 N. H. 384. Sale of only his undivided part. *Brown v. Wellington*, 106 Mass. 318. The decision was made on the ground that the cotenant who sold the grass was in the sole occupation of the land, and had the right to take the annual products of the soil.

<sup>2</sup> *Bates v. District of Columbia*, 18 D. C. 76.

<sup>3</sup> *Lamb v. Danforth*, 59 Me. 322, 8 Am. Rep. 426; *Swett v. Patrick*, 11 Me. 179; *Blondeau v. Sheridan*, 81 Mo. 545; *Paul v. Witman*, 3 Watts & S. 407. See,

however, *Roberts v. Holland*, [1893] Q. B. 665.

<sup>4</sup> *Doe v. Errington*, 1 Ad. & El. 750; *Chitty, Plead.* § 71; *Whittle v. Artis*, 55 Fed. Rep. 919; *Covillaud v. Tanner*, 7 Cal. 38; *Johnson v. Sepulbeda*, 5 Cal. 149, 151; *Throckmorton v. Burr*, 5 Cal. 400; *Dube v. Smith*, 1 Mo. 313; *Stevenson v. Cofferin*, 20 N. H. 150; *Tilden v. Tilden*, 13 Gray, 103, 108; *Rehoboth v. Hunt*, 1 Pick. 224; *Hill v. Gibbs*, 5 Hill, 56; *Cole v. Irvine*, 6 Hill, 634; *Malcom v. Rogers*, 5 Cow. 188; *White v. Pickering*, 12 S. & R. 435; *Hammett v. Blount*, 1 Swan, 385.

join in actions to recover possession of the land.<sup>1</sup> They are not required to join, but may sue severally, at their option, each for his own interest.<sup>2</sup>

Where tenants in common bring a joint action for the recovery of land, and one of them fails to show title or the right of entry and possession, the action fails as to all, unless the writ is amended before verdict by striking out such party.<sup>3</sup>

**1936. A tenant in common suing alone recovers only his aliquot part or share.** He can recover only such interest as he shows he is entitled to.<sup>4</sup> He cannot recover for himself and his cotenant. This rule seems best to accord with principle, though the rule in the greater number of States is that such tenant recovers the entire estate.

**1937. In some States one tenant in common of land suing alone may recover the entire property against a stranger claiming adversely to his cotenants as well as to himself, though he actually proves title to only an undivided interest in himself.**<sup>5</sup>

<sup>1</sup> Bliss on Code Pleading, § 25.

<sup>2</sup> *Whittle v. Artis*, 55 Fed. Rep. 919; *Bush v. Bradley*, 4 Day, 298, 303; *Hillhouse v. Mix*, 1 Root, 246, 1 Am. Dec. 41; *Harrelson v. Sarvis*, 39 S. C. 14, 17 S. E. Rep. 368; *Dorn v. Beasley*, 6 Rich. Eq. 408; *Bannister v. Bull*, 16 S. C. 220; *Reams v. Spann*, 28 S. C. 530, 6 S. E. Rep. 325; *Alford v. Dewin*, 1 Nev. 207; *Hines v. Trantham*, 27 Ala. 359; *Craig v. Taylor*, 6 B. Mon. 457; *Coulson v. Wing*, 42 Kans. 507, 22 Pac. Rep. 570.

<sup>3</sup> *De Vaughn v. McLeroy*, 82 Ga. 687, 10 S. E. Rep. 211; *Echols v. Sparks*, 79 Ga. 417, 5 S. E. Rep. 132; *Oxnard v. Proprietors*, 10 Mass. 179; *Chandler v. Simmons*, 97 Mass. 508, 93 Am. Dec. 117; *Hoyle v. Stowe*, 2 Dev. 318; *Taylor v. Taylor*, 3 A. K. Marsh. 944; *Freem. Coten.* § 359; *Pom. Rem.* §§ 193-200; 2 Greenl. Ev. § 317.

<sup>4</sup> *Hellyer v. King*, 6 Exch. 791; *Saul v. Dawson*, 3 Wils. 49; *Whittle v. Artis*, 55 Fed. Rep. 919; *Stevens v. Ruggles*, 5 Mason, 221. **Alabama**: *Jones v. Walker*, 47 Ala. 175. **California**: *Williams v. Sutton*, 43 Cal. 65; *Newman v. Bank*, 80 Cal. 368, 22 Pac. Rep. 261; *Muller v. Boggs*, 25 Cal. 175. **Georgia**: *Walker v.*

*Perryman*, 23 Ga. 309; *Wilson v. Chandler*, 60 Ga. 129; *Sanford v. Sanford*, 58 Ga. 259. **Maryland**: *Minke v. McNamee*, 30 Md. 294, 96 Am. Dec. 577. **Massachusetts**: *Dewey v. Brown*, 2 Pick. 387. **Missouri**: *Gray v. Givens*, 26 Mo. 291. **Nebraska**: *Mattis v. Boggs*, 19 Neb. 698, criticising *Crook v. Vandervoort*, 13 Neb. 505. **New York**: *Siglar v. Van Riper*, 10 Wend. 414; *Cruger v. McLauray*, 41 N. Y. 219. **Pennsylvania**: *Mobley v. Bruner*, 59 Pa. St. 481, 98 Am. Dec. 360; *Dawson v. Mills*, 32 Pa. St. 302; *Bennett v. Hethington*, 16 S. & R. 196. **South Carolina**: *Harrelson v. Sarvis*, 39 S. C. 14, 17 S. E. Rep. 368. **Virginia**: *Marshall v. Palmer (Va.)*, 21 S. E. Rep. 672. One tenant may have his remedy for the whole land as against one who has no right whatever. *Allen v. Gibson*, 4 Rand, 468.

<sup>5</sup> **California**: *Code of Civ. Pro.* § 384; *French v. Edwards*, 5 Sawyer, 266; *Lee Chunck v. Quan Wo Chong*, 91 Cal. 593, 28 Pac. Rep. 45; *Newman v. Bank*, 80 Cal. 368, 22 Pac. Rep. 261; *Chipman v. Hastings*, 50 Cal. 310; *Williams v. Sutton*, 43 Cal. 65. **Colorado**: *Weese v. Barker*, 7 Colo. 178. **Connecticut**: *Barrett v. French*,

"Each cotenant can pursue his remedies independent of the others, and may maintain ejectment or trespass to try title alone, and in many States may recover the entire premises and estate from trespassers, strangers, wrongdoers, and all persons other than his cotenants and those claiming under them. When his right is recognized he recovers for all."<sup>1</sup> In a recent decision by the Supreme Court of North Carolina this rule is laid down, the court saying: "It is obvious, therefore, that one of several cotenants, when he brings an action against a trespasser on the common property, and proves the title of the other tenants in establishing his own, may, under the common law practice in ejectment, applied to actions for the possession of land, recover the whole, though he claim sole seisin in his complaint in himself, just as he can do under the procedure prescribed in the Code, by alleging that the action is brought in behalf of himself and others having a common interest, though it has never been determined in this State how far, if at all, in the action under the provisions of the statute, the cotenants not actual parties would be concluded by the judgment."<sup>2</sup>

1938. Joint tenants should join in a suit for the possession of land,<sup>3</sup> as they have but one joint title. This is the common-

1 Conn. 354, 364, 6 Am. Dec. 241. **Kentucky**: *King v. Bullock*, 9 Dana, 41. **Nevada**: *Brown v. Warren*, 16 Nev. 228, 241; *Sharon v. Davidson*, 4 Nev. 416. **North Carolina**: *Foster v. Hackett*, 112 N. C. 546, 17 S. E. Rep. 426; *Allen v. Salinger*, 103 N. C. 14, 8 S. E. Rep. 913; *Withrow v. Biggerstaff*, 82 N. C. 82; *Yancey v. Greenlee*, 90 N. C. 317; *Gilchrist v. Middleton*, 107 N. C. 663, 12 S. E. Rep. 85; *Moody v. Johnson*, 112 N. C. 804, 17 S. E. Rep. 579; *Lenoir v. Valley Riv. M. Co.* 113 N. C. 513, 18 S. E. Rep. 73, 106 N. C. 473, 10 S. E. Rep. 525, 11 S. E. Rep. 516. **Oregon**: *Minter v. Durham*, 13 Oreg. 470, 11 Pac. Rep. 231; *Dolph v. Barney*, 5 Oreg. 191. **Texas**: *Marlin v. Kosmyroski* (Tex. Civ. App.), 27 S. W. Rep. 1042; *Bennett v. Virginia Ranch, &c. Co.* 1 Tex. Civ. App. 321, 21 S. W. Rep. 126; *Davidson v. Wallingford* (Tex.), 32 S. W. Rep. 1030; *Harber v. Dyches* (Tex.), 14 S. W. Rep.

580; *Sowers v. Peterson*, 59 Tex. 216; *Read v. Allen*, 56 Tex. 176; *Hutchins v. Bacon*, 46 Tex. 408; *Ney v. Mumme*, 66 Tex. 268, 17 S. W. Rep. 407; *Mitchell v. Mitchell*, 80 Tex. 101, 15 S. W. Rep. 705; *Boone v. Knox*, 80 Tex. 642, 16 S. W. Rep. 448; *Allen v. Peters*, 77 Tex. 59, 13 S. W. Rep. 767; *Carley v. Parton*, 75 Tex. 98, 12 S. W. Rep. 950; *Johnson v. Schumacher*, 72 Tex. 334, 12 S. W. Rep. 207; *Moore v. Stewart* (Tex.), 7 S. W. Rep. 771. **Vermont**: *Johnson v. Tilden*, 5 Vt. 426; *McFarland v. Stone*, 17 Vt. 165, 175, 44 Am. Dec. 325; *Hibbard v. Foster*, 24 Vt. 542. **West Virginia**: *Voss v. King*, 33 W. Va. 236, 10 S. E. Rep. 402.

<sup>1</sup> Sedg. & Wait, Tr. Title Land, § 300.

<sup>2</sup> *Foster v. Hackett*, 112 N. C. 546, 554, 17 S. E. Rep. 426.

<sup>3</sup> Sedgwick & Wait on Trial of Title to Land, § 302; *Dewey v. Lambier*, 7 Cal. 347.

law rule, but in some States it has been changed by statute. At common law one cannot sue for himself and his cotenants, although they are said to be sued *per my et per tout*, each having the entire possession as well of every parcel as of the whole.<sup>1</sup>

<sup>1</sup> *Mobley v. Bruner*, 59 Pa. St. 481 ; *Milne v. Cummings*, 4 Yeates, 577.

## CHAPTER XLVI.

### PARTITION.

- |                                    |  |                                            |
|------------------------------------|--|--------------------------------------------|
| I. Voluntary partition, 1939-1953. |  | III. Equities to be considered, 1974-1993. |
| II. Partition by suit, 1954-1973.  |  | IV. Partition by sale, 1994-2000.          |

#### I. *Voluntary Partition.*

1939. The usual mode of effecting a voluntary partition is for each cotenant to take a conveyance from all the other part owners of the part of the land which all had agreed he should receive as his share of the common or joint property. All the deeds are construed together as one instrument. A partition may also be effected by a conveyance by all the cotenants to a third person, followed by conveyances by the latter to the several cotenants of the specific parts which they have agreed among themselves to accept as their shares.

A partition made by mutual deeds between cotenants, one of whom has agreed to pay a certain sum to make up the difference in value between the parcels, will not be set aside at the suit of the other because of the failure of the former to pay the sum agreed.<sup>1</sup>

1940. By the old common law, a voluntary partition could be made between tenants in common by parol agreement executed in severalty with livery of seisin.<sup>2</sup> "And note," says Littleton, "that partition by agreement between parceners may be made by law between them, as well by parol without deed as by deed."<sup>3</sup> Coke says, "If two tenants in common be, and they make partition by parol, and execute the same in severalty by livery, this is good and sufficient in law."<sup>4</sup> Whether the statute of frauds stands in the way of a valid parol partition is a question upon which the authorities are divided. The generally recognized

<sup>1</sup> Schnorbus v. Winkle (Ky.), 15 S. W. Rep. 861.

<sup>3</sup> Littleton, § 250.

<sup>4</sup> Coke on Litt. 169 a.

<sup>2</sup> 2 Cruise Dig. 384, 538; Freeman on Cotenancy, § 396.

doctrine of the English courts is that the statute of frauds applies to partitions.<sup>1</sup> This is the rule in some of the American States.<sup>2</sup> "The peace of society and the security of titles," said Chief Justice Hornblower in a New Jersey case, "under the existing circumstances of our country and the policy of our laws, in my opinion strongly require an adherence to the rule that all partitions of freehold estates among cotenants should be by deed or writing. . . . If partitions may be made by parol, and if not only the fact of such partition having been made and understandingly agreed to by all the parties, but the time when the partition lines, the metes and bounds, courses and distances, of the several parcels

<sup>1</sup> 2 Black. Com. 323; Freeman on Cotenancy, § 397; 1 Washburn on Real Prop. 430; Browne on Statute of Frauds, §§ 68, 397; Johnson v. Wilson, Willes, 248, 253. In this case the question was whether an award of arbitrators making partition was good without conveyances in conformity with, and executing the award. Lord Chief Justice Willes, after stating that at common law before the statute of frauds a livery of seisin was necessary, further says: "This was before the statute 29 Car. II., where a feoffment might be made by parol; and the livery which is mentioned supposes that a feoffment is intended, which would then have been a proper conveyance. And therefore, as since the statute of Car. II. no conveyance can be but by deed, a proper conveyance is now become necessary, and for this reason the award is incomplete and not good."

<sup>2</sup> Delaware: M'Call v. Reybold, 1 Harr. 146. Kentucky: Duncan v. Duncan, 93 Ky. 37, 18 S. W. Rep. 1022, 40 Am. St. Rep. 159; Sloan v. Grider (Ky.), 25 S. W. Rep. 110; White v. O'Bannon, 86 Ky. 93; Craig v. Taylor, 6 B. Mon. 459; Lacy v. Overton, 2 A. K. Marsh. 440, 442. Louisiana: Wright v. Cane, 18 La. Ann. 579. Maine: Chenery v. Dole, 39 Me. 164; Duncan v. Sylvester, 16 Me. 388; Gardiner v. Heald, 5 Me. 380; John v. Sabattis, 69 Me. 473. Massachusetts: Porter v. Hill, 9 Mass. 34, 6 Am. Dec. 22; Porter v. Perkins, 5 Mass. 233, 4 Am. Dec. 52. New Hampshire: Ballou v. Hale, 47

N. H. 347, 93 Am. Dec. 438; Wood v. Griffin, 46 N. H. 237; Dow v. Jewell, 18 N. H. 340, 45 Am. Dec. 371. This last case holds that a parol partition may be made of lands held under a trust arising by implication of law, because the trust itself is not within the statute of frauds. New Jersey: Woodhull v. Longstreet, 18 N. J. L. 405; Richman v. Baldwin, 21 N. J. L. 395; Lloyd v. Conover, 25 N. J. L. 47. North Carolina: Fort v. Allen, 110 N. C. 183, 14 S. E. Rep. 685; Medlin v. Steele, 75 N. C. 154; Anders v. Anders, 2 Dev. 529; McPherson v. Seguire, 3 Dev. 153. Ohio: Berry v. Seawall, 65 Fed. Rep. 742, 13 C. C. A. 101. And see Farmers' & Merchants' Nat. Bank v. Wallace, 45 Ohio St. 152, 168, 12 N. E. Rep. 439; Piatt v. Hubbel, 5 Ohio, 243. South Carolina: "A parol partition is binding upon the parties if there is sufficient proof of part performance to take it out of the statute of frauds; and long possession under such partition is such a part performance as will take the case out of the statute of frauds." Rountree v. Lane, 32 S. C. 160, 10 S. E. Rep. 941; Kennemore v. Kennemore, 26 S. C. 251, 1 S. E. Rep. 881; Goodhue v. Barnwell, Rice Eq. 198; Jones v. Reeves, 6 Rich. L. 132. Vermont: Johnson v. Goodwin, 27 Vt. 288; Pope v. Henry, 24 Vt. 560; Booth v. Adams, 11 Vt. 156, holding that a parol partition with possession for a less time than the period of limitation is not binding in law.

apportioned to each, are all to rest in the frail memory of man; if no records or writings are to be made of such partitions, to which purchasers and heirs are to resort for information and certainty, — it will not only depreciate the value of real estate derived under such partitions, by rendering titles uncertain and precarious, but in the end, be productive of fruitful litigation.”<sup>1</sup>

1941. It is the policy of the law generally in this country to require not only written evidence of the ownership of land, but recorded evidence as well. In a recent case relating to a parol partition in Ohio, Judge Taft, in the Circuit Court of Appeals, said: “The recording acts were passed to give to the public exact evidence of the ownership of each piece of land in the community. Is it possible that the legislature did not intend that the public should know from that record whether land is owned by one person or a dozen? But it is said that the public may know of the partition by the visible possession. So they may know the ownership of all land. If the change of ownership caused by a partition is not within the deed statute, there would seem to be no authority for recording partition at all. The recording act provides for the recording of ‘deeds and instruments for the conveyance or incumbrance of any lands, tenements, or hereditaments.’ It nowhere gives the county recorder specific authority to record partition deeds. Unless, therefore, a partition deed is a deed for the conveyance of land, or some interest in it, it would seem not to be within the description of those deeds whose record is provided by law. If no provision is made for such record, then the innumerable records of partition deeds that have been made since the admission of Ohio as a State are nullities, and certified copies of them are not evidence in any court of justice. This is the absurd conclusion we must reach if we once yield to the claim that a partition does not involve a transfer of interest in land within the statute of frauds, the statute of deeds, and the recording act of Ohio.”<sup>2</sup>

1942. There is more authority, on the other hand, for the rule that a parol partition followed by possession in severalty is valid.<sup>3</sup> This rule rests upon the construction given to the

<sup>1</sup> Woodhull v. Longstreet, 18 N. J. L. 414.

<sup>2</sup> Berry v. Seawall, 65 Fed. Rep. 742, 747, per Taft, J.

<sup>3</sup> California: Lanterman v. Williams, 55 Cal. 60; Woodbeck v. Wilders, 18 Cal. 131; Elias v. Verdugo, 27 Cal. 418; Long v. Dollarhide, 24 Cal. 218. The last two

statute of frauds, that a specific execution of a parol agreement concerning land may be decreed in equity when the parties have already carried the agreement partly into effect. "This determination," says Chief Justice Tilghman, of Pennsylvania, "was founded on two principles: first, that, where the parties have acted on their agreement, there is no danger of perjury in proving it; and, second, because it is against equity that a man should refuse to perfect an agreement from which he had derived benefit by execution in part. Whether the courts of chancery have gone further than they ought, in thus indirectly giving efficacy to a parol agreement concerning land, we do not think ourselves at liberty to inquire, because the principles I have mentioned have been adopted by this court, and long considered as the law of

cases were before the adoption of the common law. **Connecticut**: *Brown v. Wheeler*, 17 Conn. 345, 44 Am. Dec. 550. **Georgia**: *Blacker v. Dunlop*, 93 Ga. 819, 21 S. E. Rep. 135; *Wilchel v. Thompson*, 39 Ga. 559. **Illinois**: *Sontag v. Bigelow*, 142 Ill. 143, 31 N. E. Rep. 674; *Gage v. Bissell*, 119 Ill. 298, 10 N. E. Rep. 238; *Tomlin v. Hilyard*, 43 Ill. 300, 92 Am. Dec. 118; *Lavalle v. Strobel*, 89 Ill. 370; *Shepard v. Rinks*, 78 Ill. 188; *Nichols v. Padfield*, 77 Ill. 253; *Grimes v. Butts*, 65 Ill. 347; *Manly v. Pettee*, 38 Ill. 128. **Indiana**: *Hauk v. McComas*, 98 Ind. 460; *Bumgardner v. Edwards*, 85 Ind. 117; *Bruce v. Osgood*, 113 Ind. 360, 14 N. E. Rep. 563; *Moore v. Kerr*, 46 Ind. 468; *Tate v. Foshee*, 117 Ind. 322, 20 N. E. Rep. 241. **Mississippi**: *Pipes v. Buckner*, 51 Miss. 848; *Natchez v. Vandervelde*, 31 Miss. 706, 66 Am. Dec. 581; *Willey v. Bonney*, 31 Miss. 644. **Missouri**: *Sutton v. Porter*, 119 Mo. 100, 24 S. W. Rep. 760; *Nave v. Smith*, 95 Mo. 596, 6 Am. St. Rep. 79; *Hazen v. Barnett*, 50 Mo. 506; *Bompart v. Roderman*, 24 Mo. 385; *Le Bourgeoise v. Blank*, 8 Mo. App. 434. **New York**: *Taylor v. Millard*, 118 N. Y. 244, affirming 42 Hun, 363; *Jackson v. Vosburgh*, 9 Johns. 270, 6 Am. Dec. 276; *Wood v. Fleet*, 36 N. Y. 499, 93 Am. Dec. 528; *Conkling v. Brown*, 57 Barb. 265; *Ryerss v. Wheeler*, 25 Wend. 434, 37 Am. Dec. 243; *Mount v. Morton*, 20 Barb. 123, 138; *Otis v. Cusack*, 43 Barb. 546; *Jackson v. Christman*, 4 Wend. 277; *Jackson v. Harder*, 4 Johns. 202, 4 Am. Dec. 262. **Ohio**: *Piatt v. Hubbel*, 5 Ohio, 243. **Pennsylvania**: *Wolf v. Wolf*, 158 Pa. St. 621, 28 Atl. Rep. 164; *Mellon v. Reed*, 114 Pa. St. 647, 653, 8 Atl. Rep. 227; *Maul v. Rider*, 51 Pa. St. 377; *McKnight v. Bell*, 135 Pa. St. 358, 19 Atl. Rep. 1036; *McConnell v. Carey*, 48 Pa. St. 345; *McMahan v. McMahan*, 13 Pa. St. 376, 53 Am. Dec. 481; *Calhoun v. Hays*, 8 Watts & S. 127, 132, 42 Am. Dec. 275. **Tennessee**: *Meacham v. Meacham*, 91 Tenn. 532, 19 S. W. Rep. 757. **Texas**: *Linnartz v. McCulloch* (Tex. Civ. App.), 27 S. W. Rep. 279; *Martin v. Harris* (Tex. Civ. App.), 26 S. W. Rep. 91; *Warren v. Frederichs*, 76 Tex. 647; *Evans v. Martin* (Tex. Civ. App.), 25 S. W. Rep. 688; *Murrell v. Mandelbaum*, 85 Tex. 22, 34 Am. St. Rep. 777; *Dement v. Williams*, 44 Tex. 158. It was remarked in this case that the statute of frauds of Texas differs from the English statute in being confined to contracts for the sale of lands, and not also of any interest in or concerning them. **Virginia**: *Coles v. Wooding*, 2 Pat. & H. 189; *Bolling v. Teel*, 76 Va. 487. **Wisconsin**: *Buzzell v. Gallagher*, 28 Wis. 678; *Eaton v. Tallmadge*, 24 Wis. 217. **West Virginia**: *Patterson v. Martin*, 33 W. Va. 494, 10 S. E. Rep. 817.



the land; and to question them now would shake many titles acquired under their authority.”<sup>1</sup>

1943. Another ground for sustaining parol partitions is that a partition of land is not a sale of any part of it. “After partition of land has been made among tenants in common, each owns in severalty an interest equal to that which he before held in common. The partition does not transfer the title of the parties so much as it assigns or apports to each his share in severalty in the land.”<sup>2</sup> It follows, therefore, that such partition, or agreement for partition, need not be evidenced by deed, or even by a writing. “A partition which merely severs the relation existing between tenants in common in the undivided whole, and vests title to a correspondent part in severalty, is not such a sale or transfer of title as will be affected by the statute of frauds; and . . . it is not necessary that a certain portion or allotment of the land in kind should be given to each of the tenants in severalty if it appears that the partition is fully executed, and that each has accepted and received his purpart, either in kind or by payment in money, or otherwise.”<sup>3</sup>

1944. As a matter of strict law, the soundness of this position may well be doubted. For reasons well stated by Judge Taft in a recent case before the Circuit Court of Appeals, the better opinion in reason and law seems to be that the change of ownership involved in partition is within the statute of frauds. “Previous to partition, certainly each tenant in common has an interest in every foot of the undivided tract. This interest is enjoyed by possession until partition. The right to use and enjoy every part of the land is commensurate with the permanency of the estate, and endures as long, provided it is not terminated by partition. When voluntary partition takes place, each party, by his act, transfers or releases the interest which he had in all the land for an exclusive and fixed possession in a part. He does not derive title or estate from his cotenant by this transfer, so that either can be said to hold under the other, or to strengthen or weaken his title to his half by the strength or weakness of his cotenant’s title, but we think it clear that there is a mutual transfer

<sup>1</sup> *Ebert v. Wood*, 1 Binn. 216, 2 Am. Dec. 436.

<sup>2</sup> *Moore v. Kerr*, 46 Ind. 468, 470, per Downey, J.

<sup>3</sup> *Calhoun v. Hays*, 8 W. & S. 127, 132, 42 Am. Dec. 275; *Mellon v. Reed*, 114 Pa. St. 647, 653, 8 Atl. Rep. 227, per Clark, J.

by each tenant to the other of his previous right of possession in the part assigned to the other. This is an interest in land, and is within the letter of the statute of frauds. It is, moreover, within the spirit of that statute. The danger that fraud and perjury would unsettle the ownership of lands, in disputes over the terms of a partition, was not materially less than in those over the terms of a sale or exchange of lands in severalty. Especially in this country and State, where there was no law of primogeniture and the land descended equally to the children, there was very little land which must not be subjected to partition at some time; and the probability that such partitions, if their terms depended on verbal agreements, would involve the greatest uncertainty in the ownership of land, must have been apparent to the legislature, and within the mischief which the statute was enacted to avoid.”<sup>1</sup>

**1945.** To make a parol partition valid it must be followed by an actual entry and exclusive possession<sup>2</sup> in accordance with the partition agreed upon. Accordingly it has been held that an agreement for partition, not carried into effect by the cotenants by entering into possession of the several parts, is not binding.<sup>3</sup> Neither is an agreement which is incapable of being executed, because possession cannot be taken in accordance with it, binding on any one.<sup>4</sup> But, to give a parol partition effect as to third persons, the several possessions of the respective parties must be so open and visible as to notify all persons interested in having such knowledge that a change from a joint to a several possession has occurred. Accordingly where, in partition between two tenants in common, the portion allotted to one was wholly unimproved and unoccupied, and that allotted to the other was occupied by a tenant who retained the same possession he had before the partition, it was held that such possession of one of the portions would not afford notice of a partition to third persons, such as judgment creditors of the other tenant in common.<sup>5</sup>

**1946.** The registration laws do not apply to parol parti-

<sup>1</sup> *Berry v. Seawall*, 65 Fed. Rep. 742, 746, 13 C. C. A. 100.

<sup>2</sup> *Sanger v. Merritt*, 131 N. Y. 614, 30 N. E. Rep. 100, affirming 15 N. Y. Supp. 511; *Patterson v. Martin*, 33 W. Va. 494, 10 S. E. Rep. 817.

<sup>3</sup> *Woodbeck v. Wilders*, 18 Cal. 131;

*Slice v. Derrick*, 2 Rich. 627; *Hauk v. McComas*, 98 Ind. 460.

<sup>4</sup> *Lanternman v. Williams*, 55 Cal. 60; *Vasey v. Board of Trustees*, 59 Ill. 188.

<sup>5</sup> *Manly v. Pettee*, 38 Ill. 128. And see *Allday v. Whitaker*, 66 Tex. 669, 1 S. W. Rep. 794.

tions,<sup>1</sup> but notice of such a partition may be imparted by possession of the parts in severalty. Where an owner of a tract of land conveys an undivided half by deed, and subsequently, by parol partition, the vendee takes the south half and the vendor the north half, and the vendor then conveys the north half, the recording of the deeds, and the fact that the south half is occupied by a tenant of the first vendee, is constructive notice of the parol partition.<sup>2</sup>

1947. A parol partition followed by possession passes the equitable title only, but the courts will in proper cases vest the legal title in the persons entitled to it. It does not pass the legal title.<sup>3</sup>

After a long period of acquiescence in a parol partition it will be presumed, if necessary, that proper partition deeds were executed by the parties.<sup>4</sup>

A fence dividing the possessions of two joint tenants is not of itself sufficient proof of a severance. There must be an agreement between the tenants for a partition, and a possession in accordance therewith.<sup>5</sup>

A parol partition followed by possession and improvements will

<sup>1</sup> *Meacham v. Meacham*, 91 Tenn. 532, 19 S. W. Rep. 757.

<sup>2</sup> *Massie v. Yates* (Tex. Civ. App.), 29 S. W. Rep. 1132.

<sup>3</sup> *California*: *Gates v. Salmon*, 46 Cal. 361. *Connecticut*: *Brown v. Wheeler*, 17 Conn. 345, 44 Am. Dec. 550. *Georgia*: *Blacker v. Dunlop*, 93 Ga. 819, 21 S. E. Rep. 135; *Hamilton v. Phillips*, 83 Ga. 293, 9 S. E. Rep. 606; *Welchel v. Thompson*, 39 Ga. 559, 99 Am. Dec. 470. *Illinois*: *Sontag v. Bigelow*, 142 Ill. 143, 31 N. E. Rep. 674; *Gage v. Bissell*, 119 Ill. 298, 10 N. E. Rep. 238; *Shepard v. Rinks*, 78 Ill. 188; *Tomlin v. Hilyard*, 43 Ill. 300, 92 Am. Dec. 118; *Grimes v. Butts*, 65 Ill. 347. *Indiana*: *Bruce v. Osgood*, 113 Ind. 360, 14 N. E. Rep. 563; *Savage v. Lee*, 101 Ind. 514; *Hauk v. McComas*, 98 Ind. 460; *Bumgardner v. Edwards*, 85 Ind. 117; *Moore v. Kerr*, 46 Ind. 468. *Iowa*: *Mahon v. Cooley*, 36 Iowa, 479. *Maryland*: *Hardy v. Summers*, 10 Gill & J. 316, 32 Am. Dec. 167. *Mississippi*: *Natchez v. Vandervelde*, 31

*Miss.* 707, 66 Am. Dec. 581; *Willey v. Bonney*, 31 Miss. 644; *Pipes v. Buckner*, 51 Miss. 848. *Missouri*: *Sutton v. Porter*, 119 Mo. 100, 24 S. W. Rep. 760; *Nave v. Smith*, 95 Mo. 596; *Hazen v. Barnett*, 50 Mo. 506; *Le Bourgeoise v. Blank*, 8 Mo. App. 434. The case of *Bompart v. Roderman*, 24 Mo. 385, to the contrary, is disapproved in the later cases. *Texas*: *Aycock v. Kimbrough*, 71 Tex. 330, 12 S. W. Rep. 71; *Wardlow v. Miller*, 69 Tex. 395, 6 S. W. Rep. 292; *Stuart v. Barker*, 17 Tex. 419; *Houston v. Sneed*, 15 Tex. 307. *West Virginia*: *Frederick v. Frederick*, 31 W. Va. 566, 8 S. E. Rep. 295; *Patterson v. Martin*, 33 W. Va. 494, 10 S. E. Rep. 817. *Wisconsin*: *Buzzell v. Gallagher*, 28 Wis. 678.

<sup>4</sup> *Jackson v. Christman*, 4 Wend. 277; *Lavalle v. Strobel*, 89 Ill. 370; *Goodman v. Winter*, 64 Ala. 410, 38 Am. Rep. 13.

<sup>5</sup> *Haughabaugh v. Honald*, 1 Const. Treadw. 90.

not be disturbed in equity ;<sup>1</sup> and, moreover, such possession long acquiesced in may be entitled to the protection of a court of equity.<sup>2</sup>

A parol partition is not invalid because not joined in at the time by one parcener if he subsequently takes possession of the parcel allotted to him and sells it.<sup>3</sup>

1948. The exercise of equitable jurisdiction to protect parol partitions that have been consummated by possession implies that the legal title did not pass by such partitions, but only an equitable title. "If the legal title had passed, certainly the partition needed the aid of no equitable principle to support it."<sup>4</sup>

The effect of a parol partition is declared in a recent decision of the Supreme Court of Illinois to the effect that such partition, when followed by a possession in conformity therewith, will so far bind the possession as to give to each cotenant the rights and incidents of an exclusive possession of his property ; while the legal title might not, perhaps, be considered as passing by such parol partition, unless after a possession sufficiently long to justify the presumption of a deed, yet the parol partition, followed by a several possession, would leave each cotenant seised of the legal title of one half of his allotment, and the equitable title to the other half, and by a bill in chancery he could compel from his co-tenant a conveyance of the legal title according to the terms of the partition.<sup>5</sup> Such a partition may be set up as a defence, should an action be brought to recover the possession, in violation of the parol partition. But there is no case which goes so far as to hold that a plaintiff could treat a parol partition as a deed, and thus recover upon it in an action of ejectment.<sup>6</sup>

1949. Mr. Freeman, however, insists that the legal title is transferred by parol partition. "In those decisions," he says, "which affirm the validity of parol partitions, the whole tenor of

<sup>1</sup> *Piatt v. Hubbel*, 5 Ohio, 243.

<sup>2</sup> *Farmers' & Merchants' Nat. Bank v. Wallace*, 45 Ohio St. 152, 168, 12 N. E. Rep. 439 ; *Rountree v. Lane*, 32 S. C. 160, 10 S. E. Rep. 941 ; *Kennemore v. Kennemore*, 26 S. C. 251, 1 S. E. Rep. 881 ; *Yarborough v. Avant*, 66 Ala. 526 ; *Docktermann v. Elder*, 27 Weekly L. Bul. 195.

<sup>3</sup> *Sutton v. Porter*, 119 Mo. 100, 24 S. W. Rep. 760.

<sup>4</sup> *Berry v. Seawall*, 65 Fed. Rep. 742, 749, 13 C. C. A. 10, per Taft, J., citing *Ireland v. Rittle*, 1 Atk. 541 ; *Whaley v. Dawson*, 2 Schoales & La T. 367.

<sup>5</sup> *Tomlin v. Hilyard*, 43 Ill. 300, 92 Am. Dec. 118 ; *Sontag v. Bigelow*, 142 Ill. 143, 31 N. E. Rep. 674.

<sup>6</sup> *Sontag v. Bigelow*, 142 Ill. 143, 31 N. E. Rep. 674.

the opinion of the courts, with one or two exceptions, is to the effect that such partitions invest each cotenant with a full perfect legal title to the purparty allotted to him, and of which, by virtue of such allotment, he has taken and held possession. If he is so invested with the legal title, no impediment exists to prevent his maintaining ejectment against any person unlawfully in possession."<sup>1</sup> But the doctrine that the legal right passed by a parol partition, with possession for a shorter time than the limitation period, is sufficient to vest the legal title in the parties to it, seems to be confined to New York, where the doctrine had its origin, to Pennsylvania and Virginia.<sup>2</sup>

Judge Taft, in a recent decision, after reviewing these decisions, says:<sup>3</sup> "The result of a careful examination of all the foregoing cases is that, by the great weight of authority in this country, a parol partition, consummated by possession and acquiescence under it for any less period than that which creates a bar of the statute of limitations, does not vest the legal title in severalty to the allotted shares, but that such a partition, acquiesced in for any considerable length of time, will estop any person joining in it, and accepting exclusive possession under it, from asserting title or right of possession in violation of its terms."

1950. A parol partition, if fair and followed by possession,

<sup>1</sup> Freeman, Cotenancy, 2d ed. § 400.

<sup>2</sup> New York: *Duncan v. Harder*, 4 Johns. 202; *Jackson v. Vosburgh*, 9 Johns. 270, 6 Am. Dec. 276; *Jackson v. Long*, 7 Wend. 170; *Ryerss v. Wheeler*, 25 Wend. 434, 37 Am. Dec. 243; *Baker v. Lorillard*, 4 N. Y. 257; *Wood v. Fleet*, 36 N. Y. 499, 93 Am. Dec. 528; *Taylor v. Millard*, 118 N. Y. 244, 23 N. E. Rep. 376. Pennsylvania: *Ebert v. Wood*, 1 Binn. 216, 2 Am. Dec. 436; *Bavington v. Clarke*, 2 Pen. & W. 115; *Calhoun v. Hays*, 8 Watts & S. 127, 42 Am. Dec. 275; *McMahan v. McMahan*, 13 Pa. St. 376, 380, 53 Am. Dec. 481; *Darlington's Appropriation*, 13 Pa. St. 430; *McConnell v. Carey*, 48 Pa. St. 345; *Williard v. Williard*, 56 Pa. St. 119; *Mellon v. Reed*, 114 Pa. St. 647, 8 Atl. Rep. 227; *McKnight v. Bell*, 135 Pa. St. 358, 19 Atl. Rep. 1036. In the last named case, *Gratz v. Gratz*, 4 Rawle, 411, which held

that a parol partition is within the statute of frauds and void, is expressly overruled; and it is distinctly declared that a parol partition, followed by possession in accordance with it, vests the title in severalty, and gives, not a mere equitable right, but one that may be recognized and enforced at law. Virginia: *Coles v. Wooding*, 2 Pat. & H. 189; *Bryan v. Stump*, 8 Gratt. 241, 56 Am. Dec. 139. In *Bolling v. Teel*, 76 Va. 487, no express decision of this question is made, because the case did not call for it, but it would seem that the question is not definitely settled, though the New York rule is likely to be followed.

<sup>3</sup> *Berry v. Seawall*, 65 Fed. Rep. 742, 13 C. C. A. 101. The citations in this section are largely taken from Judge Taft's thorough and able opinion in this case, which has also been freely used in other parts of this chapter.

is valid though some of the partitioners are under disability.<sup>1</sup> And where a partition was undertaken to be made by deeds, but the deeds of the married women entitled to shares of the property were invalid because their husbands did not join in executing them, it was held that the partition was valid as a parol partition, the deeds serving to show the different parcels and the persons to whom they were allotted.<sup>2</sup>

1951. A voluntary partition by deed which is invalid by reason of informal execution may be ratified by the subsequent acts of the grantor, as by accepting the portion of land allotted to him, and afterwards selling it to one who was not a party to the partition.<sup>3</sup> The grantor and any one claiming under him is estopped from disturbing the partition.

1952. If, after a conveyance by one cotenant of a specific part of the property, all the cotenants divide among themselves the remainder of it, the tenants who had undertaken to convey a part of it, sharing equally with the other owners without deduction on account of their previous conveyance, the other cotenants will be held to have recognized the purchaser's right to have the land he bought set apart to him because of their appropriation of the other land, for the purchaser could not have a proportional part of the land set apart to him elsewhere in the tract if it should appear inequitable for him to retain the identical tract conveyed to him by plaintiff's cotenants.<sup>4</sup>

While one cotenant cannot effect a partition by conveying a specific part of the land, yet if the other part owner acquiesces by accepting the remaining part, and afterwards conveying that specifically, the two conveyances operate as a complete and binding partition.<sup>5</sup> The rule is otherwise, however, in those States in which it is held that a parol partition is invalid. Thus, in a case in Maine where the cotenants, after making a parol partition, each conveyed his part to a stranger, it was held that neither cotenant

<sup>1</sup> McMahan v. McMahan, 13 Pa. St. 376, 53 Am. Dec. 481; McConnell v. Carey, 48 Pa. St. 345.

<sup>2</sup> Sutton v. Porter, 119 Mo. 100, 24 S. E. Rep. 760.

<sup>3</sup> Talkin v. Anderson (Tex.), 19 S. W. Rep. 350; Sutton v. Porter, 119 Mo. 100, 24 S. W. Rep. 760; Bacon v. Shultz, 35 La. Ann. 1059.

<sup>4</sup> Cook v. International & G. N. R. Co. 3 Tex. Civ. App. 125, 22 S. W. Rep. 1012. And see March v. Huyter, 50 Tex. 243; Peak v. Swindle, 68 Tex. 242, 4 S. W. Rep. 478.

<sup>5</sup> Eaton v. Tallmadge, 24 Wis. 217; Massie v. Yates (Tex. Civ. App.), 29 S. W. Rep. 1132.

could invest the other with a separate title to a portion of the land without the formality of a deed, and that each therefore might avoid a conveyance of the other.<sup>1</sup>

1953. The rule generally prevailing is that there is no implied warranty of title in voluntary partition deeds,<sup>2</sup> though an express warranty in such deeds is binding equally with a covenant of warranty in other conveyances.<sup>3</sup> In a few States, however, a covenant of warranty is implied in voluntary deeds of partition, so that cotenants who have made partition of their land in this way are bound, in case of the eviction of either from his share, to restore a part of the residue of the estate.<sup>4</sup> Deeds of release in partition at least estop a cotenant from claiming by title paramount to that which he conveyed.<sup>5</sup>

## II. *Partition by Suit.*

1954. In general. — At common law, coparceners alone had the right to demand partition. By statute of 31 Henry VIII. this right was extended to joint tenants and tenants in common of estates of inheritance, and in the following year the right was still further extended to life tenants and other lesser estates.<sup>6</sup> This partition was in a common-law court. Courts of chancery early assumed jurisdiction in partition, and have ever since retained such jurisdiction, to the practical exclusion of jurisdiction at law, though the statute of Henry VIII. may still be a part of the common law in some parts of this country.<sup>7</sup> "Partition at law and in equity are different things," says Lord Redesdale.<sup>8</sup> "The first operates by the judgment of a court of law, and delivering up possession in pursuance of it, which concludes all the

<sup>1</sup> *Duncan v. Sylvester*, 16 Me. 388.

<sup>2</sup> *Freeman, Cotenancy*, §§ 409, 410; *Beardsley v. Knight*, 10 Vt. 185, 33 Am. Dec. 193; *Carpenter v. Schermerhorn*, 2 Barb. Ch. 314; *Dawson v. Lawrence*, 13 Ohio, 543, 42 Am. Dec. 210; *Rountree v. Denson*, 59 Wis. 522, 18 N. W. Rep. 518; *Picot v. Page*, 26 Mo. 398; *Weiser v. Weiser*, 5 Watts, 280, 30 Am. Dec. 313; *Yancey v. Radford*, 86 Va. 638. In *Pennsylvania* it seems that the deeds of cotenants in partition of land, which has come to them by descent, import a warranty, the same as partition deeds of coparceners at common law. *Patterson v.*

*Lanning*, 10 Watts, 135, 36 Am. Dec. 154.

<sup>3</sup> *Rountree v. Denson*, 59 Wis. 522, 18 N. W. Rep. 518; *Gittings v. Worthington*, 67 Md. 139, 9 Atl. Rep. 228.

<sup>4</sup> *Rogers v. Turley*, 4 Bibb, 355; *Morris v. Harris*, 9 Gill, 19, 26.

<sup>5</sup> *Tewksbury v. Provizzo*, 12 Cal. 20, 25.

<sup>6</sup> 31 Hen. VIII. ch. 1, and 32 Hen. VIII. ch. 32.

<sup>7</sup> *Willard v. Willard*, 145 U. S. 116, 12 Sup. Ct. Rep. 818.

<sup>8</sup> *Whaley v. Dawson*, 2 Sch. & Lef. 367.

parties to it. Partition in equity proceeds upon conveyances to be executed by the parties, and, if the parties be not competent to execute the conveyances, the partition cannot be effectually had." Such conveyances may be decreed by the court, and compelled by attachment.<sup>1</sup>

Partition is now provided for and regulated by statute in almost every State;<sup>2</sup> but these statutes do not, as a rule, divest courts of equity of their jurisdiction, though in some States jurisdiction in equity is excluded.<sup>3</sup> It is not practicable to do more than make a reference to these statutes, without making any summary of them.<sup>4</sup> Of course the statute under which any proceeding is had must be carefully followed.

1955. The right of partition is an absolute right,<sup>5</sup> though

<sup>1</sup> *Gay v. Parpart*, 106 U. S. 679, 690, 1 S. Ct. Rep. 456.

<sup>2</sup> *Wilkinson v. Stuart*, 74 Ala. 198; *Patton v. Wagner*, 19 Ark. 233; *Labadie v. Hewitt*, 85 Ill. 341; *Spitts v. Wells*, 18 Mo. 468; *Whitten v. Whitten*, 36 N. H. 327. See *Freeman, Cotenancy*, § 428.

<sup>3</sup> *Husband v. Aldrich*, 135 Mass. 317; *Whiting v. Whiting*, 15 Gray, 503; *Rutherford v. Jones*, 14 Ga. 521, 60 Am. Dec. 655.

<sup>4</sup> **Alabama**: Code 1886, §§ 3237-3281. **Arizona** T.: R. S. 1887, §§ 2373-2392. **Arkansas**: Dig. of Stats. 1894, §§ 5415-5446 a. **California**: Code Civ. Pro. §§ 752-801. **Colorado**: 2 Annot. Stats. 1891, §§ 3346-3368. **Connecticut**: G. S. 1888, §§ 1304-1312. **Delaware**: Code 1893, ch. 86. **Florida**: R. S. 1892, §§ 1490-1497. **Georgia**: Code 1882, §§ 3996-4007. **Idaho**: R. S. 1887, §§ 4560-4606. **Illinois**: R. S. 1889, ch. 106. **Indiana**: R. S. 1894, §§ 1200-1223. **Iowa**: R. S. 1888, §§ 4511-4542. **Kansas**: G. S. 1889, ¶¶ 4717-4732. **Louisiana**: R. Code, 1894, pp. 763-766. **Maine**: R. S. 1883, ch. 88. **Massachusetts**: P. S. 1882, ch. 178. **Michigan**: *Howell's Annot. Stats.* 1882, §§ 7850-7939. **Minnesota**: G. S. 1894, §§ 5770-5815. **Mississippi**: G. S. 1892, §§ 3096-3125. **Missouri**: 2 R. S. 1899, §§ 7132-7191. **Nevada**: G. S. 1885, §§ 3288-3341. **New Hampshire**: P. S. 1891, ch. 243. **New Jersey**: R. S. 1877, pp. 795-806;

Supp. 1886, pp. 783-786. **New York**: 2 Bliss's Annot. Code 1895, §§ 1532-1595. **North Dakota**: R. Codes 1895, §§ 5795-5843. **Ohio**: R. S. 1892, §§ 5754-5778. **Oregon**: 2 Annot. Laws 1892, §§ 423-471. **Pennsylvania**: 2 Brightly's Purdon's Dig. 1894, pp. 1638-1645. **Rhode Island**: G. L. 1896, ch. 265. **South Carolina**: R. S. 1893, §§ 1948-1951. **South Dakota**: Comp. Laws Dakota 1887, §§ 5362-5410. **Tennessee**: Code 1884, §§ 3993-4053. **Texas**: 2 Sayles Civ. Stats. 1889, arts. 3465-3483. **Utah**: 2 Comp. Laws 1888, §§ 3479-3528. **Vermont**: R. L. 1880, ch. 70. **Virginia**: Code 1887, ch. 114. **West Virginia**: Code 1891, ch. 79. **Washington**: 2 Hill's Annot. Stats. 1891, §§ 577-624. **Wisconsin**: Annot. Stats. 1889, §§ 3101-3153. **Wyoming**: R. S. 1887, §§ 2962-2984.

<sup>5</sup> 3 Pom. Eq. Jur. § 1389; *Parker v. Gerard*, Amb. 236; *Calmady v. Calmady*, 2 Ves. Jr. 568; *Willard v. Willard*, 145 U. S. 116, 12 Sup. Ct. Rep. 818, 6 Mackey, 559; *Mitchell v. Starbuck*, 10 Mass. 5; *Hanson v. Willard*, 12 Me. 142, 28 Am. Dec. 162; *Scovil v. Kennedy*, 14 Conn. 349; *Haeussler v. Missouri Iron Co.* 110 Mo. 188, 19 S. W. Rep. 75, 33 Am. St. Rep. 431, 16 L. R. A. 220; *Smith v. Smith*, Hoff. Ch. 506, 10 Paige, 470; *Lake v. Jarrett*, 12 Ind. 395; *Reynolds v. Reynolds*, 43 La. Ann. 1118, 10 So. Rep. 303; *Land v. Smith*, 44 La. Ann. 931, 11 So.



an agreement not to exercise it is valid.<sup>1</sup> Restraints upon the alienation and enjoyment of property are opposed to the common law, and especially opposed to the jurisprudence of the United States at the present day. An agreement between cotenants perpetually prohibiting partition has accordingly been held to be repugnant to the essential characteristics of cotenancy.<sup>2</sup>

A tenant in common may, however, be estopped to demand partition by the terms of the deed under which their title is held, as where a deed of the site of a hotel was made upon condition that the grantees, their heirs and assigns, should hold the same in common without partition or division. Such a condition is not invalid as a restraint of alienation, but only a partial and temporary restriction as to the mode of occupation.<sup>3</sup>

Every tenant in common is entitled to demand partition in equity as a matter of right, though such partition may be inconvenient or injurious to the others.<sup>4</sup> A spring and aqueduct owned in common by several persons may be sold upon partition in equity, though the right of one of the owners has become appurtenant to his other land.<sup>5</sup>

1956. The situation of the property, and not the circumstances of the parties, determines the question whether a partition can be made. Under a statute which provides for a partition "unless the property is so situated that partition cannot be made without great prejudice to the owners," an olive ranch which

Rep. 577; *Campbell v. Lowe*, 9 Md. 500, 66 Am. Dec. 339; *Donnor v. Quartermas*, 90 Ala. 164, 8 So. Rep. 715; *Donnell v. Mateer*, 7 Ired. Eq. 94; *Higginbottom v. Short*, 25 Miss. 160, 57 Am. Dec. 198; *Wiseley v. Findlay*, 3 Rand. 361, 15 Am. Dec. 712.

<sup>1</sup> *Hoyt v. Kimball*, 49 N. H. 322; *Spaulding v. Woodward*, 53 N. H. 577, 16 Am. Rep. 392; *Coleman v. Coleman*, 19 Pa. St. 100, 57 Am. Dec. 641; *Eberts v. Fisher*, 54 Mich. 294.

<sup>2</sup> The civil law is to this effect. Domat says: "It is always free for every one of those who have anything in common among them to divide it, and, although they may agree to put off the partition to a certain time, yet they can make no such agreement as never to come to a parti-

tion; for it would be contrary to good manners that the proprietors should be forced to have always an occasion of falling out by reason of the undivided possession of a common thing." Domat's Civil Law by Strahan, pt. i. book ii. tit. 5, § 2, art. 11.

<sup>3</sup> *Hunt v. Wright*, 47 N. H. 396, 93 Am. Dec. 451.

<sup>4</sup> *Donnor v. Quartermas*, 90 Ala. 164, 8 So. Rep. 715; *Land v. Smith*, 44 La. Ann. 931, 11 So. Rep. 577; *Hanson v. Willard*, 12 Me. 142, 28 Am. Dec. 162; *Higginbottom v. Short*, 25 Miss. 160, 57 Am. Dec. 198; *Harman v. Kelley*, 14 Ohio, 502, 45 Am. Dec. 552; *Wiseley v. Findlay*, 3 Rand (Va.), 15 Am. Dec. 712.

<sup>5</sup> *Allard v. Carleton*, 64 N. H. 24, 3 Atl. Rep. 313.

can be divided into two large orchards, such as to justify the building of works for the manufacture of oil or the pickling of olives, may be divided in partition, although the contract between the owners contemplated the building up and sale of the property as a whole, without making any distinct agreement to that effect; and the facts that the defendant is a lawyer practicing in a distant State and has no knowledge of olive culture, and that the plaintiff would be unable to buy the property if it should be sold as a whole, are unimportant.<sup>1</sup>

Though the land be indivisible in itself, yet an allotment of it may be made in case one cotenant owns adjoining land, so as to allow him an outlet to a turnpike.<sup>2</sup>

A statute which authorizes a court to compel a partition by division or sale at its discretion, as the facts appearing at the hearing may require, does not affect the general rule, governing every court of law or equity having jurisdiction to grant partition, that partition is of right, and not to be defeated by the mere unwillingness of one party to have each enjoy his own in severalty.<sup>3</sup>

1957. Of course there is no right of partition between persons who already own different parts of the property in severalty. Thus, where an association and a town buy land and erect a building thereon under an agreement that each is to own and use a story of the building, and that the town shall have control of the ground, subject to the association's right of access to its part of the building, there is no community of interest entitling the town to partition, since each party owns its part in severalty.<sup>4</sup>

1958. As a general rule, only one having both title and possession or the right of possession can maintain a suit for partition.<sup>5</sup> Thus a remainder-man cannot maintain such action,

<sup>1</sup> Hayne v. Gould, 54 Fed. Rep. 951.

ter v. Atwood, 34 Me. 153, 56 Am. Dec.

<sup>2</sup> Conner v. Cox (Ky.), 22 S. W. Rep. 647.

<sup>5</sup> Sanders v. Devereux, 60 Fed. Rep.

605.  
<sup>3</sup> Willard v. Willard, 145 U. S. 116, 12 Sup. Ct. Rep. 818, per Gray, J., substantially in his language.

311; Moore v. Shannon, 6 Mackey, 157; O'Brien v. Bailey, 163 Mass. 325, 39 N. E. Rep. 1109; Pub. Stats. of Mass. ch. 178, § 3; Haskell v. Queen, 66 Hun, 634, 21 N. Y. Supp. 357; McLean v. McLean, 66 Hun, 631, 21 N. Y. Supp. 326; Sullivan v. Sullivan, 66 N. Y. 37; Tower v. Tower (Ind.), 40 N. E. Rep. 747; Schori v. Stephens, 62 Ind. 441; Scarborough v. Smith, 18 Kans. 399; McMurtry v. Keif-

<sup>4</sup> Anderson School v. Milroy Lodge (Ind.), 29 N. E. Rep. 411. See, also, Donnor v. Quartermas, 90 Ala. 164, 8 So. Rep. 715; Inman v. Prout, 90 Ala. 362; Russell v. Beasley, 72 Ala. 190; McConnell v. Kibbe, 43 Ill. 12, 92 Am. Dec. 93; Corbitt v. Corbitt, 1 Jones Eq. 114; Sout-

because, although he has title, he has neither possession nor the right of possession. But title and right of possession are sufficient for the maintenance of this action without actual possession, or a technical seisin not included in such title and right.<sup>1</sup> The complainant must be able to show a clear legal title.<sup>2</sup> The court will allow the complainant a reasonable time to establish his title at law, before dismissing the suit.<sup>3</sup>

A complaint for partition which does not allege a present possession and ownership of the land is insufficient.<sup>4</sup> The complainant's title must be a legal title and not merely an equitable one.<sup>5</sup>

1959. A mortgagee, before he has acquired complete title by foreclosure, cannot ordinarily maintain a suit for partition.<sup>6</sup> Before foreclosure a mortgage is only a lien or charge upon the land, which may be conveyed by the mortgagor, attached, and dealt with in other respects as his property. For most purposes the title is in the mortgagor, who may wholly defeat the estate of the mortgagee by redemption. The mortgagee's entry to foreclose and possession of the property do not change the redeemable character of his estate, or give him such an estate as will enable him to maintain partition.

A mortgagee in exclusive possession for condition broken cannot maintain a suit for partition. He has not such an estate in possession as is requisite to sustain partition. His possession is on his own behalf to enforce the payment of the mortgage, and is subject to termination at any time by redemption.<sup>7</sup>

ner, 36 Neb. 522, 54 N. W. Rep. 844; Whitten v. Whitten, 36 N. H. 326; Nichols v. Nichols, 28 Vt. 228, 67 Am. Dec. 699 and note, p. 703; Savage v. Savage, 19 Oreg. 112, 23 Pac. Rep. 890; Windsor v. Simpkins, 19 Oreg. 117, 23 Pac. Rep. 669; Thompson v. Holden, 117 Mo. 118, 22 S. W. Rep. 905; Criscoe v. Hambrick, 47 Ark. 235, 1 S. W. Rep. 150; Stevens v. Enders, 13 N. J. L. 271.

<sup>1</sup> Barker v. Jones, 62 N. H. 497.

<sup>2</sup> Pierce v. Rollins, 83 Me. 172, 22 Atl. Rep. 110.

<sup>3</sup> Nash v. Simpson, 78 Me. 142, 150, 3 Atl. Rep. 53; Pierce v. Rollins, 83 Me. 172, 22 Atl. Rep. 110; Brown v. Cranberry Iron & Coal Co. 40 Fed. Rep. 849.

<sup>4</sup> Brown v. Brown, 133 Ind. 476, 32 N. E. Rep. 1128, 33 N. E. Rep. 615; Din-

widdie v. Smith (Ind.), 40 N. E. Rep. 748; Wintermute v. Reese, 84 Ind. 308; Balen v. Jacquelin, 67 Hun, 311, 22 N. Y. Supp. 193; Epley v. Epley, 111 N. C. 505, 16 S. E. Rep. 321; Ransom v. High, 37 W. Va. 838, 17 S. E. Rep. 413. See this case also as to general requisites of complaint.

<sup>5</sup> McCabe v. Hunter, 7 Mo. 355; Coale v. Barney, 1 Gill & J. 324.

<sup>6</sup> Jones on Mortg. § 705; Ewer v. Hobbs, 5 Met. 1; Norcross v. Norcross, 105 Mass. 265; Phelps v. Townsley, 10 Allen, 554. See Conover v. Sealy, 45 N. J. Eq. 589, 19 Atl. Rep. 616, where under the circumstances a partition by sale and a foreclosure by sale were carried into effect by one sale.

<sup>7</sup> Jones on Mortg. § 705.

1960. A tenant in common who has mortgaged his undivided share in the land may, so long as he remains in possession, maintain a petition for partition against the owner of the other shares in the land;<sup>1</sup> but if his mortgagee be the owner of the other shares, he cannot, without his consent, have partition; for it is an adverse proceeding affecting either the title or the possession, or both, and the mortgagee has both the legal title and, after default at least, the right of possession.<sup>2</sup> But in such case the mortgagee can have partition if he desires it.<sup>3</sup> His mortgagor cannot, however, compel him to join a proceeding for partition.<sup>4</sup>

1961. A judgment lien upon the undivided interest of a tenant in common is subordinate to the right of the cotenants to enforce partition; and, when this is made, the judgment lien is transferred to the portion assigned to the debtor in severalty, or to his share in the proceeds of sale.<sup>5</sup>

1962. A partner cannot maintain an action for partition against his copartner as to real estate owned by the firm, where there has been no adjustment of the copartnership accounts.<sup>6</sup>

A surviving partner has, for the purpose of administering and winding up the partnership affairs, the right of possession of partnership real estate, exclusive of the deceased partner's heirs, and they cannot, pending the administration, maintain against him an action for partition thereof.<sup>7</sup>

1963. Upon a bill for partition of lands, if the legal title of the parties is brought into dispute, a court of equity will not proceed to settle the disputed title, but will either dismiss the bill or retain it to allow the legal title to be settled in an action at law; but if, on such a bill, the title of any party is disputed on equitable grounds, the legal title not being contested, a court of equity will pass upon and settle such dispute in that suit.<sup>8</sup>

<sup>1</sup> Upham v. Bradley, 17 Me. 423; Hall v. Morris, 13 Bush, 322.

<sup>2</sup> Bradley v. Fuller, 23 Pick. 1, 8.

<sup>3</sup> Green v. Arnold, 11 R. I. 364, 23 Am. Rep. 466.

<sup>4</sup> Wotten v. Copeland, 7 Johns. Ch. 140; McArthur v. Scott, 31 Fed. Rep. 521.

<sup>5</sup> Ketchin v. Patrick, 32 S. C. 443, 11 S. E. Rep. 301.

<sup>6</sup> MacFarlane v. MacFarlane, 82 Hun, 238, 31 N. Y. S. 272; Baldes v. Henniges, 7 Kulp, 143.

<sup>7</sup> Holton v. Guinn, 65 Fed. Rep. 450.

<sup>8</sup> 3 Pom. Eq. Jur. § 1388; Bisp. Eq. § 489; McCall v. Carpenter, 18 How. 297; Fuller v. Montague, 59 Fed. Rep. 212; Howard v. Howard, 21 D. C. 224; Mudd v. Grinder, 1 App. D. C. 418. Alabama: McQueen v. Turner, 91 Ala. 273, 8 So.

The rule making possession, either actual or constructive, essential to the maintenance of an action for partition, prevents an action for partition being made the substitute for an action of ejectment, or for an action to establish the title of adverse claimants to the property.<sup>1</sup>

A tenant in common who has been actually ousted cannot maintain a petition for partition, though, if he has not been actually ousted, but has elected to consider himself disseised for the sake of maintaining a writ of entry against his cotenant, he may maintain a proceeding for partition.<sup>2</sup>

1964. In equity, as at law, a pending lease for years is no

Rep. 863; *Sellers v. Friedman*, 100 Ala. 499. But in this State a court of equity has concurrent jurisdiction with a court of law with respect to the legal title. *Gore v. Dickinson*, 98 Ala. 363, 11 So. Rep. 743. As to title contested by stranger, see *Bullock v. Knox*, 96 Ala. 195, 11 So. Rep. 339. **Arkansas**: *Criscoe v. Ham-buck*, 47 Ark. 235, 1 S. W. Rep. 150; *Moore v. Gordon*, 44 Ark. 334. **Florida**: *Rivas v. Summers*, 33 Fla. 539, 15 So. Rep. 319; *Mattair v. Payne*, 15 Fla. 682. **Illinois**: *Walker v. Laffin*, 26 Ill. 472. **Massachusetts**: *Rickard v. Rickard*, 13 Pick. 251. **Michigan**: *Hoffman v. Beard*, 22 Mich. 59; *Fenton v. Steere*, 76 Mich. 405, 43 N. W. Rep. 437. **Mississippi**: *Beebe v. Louisville, N. O. & C. R. Co.* 39 Fed. Rep. 481; *Shearer v. Winston*, 33 Miss. 149. But under Code 1880, § 2576, the court has jurisdiction to try the title. *Cloughton v. Cloughton*, 70 Miss. 384, 12 So. Rep. 340. **Missouri**: *Rozier v. Johnson*, 35 Mo. 326; *Holloway v. Holloway*, 97 Mo. 628, 11 S. W. Rep. 233. **Nebraska**: *Seymour v. Ricketts*, 21 Neb. 240, 31 N. W. Rep. 781. **New Jersey**: *Stockbower v. Kanouse (N. J. L.)*, 26 Atl. Rep. 333, citing *Manners v. Manners*, 2 N. J. Eq. 384, 35 Am. Dec. 512; *Obert v. Obert*, 10 N. J. Eq. 98, 12 N. J. Eq. 423; *Lucas v. King*, 10 N. J. Eq. 277; *Palmer v. Casperson*, 17 N. J. Eq. 204; *Dewitt v. Ackerman*, 17 N. J. Eq. 215; *Hay v. Estell*, 18 N. J. Eq. 251; *Riverview Cemetery Co. v. Turner*, 24 N. J. Eq. 18;

*Hoyt v. Tuers*, 35 N. J. Eq. 360; *Polhemus v. Emson*, 29 N. J. Eq. 583; *Read v. Huff*, 40 N. J. Eq. 229; *Vreeland v. Vreeland*, 49 N. J. Eq. 322, 24 Atl. Rep. 551. The case of *Forsyth v. Forsyth*, 46 N. J. Eq. 400, 19 Atl. Rep. 119, affirmed 47 N. J. Eq. 327, 21 Atl. Rep. 754, is not to be considered as indicating the abandonment or relaxation of the rule forbidding a court of equity to settle, in a suit for partition, a legal title. **New York**: *Cuthbert v. Ives*, 65 Hun, 625, 20 N. Y. Supp. 469; *Van Schuyver v. Mulford*, 59 N. Y. 426; *Wilkin v. Wilkin*, 1 Johns. Ch. 111; *Phelps v. Green*, 3 Johns. Ch. 302; *Coxe v. Smith*, 4 Johns. Ch. 271. **Ohio**: *Harman v. Kelley*, 14 Ohio, 502, 45 Am. Dec. 552. **Oregon**: *Windsor v. Simpkins*, 19 Oreg. 117, 23 Pac. Rep. 669. **Pennsylvania**: *Hayes' Appeal*, 123 Pa. St. 110, 16 Atl. Rep. 600; *Welch's Appeal*, 126 Pa. St. 297, 17 Atl. Rep. 623. **South Carolina**: *Capell v. Moses*, 36 S. C. 559, 15 S. E. Rep. 711; *Carrigan v. Evans*, 31 S. C. 262, 9 S. E. Rep. 852. **Texas**: *Peterson v. Fowler*, 73 Tex. 524, 11 S. W. Rep. 534. **Washington**: Under Code of Procedure, § 583, in a suit in equity for partition, the court may determine the disputed title. *Hill v. Young*, 7 Wash. 33, 34 Pac. Rep. 144. **Wisconsin**: *Hardy v. Mills*, 35 Wis. 141; *Deery v. McClintock*, 31 Wis. 195, 202.

<sup>1</sup> *Haskell v. Queen*, 66 Hun, 634, 21 N. Y. Supp. 357.

<sup>2</sup> *Fisher v. Dewerson*, 3 Met. 544.

obstacle to partition between owners of the fee.<sup>1</sup> The partition, however, must be made subject to the lease.<sup>2</sup>

The fact that land is subject to a perpetual mining lease is no objection to a partition suit between the co-owners, subject to the rights of the tenant. "In time, by the sale and descent of undivided interests, the owners would become so numerous, and the interests so small, that the estate would be almost, if not wholly, valueless. . . . The partition in kind or sale under partition proceedings of these lands subject to the mining right, instead of being detrimental, would be beneficial, to the owner of that right, for it is more difficult and unsatisfactory to deal with many than one."<sup>3</sup>

1965. As a general rule, partition will not be made of a part only of an entire estate. The result of entertaining a suit for partition in such case would be the splitting up of a cause of action in its nature entire and indivisible.<sup>4</sup> But if the lands consist of several distinct tracts held under the same conveyance, there may be partition of one distinct tract in case there is any obstacle to a partition of the others.<sup>5</sup> But, aside from cases in which the circumstances are peculiar, the court will not order a partition of a part only of an estate held in common. A partition of a part of the estate will not be entertained against the objection of any person interested. It does not follow, however, that the court will not, after a partition has been made which does not include all the land that should have been included, in a new proceeding do that which should have been done in the original suit. "Ordinarily, a petition of this kind should include the entire estate held in common; but it does not follow, if, by mistake or

<sup>1</sup> Willard v. Willard, 145 U. S. 116, 121, per Gray, J., citing *Wilkinson v. Joberns*, L. R. 16 Eq. 14; *Hunt v. Hazelton*, 5 N. H. 216; *Woodworth v. Campbell*, 5 Paige, 518; *Thruston v. Minke*, 32 Md. 571; *Cook v. Webb*, 19 Minn. 167. "The decision in *Hunnewell v. Taylor*, 6 Cush. 472, cited by the appellant, was governed by an express statute of Massachusetts authorizing a petition for partition 'by any person who has an estate in possession, but not by one who has only a remainder or reversion,' which was presently modified by an enactment that partition

might be had notwithstanding the existence of a lease of a whole or part of the estate." Pub. Stats. ch. 178, §§ 3, 68.

<sup>2</sup> *Woodworth v. Campbell*, 5 Paige, 518.

<sup>3</sup> *Haeussler v. Missouri Iron Co.* 110 Mo. 188, 19 S. W. Rep. 75.

<sup>4</sup> *Barnes v. Lynch*, 151 Mass. 510, 24 N. E. Rep. 783; *Bigelow v. Littlefield*, 52 Me. 24, 83 Am. Dec. 484; *Blossom v. Brightman*, 21 Pick. 285; *Marmaduke v. Tennant*, 4 B. Mon. 210; *Jackson v. Myers*, 14 Johns. 354.

<sup>5</sup> *Wilkinson v. Stuart*, 74 Ala. 198.

by the consent of all the tenants, a partition has been made of a portion of their estate, whether by order of the court or otherwise, that the court is powerless to divide the remainder on a petition of one or more of the tenants in common. It would be a harsh rule, that, after a division of a part of an estate, partition of the remainder could never be ordered by the court. When parties have acted innocently and fairly in making or obtaining a division which does not cover all their estate, there is no reason why the law should not aid them when they ask for a division of the remainder."<sup>1</sup>

Where the estate of which partition is sought consists of several parcels, but it appears that the title to one of the parcels is in dispute, so that partition of that cannot be made, the proceedings cannot be suspended as to that parcel, and partition had of the residue.<sup>2</sup>

In case one tenant in common has mortgaged his undivided interest in one of several separate parcels, such parcel may be treated as a separate estate, and a separate partition may be made of that.<sup>3</sup>

A conveyance by one cotenant of a specific part of the estate does not affect the right of the other cotenants to a partition, for such conveyance is void as to them.<sup>4</sup>

1966. As in other proceedings affecting the title to lands, all parties having an interest in them must be made parties to the suit.<sup>5</sup> If one having such interest is not made a party to the proceedings, or is not served with notice of the same, he will not be bound or estopped by any judgment rendered therein.

Though a statute provides that partition may be made though some of the cotenants are infants, a court of equity is not com-

<sup>1</sup> *Barnes v. Boardman*, 157 Mass. 479, 480, 32 N. E. Rep. 670, per Knowlton, J.

<sup>2</sup> *In re Adelman's Est.* 6 Kulp, 382.

<sup>3</sup> *Green v. Arnold*, 11 R. I. 364, 23 Am. Rep. 466; *Butler v. Roys*, 25 Mich. 53, 12 Am. Rep. 218; *Freeman, Cotency*, §§ 201-204.

<sup>4</sup> *Gore v. Dickinson*, 98 Ala. 363, 11 So. Rep. 743; *Barnes v. Boardman*, 157 Mass. 479, 32 N. E. Rep. 670.

<sup>5</sup> *Jones v. Napier*, 93 Ga. 582, 20 S. E.

Rep. 41; *Childs v. Hayman*, 72 Ga. 791; *Campbell v. Stokes*, 142 N. Y. 23, 36 N. E. Rep. 811, 66 Hun, 381; *Moore v. Appleby*, 108 N. Y. 237, 15 N. E. Rep. 377; *Lilly v. Menke*, 126 Mo. 190, 28 S. W. Rep. 643, 994; *Hiles v. Rule*, 121 Mo. 248, 25 S. W. Rep. 959; *Curtis v. Cockrell* (Tex. Civ. App.), 28 S. W. Rep. 129; *Ellis v. Stewart* (Tex. Civ. App.), 24 S. W. Rep. 585; *Holloway v. McIlhenny Co.* 77 Tex. 657, 14 S. W. Rep. 240.

pelled to decree partition upon a suit of minors where such decree is not for their interest.<sup>1</sup>

Where it is alleged and proven in partition proceedings that the United States has an interest in the land, there can be no partition unless the United States consents to become a party.<sup>2</sup>

An administrator, though the estate be insolvent, has no such seisin of the land of the deceased as to entitle him to be made a party.<sup>3</sup>

1967. A creditor who has no lien upon the land is not a proper party to the suit, and it will be dismissed as to such creditor.<sup>4</sup> But a creditor who has a lien either upon the entire property or upon a specific part of it should be made a party.<sup>5</sup> A mortgagee of the interest of one tenant in common must be made a party to a suit for partition of the common land, or he will not be bound by the decree, unless he voluntarily ratifies the partition made.<sup>6</sup>

A creditor holding an absolute deed from one tenant in common as security may perhaps under some circumstances maintain a suit for partition; but without good cause, a partition in opposition to the will of the debtor should be denied.<sup>7</sup>

1968. The grantee of a specific part of the common land from one tenant is a proper party to such a suit because of his interest in having the partition so directed as to protect him, so far as that may be done without prejudice to the rights of the other tenants in common.<sup>8</sup> The claim of such grantee constitutes

<sup>1</sup> *Ames v. Ames*, 148 Ill. 321, 36 N. E. Rep. 110.

<sup>2</sup> *Ferris v. Montgomery Land & Imp. Co.* 94 Ala. 557, 10 So. Rep. 607.

<sup>3</sup> *Throckmorton v. Pence*, 121 Mo. 50, 25 S. W. Rep. 843; *Garrison v. Cox*, 99 N. C. 478; *Wood v. Bryant*, 68 Miss. 198, 8 So. Rep. 518; *Speer v. Speer*, 14 N. J. Eq. 240; *Stevenson v. Anderson*, 87 Ala. 228; *Marshall v. Marshall*, 86 Ala. 383, 5 So. Rep. 475; *Stern v. Cox*, 16 Md. 533.

<sup>4</sup> *Agar v. Fairfax*, 17 Ves. 533; *Stevens v. McCormick*, 90 Va. 735, 19 S. E. Rep. 742; *Wotten v. Copeland*, 7 Johns. Ch. 140.

<sup>5</sup> *Townshend v. O'Bogert*, 12 N. Y. Supp. 461, 20 Civ. Pro. Rep. 262.

<sup>6</sup> *Bradley v. Fuller*, 23 Pick. 1; *Munroe v. Luke*, 19 Pick. 40; *Colton v. Smith*,

11 Pick. 311, 22 Am. Dec. 375; *Loomis v. Riley*, 24 Ill. 307.

*Contra*, *Stewart v. Allegheny Nat. Bank*, 101 Pa. St. 342; *Long's App.* 77 Pa. St. 151; *Speer v. Speer*, 14 N. J. Eq. 240, 251; *Low v. Holmes*, 17 N. J. Eq. 148.

<sup>7</sup> *Welch v. Agar*, 84 Ga. 583, 587, 11 S. E. Rep. 149.

<sup>8</sup> *Ferris v. Montgomery Land & Imp. Co.* 94 Ala. 557, 10 So. Rep. 607; *Gates v. Salmon*, 35 Cal. 576, 588, 95 Am. Dec. 139, 46 Cal. 361; *Sutter v. San Francisco*, 36 Cal. 112; *Harlan v. Langham*, 69 Pa. St. 235; *Whitton v. Whitton*, 38 N. H. 127, 75 Am. Dec. 163; *Batterton v. Chiles*, 12 B. Mon. 348, 54 Am. Dec. 539; *Puckett v. McDaniel* (Tex. Civ. App.), 28 S. W. Rep. 360.



an equity which is involved in a partition of the original tract, and may be recognized and brought to the attention of the court in an original bill filed by others interested in the partition of the common property, or the grantee may propound it in a cross-bill.<sup>1</sup>

But the grantor of such specific part must be made a party. The suit cannot be maintained by making the purchaser of a specific parcel a party without such grantor.<sup>2</sup> The purchaser of such parcel is not entitled to be made a party.<sup>3</sup>

But a suit for partition may be maintained without making a purchaser of a part by metes and bounds from one cotenant a party. The others, however, by suing for a partition of the remainder without making the purchaser a party, and by charging him with the proceeds of the sale, ratify the sale and the purchaser's title.<sup>4</sup>

A person to whom one cotenant has attempted to convey an easement is not a necessary party. Neither is a former cotenant who in a conveyance of his interest has attempted to create an easement by a reservation to himself. One cotenant cannot create an easement in the common property in another, nor can he in a conveyance of his interest create an easement in himself by reservation.<sup>5</sup>

**1969.** The wife of a tenant in common is not a necessary party to a suit for partition, since her inchoate dower rights are subject to the liability of her husband's seisin to be lost by partition sale.<sup>6</sup>

In partition between married women, it would seem that, under the statutes relating to the property of married women, their husbands would not be necessary parties, though they may be proper parties under the statutes of some States.<sup>7</sup>

**1970.** At common law and in equity, estates in remainder or reversion cannot be divided by compulsory partition ;<sup>8</sup> but

<sup>1</sup> *Ferris v. Montgomery Land & Imp. Co.* 94 Ala. 557, 10 So. Rep. 607.

<sup>2</sup> *Barnes v. Lynch*, 151 Mass. 510.

<sup>3</sup> *Broughton v. Howe*, 6 Vt. 266.

<sup>4</sup> *New York & T. Land Co. v. Hyland* (Tex. Civ. App.), 28 S. W. Rep. 206 ; *Arnold v. Cauble*, 49 Tex. 527 ; *Camoron v. Thurmond*, 56 Tex. 22 ; *Battle v. John*, 49 Tex. 202.

<sup>5</sup> *Pfeiffer v. University*, 74 Cal. 156, 15 Pac. Rep. 622.

<sup>6</sup> *Davis v. Lang*, 153 Ill. 175, 38 N. E. Rep. 635 ; *Hoxsie v. Ellis*, 4 R. I. 123 ; *Motley v. Blake*, 12 Mass. 280 ; *Doremus v. Doremus*, 66 Hun, 125, 20 N. Y. Supp. 906 ; *Matthews v. Matthews*, 1 Edw. Ch. 567.

<sup>7</sup> *Bower v. Bowen*, 139 Ind. 31, 38 N. E. Rep. 326 ; *Marshall v. Marshall*, 86 Ala. 383, 5 So. Rep. 475.

<sup>8</sup> *Evans v. Bagshaw*, L. R. 8 Eq. 469, affirmed 5 L. R. Ch. 340 ; *Johnson v.*

in some States partition may be had in such cases by virtue of statutory provisions.<sup>1</sup>

1971. A decree of partition should not be made until all the defendants have answered, or a decree *pro confesso* has been regularly entered against those who have failed to answer.<sup>2</sup>

While partition of decedent's real estate may be commenced before it is determined that the personal estate is sufficient to pay the debts, the decree cannot be rendered till such determination.<sup>3</sup>

1972. Owelty of partition constitutes a first lien on the purpart of the former tenant in common, and is entitled to the priority over a mortgage of his undivided interest given by him before partition.<sup>4</sup> "Presumably," says Mr. Justice Mercur,<sup>5</sup> "the tenant thus taking acquires an estate in land of a value as much greater than his previous estate as the amount of the owelty is, charged thereon. Hence, although a previous lien on an undivided interest may in form be displaced by the lien of the owelty in partition, yet the effect is more imaginary than real. It will practically bind land of value equal to that on which it was a lien before partition. The partition has added to the value of the estate of the tenant a sum equal to the amount of the owelty charged thereon. Conceding, however, that a second lien is not as desirable as a first one, yet, when a person obtains a lien against the estate of a tenant in common, he assumes that risk.

Johnson, 7 Allen, 196, 83 Am. Dec. 676; Baldwin v. Aldrich, 33 Vt. 526, 80 Am. Dec. 695; Brown v. Brown, 8 N. H. 93; Wilkinson v. Stuart, 74 Ala. 198; McQueen v. Turner, 91 Ala. 273, 8 So. Rep. 863; Stevens v. Enders, 13 N. J. L. 271; Wood v. Sugg, 91 N. C. 93, 49 Am. Rep. 639; Metcalfe v. Miller, 96 Mich. 459, 56 N. W. Rep. 16; Merritt v. Hughes, 36 W. Va. 356, 15 S. E. Rep. 56; Ziegler v. Grim, 6 Watts, 106.

<sup>1</sup> Howell v. Mills, 56 N. Y. 226; Jenkins v. Fahey, 73 N. Y. 355; Smith v. Gaines, 38 N. J. Eq. 65; Sikemeier v. Galvin, 124 Mo. 367, 27 S. W. Rep. 551; Reinders v. Koppelman, 68 Mo. 482, 30 Am. Rep. 802; Preston v. Brant, 96 Mo. 552; Bierce v. James, 87 Tenn. 538; Smalley v. Isaacson, 40 Minn. 450, 42 N. W. Rep. 352; Hilliard v. Scoville, 52

Ill. 449; Bice v. Nixon, 34 W. Va. 107, 11 S. E. Rep. 1004.

<sup>2</sup> Benner v. Street, 32 Fla. 274, 13 So. Rep. 407; Street v. Benner, 20 Fla. 700.

<sup>3</sup> Clarity v. Sheridan (Iowa), 59 N. W. Rep. 52.

<sup>4</sup> McCandless' Appeal, 98 Pa. St. 489, 494; Allegheny National Bank's Appeal, 99 Pa. St. 148; Wright v. Vickers, 81 Pa. St. 122; Baltimore & O. R. Co. v. Trimble, 51 Md. 99; Cox v. McMullin, 14 Gratt. 82. In case an equal partition of land cannot otherwise be made, courts of equity may order the payment of a sum of money by the party to whom the most valuable part of the property is assigned. The sum so directed to be paid to make the partition equal is called owelty. Cooter v. Dearborn, 115 Ill. 509, 4 N. E. Rep. 388.

<sup>5</sup> McCandless' Appeal, 98 Pa. St. 489.

He knows the estate is subject to partition and all its incidents. He cannot impair any of the rights of the cotenants. Their rights are superior to the rights of a lien creditor of one tenant. Such a lien will not deprive them of any right incident to a partition that they might otherwise have enjoyed." Such a lien is in the nature of a vendor's lien. It accrues as soon as partition is made final by decree, and may be enforced by proceedings in equity.<sup>1</sup>

1973. Where partition has been made by law, each partitioner becomes a warrantor to all the others, to the extent of his share, so long as the privity of estate continues between them.<sup>2</sup> If a tenant is evicted from the land allotted to him, he may have recourse to the other tenants for compensation. But his right to compensation does not extend to a purchaser from the tenant, because, as Professor Washburn says, "by such alienation the privity of estate between them and the holder of his share is destroyed."<sup>3</sup>

### III. *Equities to be considered.*

1974. A suit for partition is either a proceeding in equity or one of an equitable nature under the codes and statutes, so that the court will undertake to do what is "equitable, just, and proper."<sup>4</sup> The facts that entitle a party to equitable relief should be specially pleaded.<sup>5</sup>

1975. There is much authority for the doctrine that each tenant in common has an equitable lien upon the share of his cotenant, until all equities relating to the tenancy are adjusted; or, in other words, while each tenant is vested with the title to his own undivided interest in the common estate, he holds a contingent interest in the entire estate until partition is made and accounts are settled. "Thus," as was said in a recent case in Missouri,<sup>6</sup> "if one tenant has made necessary and lasting improvements on the common estate, or has paid the taxes legally assessed

<sup>1</sup> Baltimore & O. R. Co. v. Trimble, 51 Md. 99; Snively's Appeal (Pa.), 18 Atl. Rep. 124; Burnside v. Watkins, 30 S. C. 459, 9 S. E. Rep. 518.

<sup>2</sup> 1 Washb. Real Prop. \*432.

<sup>3</sup> Ketchin v. Patrick, 32 S. C. 398, 11 S. E. Rep. 301; Morris v. Harris, 9 Gill, 19; Picot v. Page, 26 Mo. 398; Rector v. Waugh, 17 Mo. 13, 57 Am. Dec. 251;

Weiser v. Weiser, 5 Watts, 279, 30 Am. Dec. 313.

<sup>4</sup> Emeric v. Alvarado, 90 Cal. 444, 457, 27 Pac. Rep. 356, per McFarland, J.

<sup>5</sup> Wiedner v. Hell (Tex. Civ. App.), 26 S. W. Rep. 781.

<sup>6</sup> Beck v. Kallmeyer, 42 Mo. App. 564, 570, per Biggs, J.

against it, he will hold the title of his cotenants until he is reimbursed. Or, if the property has passed by descent, and one of the heirs has received advancements, he must account for the advancements, and the other heirs will hold his title until their respective interests can be equalized in a partition proceeding. Or, as in this case, if one tenant collects more than his share of the rents, his cotenant will be entitled to demand and receive from him his portion of the rents, and he will be seised of the entire title until this equitable claim is settled. This is substantially the doctrine of the Supreme Courts of the States of Indiana, Pennsylvania, and New York.”<sup>1</sup>

It is accordingly held that if one tenant in common mortgages his undivided interest, and collects the rents accruing from the property, the lien of the coparcener for his share of these rents takes priority over the mortgage, and the rule applies as to rents collected either before the mortgage, or after the mortgage and prior to its foreclosure; nor is it affected by the ignorance of the mortgagee of the fact that the mortgagor has collected the rents.<sup>2</sup>

1976. A deed by one tenant in common of a part of the land to a stranger does not constitute a partition. Such a deed “neither confers nor takes away from the other any right; it matters not what may be the form of the instrument by which the intent to partition is evidenced. The very basis for partition is co-ownership, and when this does not exist the instrument which attempts partition is simply void.”<sup>3</sup> The purchaser of a specific portion of the common property acquires an equity to have such portion, if it does not exceed his grantor’s share in the property allotted to him on a partition of the whole property. “So far as the grantor’s cotenants are concerned, the extent of the operation of his conveyance was to transfer to his grantee his undivided interest in the particular parcel therein described. Such a conveyance is ineffectual to prejudice or abridge the rights of the cotenants who do not join in it; for each tenant in common has an undivided interest in the whole tract and in every

<sup>1</sup> *Peck v. Williams*, 113 Ind. 256, 15 N. E. Rep. 270; *Foltz v. Wert*, 103 Ind. 404, 2 N. E. Rep. 950; *McCandless’ Appeal*, 98 Pa. St. 489; *Scott v. Guernsey*, 48 N. Y. 106.

<sup>2</sup> *Beck v. Kallmeyer*, 42 Mo. App. 563.

<sup>3</sup> *Davis v. Agnew*, 67 Tex. 206, 2 S. W. Rep. 43, 376, per Stayton, J.; *Smith v. Powell*, 5 Tex. Civ. App. 373, 23 S. W. Rep. 1109; *Warthen v. Siefert*, 139 Ind. 233, 38 N. E. Rep. 464; *Dawson v. Lawrence*, 13 Ohio, 543, 546, 42 Am. Dec. 210.

part of it, and the right of one of them in any part of the property cannot be impaired by the act of another. The conveyance does not, so far as the cotenants who did not join in it are concerned, sever the special tract therein described from the general tract, to which the tenancy in common extends. They still have the same interest in the part of the property described in the conveyance as they had before it was executed. They are still entitled to a partition, and may have their shares in the property set off to them in severalty, just as if no conveyance had been made. Their rights are not increased or diminished. The grantee is simply clothed with the rights of his grantor in the special tract described in the conveyance.”<sup>1</sup>

1977. Whether one cotenant can convey his share of a specific part of a larger estate is a question upon which there is some conflict of authority. But where several distinct parcels of land are held in common, each cotenant may convey his interest in a separate parcel. And where the cotenants by agreement convert a single tract of land into smaller tracts, as by laying it off into town lots, they become cotenants of each lot, and each may convey his interest therein.<sup>2</sup>

1978. A purchaser from one tenant in common acquires an undivided interest with the other cotenants, though the conveyance purports to pass the entire interest and title to a portion of the land described by metes and bounds, or the entire estate in the common land. A conveyance of a specific part of the common land is not void. The grantee under it takes such share as would be equal to the undivided interest which the granting cotenant had in such specific tract, and upon partition the court will set apart a specific tract to the share of the cotenant who has undertaken to convey the title in fee to such tract in severalty, so that the grantee may have what is justly his, when this can be done without material injury to the rights and interests of the other cotenants.<sup>3</sup>

<sup>1</sup> *Ferris v. Montgomery Land & Imp. Co.* 94 Ala. 557, 10 So. Rep. 607, per Walker, J. And, to like effect, *Emeric v. Alvarado*, 90 Cal. 444, 27 Pac. Rep. 356; *Nichols v. Smith*, 22 Pick. 316; *Holcombe v. Coryell*, 10 N. J. Eq. 392; *Campau v. Godfrey*, 18 Mich. 27, 100 Am. Dec. 133.

<sup>2</sup> *Butler v. Roys*, 25 Mich. 53, 12 Am. Rep. 218; *Shepherd v. Jernigan*, 51 Ark. 275, 10 S. W. Rep. 765; *Markoe v. Wake-man*, 107 Ill. 251, 262; *Barnhart v. Campbell*, 50 Mo. 597; *Primm v. Walker*, 38 Mo. 94; *Green v. Arnold*, 11 R. I. 364, 23 Am. Rep. 466.

<sup>3</sup> *Emeric v. Alvarado*, 90 Cal. 444, 27

1979. The purchaser of a specific part of the common land from one cotenant has an equitable right to have such land set apart to him in partition, if this can be done without prejudice to the interests of the other cotenants.<sup>1</sup> "The tenants in common who did not join in the conveyance do not acquire, in consequence thereof, any greater rights in the common property, or in any part of it, than they had before. They have no more right to demand that the particular tract described in the conveyance, or any part of it, be allotted to them on a partition, than they would have had if the conveyance had not been made."<sup>2</sup>

1980. A mortgagee of a specific part of the common property described by metes and bounds has the same equity to require that such part shall be allotted as the share of his mortgagor, provided this can be done without prejudice to the other cotenants.<sup>3</sup>

1981. When one tenant in common has made repairs or improvements upon the common property, while he is not entitled to compensation for such improvements, yet, when partition comes to be made, it will be so made as to allot to the improving tenant the part which he has improved, if the same can be done without prejudice to the interests of his cotenants. Where the parcel improved does not exceed the tenant's share of the whole tract, the generally if not universally recognized rule in courts of equity is to have allotted to him, in a partition, the

Pac. Rep. 356; *Wells v. Heddenberg* (Tex. Civ. App.), 30 S. W. Rep. 702.

<sup>1</sup> *Alabama*: *Ferris v. Montgomery Land & Imp. Co.* 94 Ala. 557, 10 So. Rep. 607; *Ward v. Corbett*, 72 Ala. 438. *California*: *McHarry v. Stewart* (Cal.), 35 Pac. Rep. 141; *Emeric v. Alvarado*, 90 Cal. 444, 27 Pac. Rep. 356. *Georgia*: *McRea v. Dutton*, 95 Ga. 267, 22 S. E. Rep. 149. *Maryland*: *Gittings v. Worthington*, 67 Md. 139, 146, 9 Atl. Rep. 228. *Michigan*: *Benedict v. Torrent*, 83 Mich. 181, 47 N. W. Rep. 129. *New York*: *Teal v. Woodworth*, 3 Paige Ch. 470; *St. Felix v. Rankin*, 3 Edw. Ch. 323. *Rhode Island*: *Horgan v. Bickerton*, 17 R. I. 483, 24 Atl. Rep. 772; *Crocker v. Tiffany*, 9 R. I. 505. *South Carolina*: *Garret v. Weinberg*, 43 S. C. 36, 20 S. E. Rep. 756; *Young v. Edwards*, 33 S. C. 404, 11 S.

E. Rep. 1066; *Charleston, C. & C. R. Co. v. Leech*, 33 S. C. 175, 11 S. E. Rep. 631. *Texas*: *New York & T. Land Co. v. Hyland* (Tex. Civ. App.), 28 S. W. Rep. 206; *McAllen v. Raphael* (Tex. Civ. App.), 32 S. W. Rep. 449; *Wells v. Heddenberg* (Tex. Civ. App.), 30 S. W. Rep. 702, 705; *Rutherford v. Stamper*, 60 Tex. 447; *Furrh v. Winston*, 66 Tex. 521, 1 S. W. Rep. 527; *Arnold v. Cauble*, 49 Tex. 527; *Camoron v. Thurmond*, 56 Tex. 22; *Massie v. Yates* (Tex. Civ. App.), 29 S. W. Rep. 1132. *West Virginia*: *Bogges v. Meredith*, 16 W. Va. 1, 29; *Worthington v. Staunton*, 16 W. Va. 208.

<sup>2</sup> *Ferris v. Montgomery Land & Imp. Co.* 94 Ala. 557, 10 So. Rep. 607.

<sup>3</sup> *Kennedy v. Boykin*, 35 S. C. 61, 14 S. E. Rep. 809.

parcel which has been enhanced in value by his expenditures and industry.<sup>1</sup> "When the equitable claim of the improving tenant can be fully recognized and protected by awarding him the part which he has improved, the question of requiring the other cotenants to make compensation for the improvements is not involved. They get their full shares of the property without any charge or burden upon them because of the improvements. The equity of a cotenant to have the part of the common property which he has improved allotted to him on a partition is not founded upon the idea that he made the improvements with the consent, express or implied, of his cotenants."<sup>2</sup>

**1982.** According to some authorities, compensation for improvements will be allowed only when the cotenant, at the time of making them, believed himself to be the sole owner

- <sup>1</sup> McDonald v. Donaldson, 47 Fed. Rep. 765, 770. **Alabama**: Donnor v. Quartermas, 90 Ala. 164, 8 So. Rep. 715; Bailey v. Campbell, 82 Ala. 342, 2 So. Rep. 646; Jackson v. King, 82 Ala. 432, 3 So. Rep. 232; Ferris v. Montgomery Land & Imp. Co. 94 Ala. 557, 10 So. Rep. 607; Wilkinson v. Stuart, 74 Ala. 198; Sanders v. Robertson, 57 Ala. 465. **California**: Seale v. Soto, 35 Cal. 102; Almeric v. Alvarado, 90 Cal. 447, 27 Pac. Rep. 356. **Illinois**: Cooter v. Dearborn, 115 Ill. 509, 4 N. E. Rep. 388; Mahoney v. Mahoney, 65 Ill. 406; Dean v. O'Meara, 47 Ill. 120; Kurtz v. Hibner, 54 Ill. 514; Eury v. Merrill, 42 Ill. App. 193. **Indiana**: Parish v. Camplin, 139 Ind. 1, 37 N. E. Rep. 607; Martindale v. Alexander, 26 Ind. 104, 89 Am. Dec. 458; Carver v. Coffman, 109 Ind. 547, 10 N. E. Rep. 567; Elrod v. Keller, 89 Ind. 382. **Kansas**: Sarbach v. Newell, 28 Kans. 642. **Kentucky**: Patrick v. Marshall, 2 Bibb, 41, 4 Am. Dec. 670; Nelson v. Clay, 7 J. J. Marsh, 138, 23 Am. Dec. 387; Armstrong v. Bryant (Ky.), 16 S. W. Rep. 463. **Maryland**: Gittings v. Worthington, 67 Md. 139, 9 Atl. Rep. 228. **Massachusetts**: Crafts v. Crafts, 13 Gray, 360. **Mississippi**: Wilson v. Duncan, 44 Miss. 642. **New Jersey**: Hall v. Piddock, 21 N. J. Eq. 311; Obert v. Obert, 5 N. J. Eq. 397; Booraem v. Wells, 19 N. J. Eq. 87. **New York**: Ford v. Knapp, 102 N. Y. 135, 6 N. E. Rep. 283, 55 Am. Rep. 782; Stephenson v. Cotter, 5 N. Y. Supp. 749; Town v. Needham, 3 Paige, 545, 24 Am. Dec. 246; St. Felix v. Rankin, 3 Edw. Ch. 323; Conklin v. Conklin, 3 Sandf. Ch. 64; Green v. Putnam, 1 Barb. 500. **Ohio**: McClaskey v. Barr, 62 Fed. Rep. 209. **North Carolina**: Cox v. Ward, 107 N. C. 507, 12 S. E. Rep. 379; Pope v. Whitehead, 68 N. C. 191. **South Carolina**: Scaife v. Thomson, 15 S. C. 337; Charleston, C. & C. R. Co. v. Leech, 39 S. C. 446, 17 S. E. Rep. 994, per McIver, C. J. **Tennessee**: Reeves v. Reeves, 11 Heisk. 669. **Texas**: Tevis v. Collier, 84 Tex. 638, 19 S. W. Rep. 801; Thompson v. Jones, 77 Tex. 626, 14 S. W. Rep. 222; Curtis v. Poland, 66 Tex. 511, 2 S. W. Rep. 39; Taylor v. Taylor (Tex. Civ. App.), 26 S. W. Rep. 889; Lewis v. Sellick, 69 Tex. 379, 7 S. W. Rep. 673; McLane v. Canales (Tex. Civ. App.), 25 S. W. Rep. 29. **Washington**: Blackwell v. McLean, 9 Wash. 301, 37 Pac. Rep. 317. **West Virginia**: Dodson v. Hays, 29 W. Va. 577, 2 S. E. Rep. 415; Ward v. Ward (W. Va.), 21 S. E. Rep. 746, 747.
- <sup>2</sup> Ferris v. Montgomery Land & Imp. Co. 94 Ala. 557, 10 So. Rep. 607.

of the land. But when one, under a mistaken belief that he is the sole owner of land, makes valuable improvements, and it is necessary to sell the land, in partition proceedings, the part owner who has made such improvements is entitled to an allowance therefor,<sup>1</sup> though there is some conflict in the authorities upon the question of allowing a cotenant, in partition, to recover compensation for improvements made by him without the assent of his cotenants.

Some cases hold, and it is the more general rule, that in any case the cotenant is entitled to receive the proportionate share of the cost of such improvements from his cotenant.<sup>2</sup>

1983. A purchaser of a part of the common property who has made improvements thereon is entitled, in partition, to the same equities that his grantor would have been entitled to had he made the improvements. "We have seen that if one tenant in common deals in good faith with a part of the common property as if he were the sole owner thereof, by erecting improvements on his own account, he will be allowed, on a partition, to retain the improved part, if that does not involve any prejudice to the rights of his co-owners. If the improvements are made, not by the original tenant in common, but by his grantee, we can perceive no good reason why the latter should not have the benefit of the same measure of protection which a court of equity would have afforded to his grantor if no conveyance had been made."<sup>3</sup>

1984. A cotenant claiming, in partition, allowance for improvements made by him, must state in the pleadings the grounds of his claim, and must establish it by evidence,<sup>4</sup> though it has been held that a defendant may recover for improvements under the general prayer for relief without filing a cross-bill.<sup>5</sup>

1985. When a tenant in common has undertaken to place a burden upon a particular part of the property, that part should be assigned to such tenant in partition, provided it is

<sup>1</sup> Killmer v. Wuchner, 79 Iowa, 722, 45 N. W. Rep. 299; Ford v. Knapp, 102 N. Y. 135, 6 N. E. Rep. 283, 55 Am. Rep. 782.

<sup>2</sup> Pierson v. Conley, 95 Mich. 619, 55 N. W. Rep. 387.

<sup>3</sup> Ferris v. Montgomery Land & Imp. Co. 94 Ala. 557, 10 So. Rep. 607.

<sup>4</sup> Freeman v. Preston (Tex. Civ. App.), 29 S. W. Rep. 495; Prather v. Prather (Ind.), 39 N. E. Rep. 310; Wainman v. Hampton, 110 N. Y. 429, 18 N. E. Rep. 234.

<sup>5</sup> McClaskey v. Barr, 62 Fed. Rep. 209.



practicable to do so without prejudice to the rights and interests of the other cotenants.<sup>1</sup>

**1986.** In a suit for partition the defendant may require the plaintiff to account for rents and profits received by him, or waste committed or suffered by him, and may have an allowance made therefor.<sup>2</sup> It was so held in a case where it appeared that the plaintiff, in a suit for partition of lands on which there was a stone quarry, had collected rents and had quarried and sold stone therefrom.<sup>3</sup>

When a tenant in possession asks for an allowance for improvements made by him, and it appears that he has received all the rents and profits while in possession, this fact should be taken into account in making the adjustment. It would be inequitable to hold that such tenant can recover the full value of the improvements made, without deduction for the rents received which equitably belong to his cotenant.<sup>4</sup>

In an action for a partition, an allegation that defendant has been in possession of the property, and has received the rents and profits thereof, is not sufficient to support a claim for the rents, in the absence of an allegation that plaintiff was denied a joint occupancy of the premises.<sup>5</sup>

**1987.** As a general rule, a tenant in common is not liable

<sup>1</sup> *Charleston, C. & C. R. Co. v. Leech*, 39 S. C. 446, 17 S. E. Rep. 994, 33 S. C. 175, 11 S. E. Rep. 631, 35 S. C. 146, 14 S. E. Rep. 730. In this case, one owning a one third interest in land, of which her children owned the other two thirds, conveyed to a railroad company a right of way over her land. In an action by the company to enjoin proceedings by the children to recover damages for the building of the road over the land, an order was granted for partition of the land; the allotment to the mother to include, if possible, the strip over which plaintiffs's road was constructed. Before the partition was made the mother died, and her one third interest passed to her children, so as to vest in them the entire title to the land. It was held that the children must take the mother's interest burdened with the easement placed on it in favor of plaintiff, and, since the value of such interest exceeded the amount of damage done by the

construction of the railroad, they were not entitled to maintain an action for damages. See *Young v. Edwards*, 33 S. C. 404, 11 S. E. Rep. 1066.

<sup>2</sup> *Scott v. Guernsey*, 48 N. Y. 106; *Walther v. Regnault*, 9 N. Y. Supp. 849; *Brevoort v. Brevoort*, 70 N. Y. 136, 139; *McCabe v. McCabe*, 18 Hun, 153; *Estate of Lucy*, 4 Misc. 349, 24 N. Y. Supp. 352; *Beck v. Kallmeyer*, 42 Mo. App. 563; *Humphrey v. Foster*, 13 Gratt. 653.

<sup>3</sup> *McCabe v. McCabe*, 18 Hun, 153, cited with approval in *Abbey v. Wheeler*, 85 Hun, 226, 10 Misc. Rep. 61, 32 N. Y. Supp. 1069, 30 N. Y. Supp. 874.

<sup>4</sup> *Peden v. Cavins*, 134 Ind. 494, 34 N. E. Rep. 7, 39 Am. St. Rep. 276; *Cooter v. Dearborn*, 115 Ill. 509, 4 N. E. Rep. 388; *Rowan v. Reed*, 19 Ill. 21; *McGee v. Hall*, 28 S. C. 562, 6 S. E. Rep. 566.

<sup>5</sup> *Lilly v. Menke*, 126 Mo. 190, 21 S. W. Rep. 643.

to his cotenant for the use of the common property. A distinction is to be observed between the case where a tenant in common has collected rents and profits from another, and the case where he has been himself in actual occupation and has taken the rents and profits. In the latter case he is not liable to account for the rents and profits, because, by virtue of his title, he has the right to occupy and enjoy the whole property.<sup>1</sup> But where he has received the rents from others he must account for them;<sup>2</sup> and the same rule is held to apply where he consumes or destroys a part of the common property. In a case where a tenant in common was held to account for stone quarried from the common property, the court said: "It may be necessary to adhere to the rule that, for mere occupancy, the cotenant shall not be liable to account. But there is no reason to extend that rule to a case where the cotenant actually consumes or takes off and disposes of a part of the property held in common."<sup>3</sup>

**1988.** A tenant who has paid taxes upon the common land, or removed other incumbrances, may have allowance made therefor. If, however, such tenant has had the possession and use of the entire land during the years he has paid the taxes, the court should, in adjusting the equities, take into account the value of such possession, though a cotenant cannot recover rent until demand and refusal of joint occupancy.<sup>4</sup> But if the cotenant who has been in exclusive possession has held adversely to the title of the others, he is without equity to prove, against the proceeds of a sale in partition, claims for taxes and assessments paid by him during his exclusive enjoyment of the property.<sup>5</sup>

**1989.** A tenant in common may maintain an action for partition against a cotenant who holds a valid tax lien on the

<sup>1</sup> *Angelo v. Angelo*, 146 Ill. 629, 35 N. E. Rep. 229; *Chapin v. Foss*, 75 Ill. 280; *Boley v. Barutio*, 120 Ill. 192, 11 N. E. Rep. 393, and cases cited. *Roseboom v. Roseboom*, 15 Hun, 309; *McCabe v. McCabe*, 18 Hun, 153. The earliest reported judicial declaration of the doctrine to which attention has been called is found in the Year Book, 17 Edw. II. 552 (A. D. 1324).

<sup>2</sup> *Scott v. Guernsey*, 48 N. Y. 106.

<sup>3</sup> *McCabe v. McCabe*, 18 Hun, 153, 155,

per Learned, P. J. See, also, *Elwell v. Burnside*, 44 Barb. 447; *Abbey v. Wheeler*, 85 Hun, 226, 32 N. Y. Supp. 1069, 30 N. Y. Supp. 874, 10 Misc. Rep. 61.

<sup>4</sup> *McClaskey v. Barr*, 62 Fed. Rep. 209; *Bailey v. Laws*, 3 Tex. Civ. App. 529, 23 S. W. Rep. 20. And see *Thompson v. Jones*, 77 Tex. 626, 14 S. W. Rep. 222.

<sup>5</sup> *Wistar's App.* 125 Pa. St. 526, 17 Atl. Rep. 460.

plaintiff's interest, without a tender of the amount of such lien. The court has power to adjust the equities between the parties upon a division, and, if a division is not practicable, to order a sale and a distribution of the proceeds, according to the rights of the parties;<sup>1</sup> though such tenant whose land is subject to a valid tax-lien cannot maintain an action against the holder of the lien to quiet title, without first tendering the amount necessary to discharge it.<sup>2</sup>

1990. In a suit for partition a tenant who has incurred necessary expenses in caring for the common property should be allowed therefor, although his cotenant had given written notice that he would not be responsible for running expenses.<sup>3</sup>

1991. In some cases it is held that the amount of the compensation is not permitted to go beyond the amount of the rents charged against the improving tenant.<sup>4</sup> But this rule does not apply in case of partition, for in such case the part of the property improved is set off to the cotenant who made the improvements; and, if a division cannot be made and the land

<sup>1</sup> *Schissel v. Dickson*, 129 Ind. 139, 28 N. E. Rep. 540; *Milligan v. Poole*, 35 Ind. 64; *Schee v. McQuilken*, 59 Ind. 269; *Cravens v. Kitts*, 64 Ind. 581; *Clark v. Stephenson*, 73 Ind. 489.

<sup>2</sup> *Ethel v. Batchelder*, 90 Ind. 520; *Lancaster v. Du Hadway*, 97 Ind. 565; *Peckham v. Millikan*, 99 Ind. 352; *Rowe v. Peabody*, 102 Ind. 198, 1 N. E. Rep. 353; *Schissel v. Dickson*, 129 Ind. 139, 28 N. E. Rep. 540.

<sup>3</sup> *Hayne v. Gould*, 54 Fed. Rep. 963. *Ross, J.*, said: "The defendant is, I think, in equity chargeable with one half of the expenses necessarily incurred by the plaintiff in caring for the trees upon the property since the commencement of the suit. While one tenant in common cannot charge his cotenant with the expenses of a venture or a speculation concerning the property, he has a right to make such expenditures as are necessary to preserve the property from destruction. Such expenditures are for the common benefit. *Freem. Coten.* §§ 174, 175. Thus, if he expends money in redeeming the property from

sale, he has an equitable lien on the interests of his cotenants for their several proportions. *Calkins v. Steinbach*, 66 Cal. 117, 4 Pac. Rep. 1103. Nor is it important that the expenses accrued after the commencement of the suit. A court of equity has the inherent power to preserve from destruction the property in litigation before it, and expenditures which the court can previously authorize, it may subsequently sanction, if in themselves proper. *Roberts v. Eldred*, 73 Cal. 394, 15 Pac. Rep. 16; *In re Estate of Moore*, 88 Cal. 1, 25 Pac. Rep. 915."

That necessary expenses incurred for the care and preservation of the common property should be allowed, see *Holbrooke v. Harrington* (Cal.), 36 Pac. Rep. 365; *Cotton v. Coit* (Tex. Civ. App.), 30 S. W. Rep. 281.

<sup>4</sup> *Ferris v. Montgomery Land & Imp. Co.* 94 Ala. 557, 10 So. Rep. 607; *Sanders v. Robertson*, 57 Ala. 465; *Horton v. Sledge*, 29 Ala. 478; *Ormond v. Martin*, 37 Ala. 598; *Turnipseed v. Fitzpatrick*, 75 Ala. 304.

is sold, the value of the improvements is awarded to such tenant out of the proceeds.<sup>1</sup>

1992. And so, if a tenant in common makes a parol agreement with his cotenant for the purchase of his interest, and advances money in part payment, although he cannot enforce a specific performance of the agreement, a court of equity, in a suit for partition, will decree the money advanced to be a lien upon the land.<sup>2</sup>

1993. If at the time of partition there is a growing crop of grain upon the land, the right to the crop follows the soil, though the crop had been sown and cultivated by one tenant who was in exclusive occupation of the land. The crop growing on the property of each becomes the property of each in severalty. The principle on which emblements are allowed by law to an outgoing tenant does not apply, because the cotenant when he sowed the grain knew that the land was subject to partition, and might be divided before the crop came to maturity.<sup>3</sup>

Rents accruing before partition belong to the cotenants *pro rata*, but those accruing after partition on each purpart follow the allotment.<sup>4</sup>

#### IV. *Partition by Sale.*

1994. When a division of the property itself is not practicable, partition is made by a sale of it and a division of the proceeds;<sup>5</sup> but it must appear affirmatively that actual partition cannot be made without great prejudice to the owners.

It is not usually necessary that the complaint should allege the necessity of a sale in lieu of partition, or any particular reasons

<sup>1</sup> Leake *v.* Hayes (Wash.), 43 Pac. 495, 7 N. E. Rep. 412; Smith *v.* Smith, 10 Paige, 470; Brendel *v.* Klopp, 69 Md. 1, 13 Atl. Rep. 589; Allard *v.* Carleton, 64 N. H. 24, 3 Atl. Rep. 313; Smith *v.* Upton (Ky.), 13 S. W. Rep. 721; Wrenn *v.* Gibson, 90 Ky. 189, 13 S. W. Rep. 766; Higginbottom *v.* Short, 25 Miss. 160, 57 Am. Dec. 198; Soniat *v.* Supple, 48 La. Ann. —, 19 So. Rep. 128; Holley *v.* Glover, 36 S. C. 404, 15 S. E. Rep. 605; Steedman *v.* Weeks, 2 Stro. (S. C.) Eq. 145, 49 Am. Dec. 660; Stevens *v.* McCormick, 90 Va. 735, 19 S. E. Rep. 742; Beckham *v.* Duncan (Va.), 5 S. E. Rep. 690.

<sup>2</sup> Campbell *v.* Campbell, 11 N. J. Eq. 268.

<sup>3</sup> Calhoun *v.* Curtis, 4 Met. 413, 38 Am. Dec. 380.

<sup>4</sup> *In re Carr's Estate*, 24 Pitts. Leg. Jour. (N. S.) 140.

<sup>5</sup> Coster *v.* Coster, 66 Hun, 632, 21 N. Y. Supp. 203; Stephenson *v.* Cotter, 5 N. Y. Supp. 749; Estate of Lucy, 4 Misc. Rep. 349, 24 N. Y. Supp. 352; Tinney *v.* Stebbins, 28 Barb. 290; David *v.* David, 9 N. Y. Supp. 256; Tripp *v.* Riley, 15 Barb. 333; Brooks *v.* Davey, 109 N. Y.

for a sale, but the court may order a sale when it appears from the facts disclosed that a sale is necessary.<sup>1</sup>

Before ordering a sale in a partition, the court should ascertain the interests of the respective parties.<sup>2</sup>

1995. As to the proper method of ascertaining whether the land can be conveniently divided, the statute being silent on the subject, all that is strictly necessary is that it should appear from the facts in the record that the land cannot be conveniently partitioned, and that the interests of all parties will be promoted by a sale. It is a common practice to appoint commissioners to ascertain the facts and report them to the court. The matter may also be referred to a master. But it is not essential that the facts be ascertained in either of these methods. It is sufficient if the facts appearing in the record reasonably warrant a decree of sale.<sup>3</sup>

A sale rather than a partition should be ordered where the title to a part of certain land held by tenants in common is merely possessory, while the title to the rest is undisputed; for equity will not justify a partition by which one of the parties to the suit may be awarded, as a portion of the land to which he is entitled, a substantial tract, which may afterwards turn out not to be a part of the common tract to which the parties have title.<sup>4</sup>

1996. The lien of a mortgage or other incumbrance is not affected by a sale of the land upon partition, but becomes a charge upon the proceeds of the share or interest of the incumbrancer.<sup>5</sup> The mortgagee or other incumbrancer may ratify the sale and sue for the purchase-money; and until the amount of the incumbrance is paid, it remains a lien upon the land in the hands of the purchaser.<sup>6</sup> If there is any doubt or uncertainty as to the amount of the mortgage, the court may direct the determination of this before the sale.<sup>7</sup>

<sup>1</sup> Willard v. Willard, 145 U. S. 116, 12 Sup. Ct. Rep. 818; Hill v. Young, 7 Wash. 33, 34 Pac. Rep. 144. See Keaton v. Terry, 93 Ala. 85, 9 So. Rep. 524; McEvoy v. Leonard, 89 Ala. 455, 8 So. Rep. 40.

<sup>2</sup> Stevens v. McCormick, 90 Va. 735, 19 S. E. Rep. 742.

<sup>3</sup> Zirkle v. McCue, 26 Gratt. 517, per Staples, J.; Stevens v. McCormick, 90 Va. 735, 19 S. E. Rep. 742; McCrady v. Jones, 36 S. C. 136, 15 S. E. Rep. 430.

And see Johnson v. Hoover, 75 Md. 486, 23 Atl. Rep. 903.

<sup>4</sup> Hayne v. Gould, 54 Fed. Rep. 963. See Emeric v. Alvarado, 64 Cal. 529, 580, 2 Pac. Rep. 418.

<sup>5</sup> Espalla v. Touart, 96 Ala. 137, 11 So. Rep. 219.

<sup>6</sup> Espalla v. Touart, 96 Ala. 137, 11 So. Rep. 219. And see Shivers v. Hand, 50 N. J. Eq. 231, 24 Atl. Rep. 911.

<sup>7</sup> Thurston v. Minke, 32 Md. 571.

1997. When partition is made by sale, compensation for unauthorized improvements made by one cotenant at his own expense is generally made by distributing among all the cotenants the value of the property without the improvements, leaving the additional value of the property arising from these to go to the tenant who made them.<sup>1</sup> It is generally conceded that, in making partition, the part of the estate upon which the improvements are made should be set off to the cotenant who made them, if this can be done without detriment to the other cotenants. "If the tenant has an equitable claim upon improvements in case of division, he has an equally equitable claim upon their value in case of sale. If the other tenants are entitled to their share of the value of the whole estate upon sale, why are they not also entitled to the same share in division? Or, further, if a tenant is entitled to compensation for improvements out of rents, why should he not as well be entitled to receive the excess in value which the improvements have produced upon sale? We see no difference in principle in these cases. When it is conceded that a tenant in common, improving the land he may rightfully occupy, has an equitable claim to that part, or to its rental value, in order to secure the fruit of his labor or expenditure, we fail to see how he loses such claim when the land is sold because it cannot be divided. Of course he cannot, at his pleasure, charge cotenants for improvements which they may neither agree to nor desire; nor can he ordinarily claim for that which he has done solely for his own advantage, and for which he had reaped the

<sup>1</sup> *Swan v. Swan*, 8 Price, 518; *In re Jones*, 3 Rep. 498, [1893] 2 Ch. 461. **Alabama**: *Sanders v. Robertson*, 57 Ala. 465. **Illinois**: *Kurtz v. Hibner*, 55 Ill. 514; *Dean v. O'Meara*, 47 Ill. 120. **Indiana**: *Alleman v. Hawley*, 117 Ind. 532, 20 N. E. Rep. 441; *Carver v. Coffman*, 109 Ind. 547, 10 N. E. Rep. 567; *Elrod v. Keller*, 89 Ind. 382. **Iowa**: *Killmer v. Wuchner*, 79 Iowa, 722. **Kentucky**: *Respass v. Breckenridge*, 2 A. K. Marsh. 581; *Arterburn v. Gwathmey*, 3 Bibb, 306. **Maryland**: *Worthington v. Hiss*, 70 Md. 172. **New Jersey**: *Hall v. Piddock*, 21 N. J. Eq. 311. **New York**: *Scott v. Guernsey*, 48 N. Y. 106; *Conklin v. Conklin*, 3 Sandf. Ch. 64; *Green v. Putnam*, 1 Barb. 500. **North Carolina**: *Tucker v. Markland*, 101 N. C. 422. **Ohio**: *Youngs v. Heffner*, 36 Ohio St. 232. **Rhode Island**: *Moore v. Thorp*, 16 R. I. 655, 19 Atl. Rep. 321. **South Carolina**: *Moore v. Williamson*, 10 Rich. Eq. 323, 73 Am. Dec. 93; *Johnson v. Pelot*, 24 S. C. 254, 58 Am. Rep. 253; *Sutton v. Sutton*, 26 S. C. 33. **Tennessee**: *Broyles v. Waddel*, 11 Heisk. 32. **Texas**: *Curtis v. Poland*, 66 Tex. 511, 2 S. W. Rep. 39; *McLane v. Canales* (Tex. Civ. App.), 25 S. W. Rep. 29. **Virginia**: *Carter v. Carter*, 5 Munf. 108. **Washington**: *Leake v. Hayes* (Wash.), 43 Pac. Rep. 48. **West Virginia**: *Ward v. Ward* (W. Va.), 21 S. E. Rep. 746.

benefit; but, on the other hand, when such improvements enhance the value and proceeds of the estate, the cotenants should not be enabled to take advantage, to his injury, of improvements for which they have contributed nothing.”<sup>1</sup>

1998. Where the partition can be made advantageously only by sale, there is no difficulty in giving effect to a deed of one tenant by a division of the proceeds, without prejudicing the rights of any one.<sup>2</sup> The other cotenant receives his full share of the money, just as he would if there had been no conveyance of a specific portion of the land. In such case the proceeds of sale will be distributed in shares determined by fractions whose common denominator is the total contents of the common land in acres or square feet, and whose numerators are respectively the number of acres or square feet held by the one cotenant, and the number of acres or square feet conveyed by the other.<sup>3</sup>

1999. If the property is sold in partition a cotenant who has spent money in the care and preservation of the property should be allowed the full amount properly paid out by him, instead of one half only, before a division of the proceeds.<sup>4</sup>

2000. There is no implied warranty in a deed to a purchaser at a partition sale, against the existence of any outstanding claim or title by adverse possession,<sup>5</sup> or against any outstanding paramount title.<sup>6</sup> The sale is a judicial one, and the general rule applies that there is no warranty at such a sale. The rule of *caveat emptor* and the validity of the title is at the purchaser's own risk.<sup>7</sup>

<sup>1</sup> Moore v. Thorp, 16 R. I. 655, 656, 19 Atl. Rep. 321, per Stiness, J.

<sup>2</sup> Horgar v. Bickerton, 17 R. I. 483, 24 Atl. Rep. 772, 23 Atl. Rep. 23.

<sup>3</sup> Horgan v. Bickerton, 17 R. I. 483, 24 Atl. Rep. 772, 23 Atl. Rep. 23.

<sup>4</sup> Holbrooke v. Harrington (Cal.), 36 Pac. Rep. 365.

<sup>5</sup> Buetell v. Courand (Tex. Civ. App.), 29 S. W. Rep. 1146.

<sup>6</sup> Wood v. Winings, 58 Ind. 322; Cashion v. Faina, 47 Mo. 133.

<sup>7</sup> Bassett v. Lockard, 60 Ill. 164.





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